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THE

LAWS OF ENGLAND.

VOLUME XVI.

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THE

LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895—1905,

AND OTHER LAWYERS.

VOLUME XVI.

HIGHWAYS, STREETS, AND BRIDGES.
HUSBAND AND WIFE.
INCOME TAX.

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LONDON:

BUTTERWORTH & CO., 11 & 12, BELL YARD, TEMPLE BAR.
Law Publishers.

1911

BRADBURY, AGNEW, & CO. LD., PRINTERS,
LONDON AND TONBRIDGE.

Editor in Chief.

THE RIGHT HONOURABLE THE

EARL OF HALSBURY,

LORD HIGH CHANCELLOR OF GREAT BRITAIN, 1885-86, 1886-92, and 1895-1905.

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In this Volume the Law is stated as at 1st April, 1911.

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For Crown, Revenue of - - *See title* CONSTITUTIONAL LAW.
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Revenue Authorities- - „ CONSTITUTIONAL LAW; REVENUE.

INCORPOREAL CHATTELS.

See CHOSES IN ACTION; DESCENT AND DISTRIBUTION; PERSONAL PROPERTY.

INCORPOREAL HEREDITAMENTS.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

INCORRIGIBLE ROGUES.

See POOR LAW.

INCUMBENT.

See ECCLESIASTICAL LAW.

INCUMBRANCE.

See BILLS OF SALE; MORTGAGE; REAL PROPERTY AND CHATTELS REAL.

INDECENT ASSAULT.

See CRIMINAL LAW AND PROCEDURE.

INDECENT EXPOSURE.

See CRIMINAL LAW AND PROCEDURE.

INDEMNITY.

See GUARANTEE.

INDENTURE.

See DEEDS AND OTHER INSTRUMENTS.

INDIA.

See CONSTITUTIONAL LAW; DEPENDENCIES AND COLONIES.

INDICTMENT AND INFORMATION.

See CRIMINAL LAW AND PROCEDURE; MAGISTRATES.

INDORSEMENT.

See BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

INDORSEMENT OF CLAIM.

See PLEADING; PRACTICE AND PROCEDURE.

INDUCTION.

See ECCLESIASTICAL LAW.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) ..	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R. ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	Sir J. Brooke's Abridgment
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush. ..	Browning and Lushington's Reports, Admiralty 1 vol., 1863—1866
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. A.	Court of Criminal Appeal
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols., 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas. ..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B. ..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. *temp.* Finch ..	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680
Cas. *temp.* King ..	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date) ..	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr Cas.	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas. ..	Charley's Chamber Cases, 1 vol., 1875—1876
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent.	Coke's Entries
Co. Inst.	Coke's Institutes
Co. Litt.	Coke on Littleton (1 Inst.)
Co. Rep.	Coke's Reports, 13 parts, 1572—1616
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid.	Collectanea Juridica, 2 vols.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas.	Commercial Cases, 1895—(current)
Com. Dig.	Comyns' Digest
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas. ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. *temp.* Brough. ..	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834
Coop. *temp.* Cott. ..	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1909 (current)
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

Craw. & D. Abr. C. ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
Cress. Insolv. Cas. ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas. ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832
De G.	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848
De G. F. & J.	De Gex, Fisher, and Jones's Reports, Chancery, 4 vols., 1859—1862
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports, Chancery, 8 vols., 1851—1857
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798
Dig.	Justinian's Digest or Pandects
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776
Doug. (K. B.)	Douglas' Reports, King's Bench, 4 vols., 1778—1785
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849

Dow. & Ry. (K. B.)	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827
Dow. & Ry. (M. C.)	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827
Dow. & Ry. (N. P.)	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841
Dowl. (N. S.)	Dowling's Practice Reports, New Series, 2 vols., 1841—1843
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1839
Drury *temp.* Nap.	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859
Drury *temp.* Sug.	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844
Dugd. Orig.	Dugdale's Origines Juridiciales
Dunl. (Ct. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd series, 24 vols., 1838—1862
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1223—1825
East	East's Reports, King's Bench, 16 vols., 1800—1812
East, P. C.	East's Pleas of the Crown
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754
Eng. Pr. Cas.	Roscoe's English Prize Cases, 2 vols., 1745—1858
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744
Eq. Rep.	Equity Reports, 3 vols., 1853—1855
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810
Exch.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880
F. & F.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867
F. (Ct. of Sess.)	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906
Fac. Coll. (with date)	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), fol., 1st and 2nd series, 21 vols. 1752—1825

Fac. Coll. (N. S.) (with date)	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), New Series, 16 vols., 1825—1841
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838
Ferg.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817
Fitz-G.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1728—1731
Fitz. Nat. Brev. ..	Fitzherbert's Natura Brevium
Fl. & K.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842
Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852
For.	Forrest's Reports, Exchequer, 1 vol., 1800—1801
Forb.	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713
Fort. De Laud. ..	Fortescue, De Laudibus Legum Angliæ
Fortes. Rep.	Fortescue's Reports, fol., 1 vol., 1692—1736
Fost.	Foster's Crown Cases, 1 vol., 1743—1760
Fount.	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712
Fox & S. Ir.	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825
Fox & S. Reg.	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895
Freem. (CH.)	Freeman's Reports, Chancery, 1 vol., 1660—1706
Freem. (K. B.)	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704
Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843
Gale	Gale's Reports, Exchequer, 2 vols., 1835—1836
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani
Giff.	Giffard's Reports, Chancery, 5 vols., 1857—1865
Gilb.	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714
Gilb. C. P.	Gilbert's History and Practice of the Court of Common Pleas
Gilb. (CH.)	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726
Gilm. & F.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686
Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828
Glanv.	Glanville, De Legibus et Consuetudinibus Regni Angliæ
Glanv. El. Cas.	Glanville's Election Cases, 1 vol., 1623—1624
Glascock	Glascock's Reports (Ireland), 1 vol., 1831—1832
Godb.	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637
Gouldsb.	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601
Gow	Gow's Reports, Nisi Prius, 1 vol., 1818—1820
Gwill.	Gwillim's Tithe Cases, 4 vols., 1224—1824
H. & C.	Hurlstone and Coltman's Reports, Exchequer, 4 vols. 1862—1866
H. & N.	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862

H. & Tw.	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850
H. & W.	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841
H. L. Cas.	Clark's Reports, House of Lords, 11 vols., 1847—1866
Hag. Adm.	Haggard's Reports, Admiralty, 3 vols., 1822—1838
Hag. Con.	Haggard's Consistorial Reports, 2 vols., 1789—1821
Hag. Ecc.	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833
Hailes	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791
Hale, C. L.	Hale's Common Law
Hale, P. C.	Hale's Pleas of the Crown, 2 vols.
Har. & Ruth.	Harrison and Rutherfurd's Reports, Common Pleas, 1 vol., 1865—1866
Har. & W.	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836
Harc.	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691
Hard.	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669
Hare	Hare's Reports, Chancery, 11 vols., 1841—1853
Hawk. P. C.	Hawkins's Pleas of the Crown, 2 vols.
Hayes	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832
Hayes & Jo.	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834
Hem. & M.	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865
Het.	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631
Hob.	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625
Hodg.	Hodges' Reports, Common Pleas, 3 vols., 1835—1837
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Part I.—Definitions and Characteristics.

SECT. 1.—"*Highway.*"

SECT. 1. "Highway."

SUB-SECT. 1.—*Definition at Common Law.*

Highways at common law.

1. A "highway" (*a*) is a way over which all members of the public are entitled to pass and repass (*b*); and, conversely, every piece of land which is subject to such public right of passage is a highway or part of a highway. A highway need not necessarily be a carriage way, for footpaths (*c*), bridleways, and driftways, if open to the public generally, are highways (*d*); nor need it necessarily be a thoroughfare (*e*); and there may be certain partial restrictions imposed upon the enjoyment of the right of passage (*f*). It is, however, an essential characteristic of a highway that every person should have a right to use it for the appropriate kind of traffic, subject only to any restrictions affecting all passengers alike. It follows that a road or path over which only individuals, or a limited class of the public (*e.g.*, the inhabitants or occupiers of a particular

When a road or path is no a highway.

(*a*) There are "highways" by water as well as on land; but the present article deals only with the latter. For the former, see titles FERRIES, Vol. XIV., pp. 555, 564; WATERS AND WATERCOURSES.

(*b*) Whether on business or for pleasure (*Mildred* v. *Weaver* (1862), 3 F. & F. 30, *per* ERLE, C.J.). The following are some older definitions of a "highway," but in reading them it must be remembered that it is now clear that a highway need not be a thoroughfare:—"If a way lead to a market, and were a way for all travellers, and did communicate with a great road etc., it is a highway" (*Austin's* (*Katherine*) *Case* (1672), 1 Vent. 189, *per* Lord HALE, cited Com. Dig. tit. "Chimin" (A 1). A way "which is common to all the King's people, whether it lead to a market town or only from town to town, may properly be called a highway" (1 Hawk. P. C., 7th ed., c. 76, s. 1). "Chimin est le Haut voy lou chescun homme passa, qui est appel *Via Regia*" (Termes de la Ley, *sub voce* Chimin). "Any thoroughfare which is open to all the King's subjects" (Well-beloved, Law relating to Highways, p. 1). "A passage which is open to all the King's subjects" (2 Smith, L. C., 11th ed., 164). "The common definition of a highway that is given in all the text books of authority is that it is a way, leading from one market town, or inhabited place, to another inhabited place, which is common to all the Queen's subjects" (*Bailey* v. *Jamieson* (1876), 1 C. P. D. 329, *per* Lord COLERIDGE, C.J., at p. 332). There cannot be a dedication of a highway to a limited part of the public; see p. 45, *post*.

(*c*) As to footpaths, see more particularly p. 180, *post*.

(*d*) As to the different kinds of highways, see p. 9, *post*.

(*e*) The earlier definitions (note (*b*), *supra*) suggest that a *cul de sac* cannot be a highway; but this is no longer the case; see p. 11, *post*.

(*f*) As to the power to dedicate a highway subject to restrictions or limitations, see pp. 12, 44, *post*.

SECT. 1. "Highway."

house, field, or village) have a right of passage (*g*), is not a highway; nor, *a fortiori*, is land over which a limited class of persons have rights of recreation (*h*).

Public bridges.

Public bridges are highways so far as the right of passage is concerned (*i*), but to a great extent form the subject-matter of special enactments (*k*).

Foreshore.

The foreshore of the sea is not a highway (*l*).

SUB-SECT. 2.—*Statutory Definitions.*

Statutory definitions for general purposes.

2. For the general purposes of the Highway Act, 1835 (*m*), the word "highways" means "all roads, bridges (not being county bridges), carriage ways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements."

This definition does not, of course, mean that all roads and ways of the description named are highways (*n*), but merely that all roads and ways which at common law are in fact highways are, if

(*g*) Such a road or path is a "private" or "occupation" way. "If it lead only to a church, to a private house, or village, or to fields, there 'tis a private way" (*Austin's* (*Katherine*) *Case* (1672), 1 Vent. 189, *per* Lord HALE); and no indictment will lie for obstructing it, each person aggrieved being entitled to sue the offender (*Thrower's Case* (1672), 1 Vent. 208, *per* Lord HALE). But "an indictment lies for any one of these ways, if they be common to all the Queen's subjects having occasion to pass there" (*R.* v. *Saintiff* (1704), 6 Mod. Rep. 255, *per* HOLT, C.J.). "A way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village, and which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway, because it belongeth not to all the King's subjects, but only to some particular persons . . ." (1 Hawk. P. C., 7th ed., c. 76, s. 1). As to the effect of a covenant giving persons rights over an occupation road "as fully as if it were a public highway," see *Selby* v. *Crystal Palace District Gas Co.* (1862), 31 L. J. (CH.) 595, C. A. Some so-called "churchways" may, however, be no longer merely private ways; see further, as to such ways, title CUSTOM AND USAGES, Vol. X., p. 244; and p. 23, *post*. As to rights of way existing by custom and private rights of way, see titles CUSTOM AND USAGES, Vol. X., p. 243; EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 284 *et seq.*

(*h*) As to such rights of recreation and similar rights, originating in custom, and confined to the inhabitants of some district, see titles COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 589; OPEN SPACES AND RECREATION GROUNDS. The use of a walk or esplanade for purposes of recreation is not inconsistent with its being a highway (*Sandgate Urban District Council* v. *Kent County Council* (1898), 79 L. T. 425, H. L., *per* Lord WATSON). As to a "parade" or "promenade" in a seaside town, reference may be made to *A.-G.* v. *Blackpool Corporation* (1907), 71 J. P. 478; and *Abercromby* v. *Fermoy Town Commissioners*, [1900] 1 I. R. 302, C. A.

(*i*) *R.* v. *Saintiff, supra; Bury Corporation* v. *Lancashire and Yorkshire Rail. Co.* (1888), 20 Q. B. D. 485, C. A.; but of course there may be something in a context to point to a differentiation between highways (*i.e.*, roads) and bridges (*Osmond* v. *Widdicombe* (1818), 2 B. & Ald. 49).

(*k*) As to bridges generally, see p. 184, *post*.

(*l*) *Blundell* v. *Catterall* (1821), 5 B. & Ald. 268. As to rights over the foreshore, see title WATERS AND WATERCOURSES.

(*m*) 5 & 6 Will. 4, c. 50, hereinafter sometimes referred to as "the Act" (s. 5). The Highway Acts, 1862 (25 & 26 Vict. c. 61) and 1864 (27 & 28 Vict. c. 101), are (so far as possible) to be construed as one with the Highway Act, 1835 (5 & 6 Will. 4, c. 50); see p. 24, *post*.

(*n*) For instance many "churchways" are not highways; see p. 23, *post*.

they fall within any of such descriptions, highways for the general purposes of the Act (*o*).

County bridges.

The exception as to county bridges extends to such public bridges as would be *primâ facie* repairable by the whole county, but are in the particular locality by custom repairable by a hundred or other sub-division of the county (*p*). Notwithstanding this exception, two sections (*q*) of the Act in terms deal with county bridges, and many of its provisions are applied thereto, the powers and duties of highway authorities being conferred upon the county surveyor in respect thereof (*r*).

For certain special purposes.

For certain special purposes of the Act—namely, where any matter or thing is directed or forbidden by it to be done within a certain distance of (*s*) the centre of the highway—"the highway" is defined (*t*) as meaning that portion of ground which has been maintained by the authority (*u*) as a highway, and repaired with stones or other materials used in forming highways, for the six (*a*) months immediately preceding; and the "centre of the highway" is the middle of such highway, where, a line being drawn along the highway or a point marked, an equal number of feet of highway which have been so maintained and repaired as aforesaid for twelve (*a*) months before, is found on each side of such line or mark (*t*).

"Centre of the highway."

SUB-SECT. 3.—*Kinds of Highway.*

Kinds of highway.

3. A highway may be either a carriage and cart way, a horseway, a driftway, or a footpath; for "the term highway is the *genus* of all public ways, as well cart, horse and footways" (*b*).

User permissible.

In general, the greater includes the less, *i.e.*, a horseway will include a footpath, and a carriage and cart way will include a horseway. Further, a carriage or cart way will in general include a way for driving cattle, commonly spoken of as a "drift" way (*c*).

(*o*) Highway Act, 1835 (5 & 6 Will. 4, c. 50).

(*p*) *R.* v. *Chart and Longbridge* (1870), L. R. 1 C. C. R. 237.

(*q*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 21, 22. As to bridges, see pp. 184 *et seq.*, *post*.

(*r*) See pp. 196, 197, *post*.

(*s*) *Quære* whether the section was not intended to run "done *on or* within a certain distance of" etc.

(*t*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 63.

(*u*) Or *semble* by the person liable to repair it; see p. 30, *post*.

(*a*) Note that for determining the outer edge of a highway the period of repair is six months; for determining the centre it is twelve months.

(*b*) *R.* v. *Saintiff* (1704), 6 Mod. Rep. 255, *per* HOLT, C.J.; compare *Allen* v. *Ormond* (1806), 8 East, 4; *R.* v. *Salop* (*Inhabitants*) (1810), 13 East, 95, 97.

(*c*) In a well-known passage (Co. Litt. 56 a) Sir E. Coke classified ways as follows: "There be three kinds of wayes whereof you shall reade in our ancient bookes. First, a footway, which is called *iter—quod est jus eundi vel ambulandi hominis;* and this was the 'first' way. The second is a footway and horseway, which is called *actus—ab agendo;* and this vulgarly is called 'pack and prime' way, because it is both a footway, which was the 'first' or 'prime' way, and a 'pack' or 'drift' way also. The third is *via*, or *aditus*, which contains the other two and also a cartway, etc., for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi.*" He continues, "and this (*via* or *aditus*) is twofold, viz., *regia via*, the King's highway for all men, *et communis strata*, belonging to a city or town, or between neighbours and neighbours. This is called in our

SECT. 1. "Highway."

Exceptions to general presumption.

There may, however, in special circumstances, be exceptions to the general presumption, by virtue either of some statute, under which the particular highway was created, or of the dedicating owner's intention, as expressly declared or as evidenced by the kind of user permitted by him at the date when a dedication is inferred. Thus it appears to have been recognised that an early tramway, which all persons might use with their own carriages (if properly constructed), was a highway indeed, but only for the passage of such carriages (*d*), while a towing path may be a highway to be used only by persons and horses towing vessels, no general right of footway existing, unless it has been independently acquired (*e*). In the case of a private way, it has been held that a right of way for carriages does not necessarily include a right of way for driving cattle (*f*), and apparently a similar restriction may be proved to exist in the case of a public carriage way (*g*); if so, *a fortiori*, it may exist in the case of a public horseway, and indeed it may be doubted whether there is any presumption, apart from evidence of user, that a public horseway includes a "drift" way, in the sense of a public way for driving cattle (*h*). The fact that some carriages are too wide to use a particular road does not prevent it from being a highway for carriages in general and properly so described (*i*).

Rights of public: how ascertained.

Where a highway has been set out under a statute or statutory award, or has been expressly dedicated to and accepted by the public,

books, 'Chimin' . . ." But as early as 1716 it was recognised that *communis strata* and *regia via* had become synonymous expressions, both signifying the same thing (*R.* v. *Hammond* (1717), 10 Mod. Rep. 382). As to a public carriage way, including also the lesser ways, and as to a horseway including a footpath, see also *R.* v. *Hatfield* (*Inhabitants*) (1736), Lee *temp.* Hard. 315, *per* Lord HARDWICKE, C.J.; *Wells* v. *London, Tilbury and Southend Rail. Co.* (1877), 5 Ch. D. 126, C. A., *per* AMPHLETT, J.A., at p. 132; *Jackson* v. *Stacey* (1816), Holt (N. P.), 455; *Cowling* v. *Higginson* (1838), 4 M. & W. 245; *Higham* v. *Rabett* (1839), 5 Bing. (N. C.) 622; and *Davies* v. *Stephens* (1836), 7 C. & P. 570, where Lord DENMAN, C.J., said that a public carriage way always includes a public footway.

(*d*) *R.* v. *Severn and Wye Rail. Co.* (1819), 2 B. & Ald. 646, *per* HOLROYD, J., at p. 648. But a modern railway is not a highway, there being a contractual relation between passengers and the company; see *Butler* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1888), 21 Q. B. D. 207, C. A.; *Great Northern Rail. Co.* v. *Eastern Counties Rail. Co.* (1851), 21 L. J. (CH.) 837.

(*e*) *Winch* v. *Thames Conservators* (1872), L. R. 7 C. P. 458, *per cur.*, at p. 471; *R.* v. *Severn and Wye Rail. Co.*, *supra*, *per* BAYLEY, J.

(*f*) *Ballard* v. *Dyson* (1808), 1 Taunt. 279; compare *Jackson* v. *Stacey*, *supra*. See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 291.

(*g*) *Ballard* v. *Dyson*, *supra*, where it appears from the judgment of MANSFIELD, C.J., that CHAMBRE, J., had "mentioned the case of a public way restricted to carriages only, in which some notice was affixed to caution the public that there was no drift way."

(*h*) Compare *Trickey* v. *Yeandall* (1824), 9 Moore (C. P.), 55. Coke indeed (see note (*c*), p. 9, *ante*), speaks of his second class of way as including a "pack" or "drift" way as well as a "prime" or foot way; but he calls it a "horseway," and only mentions *jus jumentum ducendi* in connection with the third class of way. It may well be that in the earlier passage he was referring only to laden horses, and obviously many horseways with bridle gates are ill-fitted for driving herds of cattle.

(*i*) *R.* v. *Lyon* (1825), 5 Dow. & Ry. (K. B.) 497.

SECT. 1. "Highway."

as a particular kind of way (*k*), no question can arise as to the minimum rights of the public over it, for their rights cannot be diminished by non-user (*l*). Where a highway originates in an inferred dedication, it is for a jury to say for what kind of traffic it was so dedicated, having regard to the character of the way and the nature of the user prior to the date at which they infer dedication; and a right of passage once acquired will extend to more modern forms of traffic reasonably similar to those for which the highway was originally dedicated, so long as they do not impose a substantially greater burden on the owner of the soil nor substantially inconvenience persons exercising the right of passage in the manner originally contemplated (*m*). Although the rights of the public once acquired cannot in the future be restricted (*n*), they may be extended by further dedication, express or inferred: thus a jury may properly find from evidence of subsequent user that a way originally set out or dedicated as a private carriage way and public footway, of no prescribed width, has since become a public carriage way (*o*); but no inference of extended dedication can be drawn where the extended user has been from its beginning a public nuisance, and inconsistent with the safe exercise of the right originally granted (*p*).

How far capable of being varied.

SUB-SECT. 4.—*A Highway need not be a Thoroughfare.*

4. A highway need not necessarily be a thoroughfare, there being no rule of law which prevents a *cul de sac* from being a highway (*q*). Thus a road, hitherto a public thoroughfare, does not cease to be

Need not be a thoroughfare.

(*k*) *I.e.*, as a carriage way, a bridleway or a footpath. An award of a road as a "public way or road" *primâ facie* means a public highway for all purposes; but the meaning may be cut down by evidence as to surrounding circumstances and long subsequent user for restricted purposes only (*R.* v. *Aldborough* (1853), 17 J. P. 648).

(*l*) *Dawes* v. *Hawkins* (1860), 8 C. B. (N. S.) 848.

(*m*) Compare *R.* v. *Mathias* (1861), 2 F. & F. 570 (perambulator); *Case* v. *Midland Rail. Co.* (1859), 27 Beav. 247 (steamboat on canal).

(*n*) Except, of course, by statute or statutory proceedings.

(*o*) *Grand Surrey Canal Co.* v. *Hall* (1840), 1 Man. & G. 392; but see *Pullin* v. *Deffel* (1891), 64 L. T. 134, where a way had been set out under an award as a public "footpath 15 feet wide," and a private carriage way, and it was held that foot passengers had a right to use the whole of the 15 feet. In such a case it is doubtful whether there could be any dedication as a public carriage way; see *Sheringham Urban District Council* v. *Halsey* (1904), 68 J. P. 395.

(*p*) See *Sheringham Urban District Council* v. *Halsey*, *supra*, where it was held that the user for wheeled traffic of a narrow "awarded" footpath had been a nuisance and could not justify an inference of dedication for such traffic, and see also *Abercromby* v. *Fermoy Town Commissioners*, [1900] 1 I. R. 302, C. A.

(*q*) It was at one time strenuously contended, notwithstanding opinions expressed by Lord KENYON, C.J., in *Rugby Charity Trustees* v. *Merryweather* (1790), 11 East, 375, n., and by Lord ELLENBOROUGH, C.J., in *R.* v. *Lloyd* (1808), 1 Camp. 260, that a way which was not a thoroughfare but only a *cul de sac* could not be a highway; see Wellbeloved, Law relating to Highways, c. 1; *Woodyer* v. *Hadden* (1813), 5 Taunt. 125, *per* MANSFIELD, C.J.; *Wood* v. *Veal* (1822), 5 B. & Ald. 454; *Campbell* v. *Lang* (1853), 1 Macq. 451, H. L., *per* Lord CRANWORTH, L.C., at p. 453. But such a contention can no longer be supported; see *Bateman* v. *Bluck* (1852), 18 Q. B. 870; *Young* v. *Cuthbertson* (1854), 1 Macq. 455, H. L., and cases cited in the notes to pp. 39, 40, *post*.

SECT. 1. 'Highway."

a highway because one end of it is lawfully stopped up (*r*), and a road which has never been, and is not intended to be, a thoroughfare may be dedicated to the public as a highway, and a jury may infer such dedication. The fact that it leads to nowhere is a point for their consideration, but is no legal bar to an inference of dedication (*s*).

Highway leading to a ferry.

A highway leading to a navigable river, itself a highway, or to a public ferry across a river, is not a *cul de sac*; and the right of passage over the *solum*, whether covered by water or not, is continuous, and will not be interrupted by a natural or artificial narrowing of the river (*t*).

SUB-SECT. 5.—*Restrictions on the Public Right of Passage.*

Restrictions on public rights.

5. Most highways have, or are deemed to have, originated from the owner's dedication of his land to the public for the purposes of passage and acceptance by the public of his gift, evidenced by their user of the way (*a*). There being no obligation on an owner to dedicate, or on the public to accept, the public cannot complain that the owner has dedicated to them an unsatisfactory or dangerous highway, or has imposed restrictions upon his dedication; and, if they accept his land as a highway, they must use it for such purposes and subject to such restrictions as he has indicated and imposed (*b*). On the other hand, when land has once been dedicated and accepted as a highway unconditionally or subject to certain restrictions, the owner cannot afterwards derogate from his gift and impose restrictions or additional restrictions.

SECT. 2.—"*Main Road*" *and* "*Ordinary Highway.*"

"Main road."

6. Highways are divisible into two classes, namely, "main roads" and "ordinary highways (*c*)."

County area.

In ordinary county areas (*d*) the following classes of roads are

(*r*) *R.* v. *Downshire* (*Marquis*) (1836), 4 Ad. & El. 698; *Gwyn* v. *Hardwicke* (1856), 25 L. J. (M. C.) 97; *R.* v. *Burney* (1875), 31 L. T. 828; *R.* v. *Waller* (1875), 31 L. T. 777. If, however, both ends be lawfully stopped, an intervening length of road, to which the public can no longer obtain access without committing a trespass, ceases to be a highway (*Bailey* v. *Jamieson* (1876), 1 C. P. D. 329).

(*s*) As to inference of dedication, see, further, pp. 38 *et seq.*, *post*, and the cases there cited.

(*t*) Compare the American case *People* v. *Lambier* (1847), 5 Den. 9. In the *Medmenham Case*, referred to by PHILLIMORE, J., in *Tyne Improvement Commissioners* v. *Imrie*, *A.-G.* v. *Tyne Improvement Commissioners* (1899), 81 L. T. 174, 179, a ferry across the Thames and the roads leading to it on either side were held to be public highways; compare title FERRIES, Vol. XIV., p. 556.

(*a*) As to dedication generally, and for examples of restricted or conditional dedication, see pp. 33, 34, *post*.

(*b*) See *Fisher* v. *Prowse* (1862), 2 B. & S. 770, *per* BLACKBURN, J.; *Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371.

(*c*) The distinction originated on 16th August, 1878, under the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), ss. 13—20.

(*d*) Including boroughs not being county or quarter sessions boroughs; see *Over Darwen Corporation* v. *Lancashire Justices* (1884), 15 Q. B. D. 20, C. A. As to special considerations affecting county boroughs and quarter sessions boroughs, see pp. 13, 14, *post*. As to the Isle of Wight and South Wales, see pp. 30, 31, *post*. Prior to 1894 certain exceptional highway areas subject to special authorities were outside the provisions of the Highways and Locomotives

SECT. 2. "Main Road" and "Ordinary Highway."

main roads, unless in any particular case a "dismaining" order has been made by the Local Government Board: (1) any road which, being originally a turnpike road, ceased to be such (*e*) between the 31st December, 1870, and the 16th August, 1878 (*f*), and was not upon the passing of the Highways and Locomotives (Amendment) Act, 1878 (*g*), ordered by the Local Government Board to remain an ordinary highway (*h*); (2) any road which being a turnpike road on the 16th August, 1878, has ceased to be such since that date (*i*); and (3) any road which has been specially declared by the county council (or their predecessors as the "county authority") (*j*) to be a main road (*k*).

Any road constructed by a county council to whom the Road Board (*l*) has made an advance for that purpose will be a main road (*m*).

"Ordinary highway."

Any highway which is not for the time being a main road is commonly spoken of as an "ordinary highway" (*n*).

Non-county quarter sessions boroughs.

In a non-county borough, which had on the 13th August, 1888 (*o*), a separate court of quarter sessions (*p*), main roads are (1) those which the county council or Local Government Board declared to be such on the original application of the borough council made before the 13th August, 1890 (*q*), and (2) any which have since been declared

(Amendment) Act, 1878 (41 & 42 Vict. c. 77), dealing with main roads; see *R.* v. *Norfolk County Council* (1891), 60 L. J. (Q. B.) 379. But apparently highways in such areas may now be declared to be main roads by virtue of the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25.

(*e*) The words "ceased to be such" refer to the date when the road subject to the turnpike trust ceased as a whole to be a turnpike road; a portion of such a road, though previously transferred to the care of improvement commissioners or a borough council, only "ceased to be" a turnpike road at the date when the trust for the whole road expired (*Lancashire Justices* v. *Rochdale Corporation* (1883), 8 App. Cas. 494; *West Riding Justices* v. *R.* (1883), 8 App. Cas. 781; *Lancaster County Justices* v. *Newton in Makerfield Improvement Commissioners* (1886), 11 App. Cas. 416). As to turnpike roads, see p. 15, *post*.

(*f*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13.

(*g*) *Ibid.*

(*h*) *Ibid.*, s. 16. The portion of that section under which such orders were made has been repealed (Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56)).

(*i*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13; and see note (*e*), *supra*.

(*j*) Formerly quarter sessions, now the county council.

(*k*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 15.

(*l*) See the Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 7, and pp. 28, 42, 94, *post*.

(*m*) *Ibid.*, s. 10 (2).

(*n*) The term "district road" appears to be used colloquially in different senses, either as denoting any highway which is not a "main road," or any such highway which is repairable by the inhabitants at large.

(*o*) The grant since the 13th August, 1888, of a separate court of quarter sessions to a non-county borough does not affect the question of main roads (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 37).

(*p*) Quarter sessions boroughs were not urban sanitary districts for the purposes of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), ss. 13, 14, 38, and therefore prior to the 1st April, 1889, had no main roads; but now quarter sessions boroughs, not being county boroughs, are urban sanitary districts for such purposes (Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 35 (4) (a), 38 (3), 109 (1)).

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 35 (4) (c), 38 (4).

SECT. 2. "Main Road" and "Ordinary Highway."

to be main roads on the application of the borough council (*r*), provided, of course, that in neither case has a "dismaining" order been subsequently made.

County boroughs.

A county borough is a separate county for all purposes relating to main roads (*s*). Any road which was, by virtue of the Highways and Locomotives (Amendment) Act, 1878 (*t*), a main road at the date of the creation of the county borough, or of the inclusion of the particular road within its area, continues to be such, and is repairable out of the borough fund (*u*). Apparently the council of such a borough has the same powers of maining and dismaining roads as a county council (*v*).

In London there are, at any rate for practical purposes, no main roads (*w*).

Creation of new main roads.

7. When any highway authority considers that a highway within its district ought to become a main road by reason of its being a medium of communication between great towns or a thoroughfare to a railway station, or otherwise, they may request the county council (*x*) to declare it to be one. Thereupon the latter body, if of opinion that there is probable cause for the application, must cause the road to be inspected, and, if satisfied that it ought to be a main road, must make an order accordingly (*a*), which must be confirmed within six months (*b*). A copy of such order must be forthwith deposited at the office of the clerk (*c*) to the county council for inspection by interested persons; and the order does not take effect until the road has been placed in proper condition to the satisfaction of the council (*d*).

Dismaining of roads.

When a county council (*e*) considers that any main road, or any part of a main road, within the county ought to be reduced to the *status* of an ordinary highway, that is, "dismained," it may apply to the Local Government Board for an order so reducing it. The Board, if of opinion that there is probable cause for the application, must cause the road to be inspected, and, if satisfied that it ought to be reduced, must make an order accordingly, the county council

(*r*) Under the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 15.

(*s*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 31, 34.

(*t*) 41 & 42 Vict. c. 77.

(*u*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 11 (1), 34 (2).

(*v*) As to such powers, see the text, *infra*. In practice, it is believed, these powers are not exercised in county boroughs, and it is arguable that, at any rate in quarter sessions boroughs, they do not exist, for the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 15, did not originally apply to such a borough (*ibid.*, s. 38).

(*w*) See p. 200, *post*.

(*x*) Formerly quarter sessions (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (viii.)). For forms of request and orders, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 406, 409, 411.

(*a*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 15.

(*b*) *Ibid.*

(*c*) Formerly the clerk of the peace.

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (7). As to the decision of any dispute as to its condition, see p. 128, *post*. And for a set of model conditions, see Encyclopædia of Forms and Precedents, Vol. VI., p. 407.

(*e*) See note (*w*), *supra*.

defraying all the expenses of the order (*f*). Where, however, the road in question lies within a borough, a "dismaining" order cannot be made without the consent of the council of the borough (*g*).

SECT. 2. "Main Road" and "Ordinary Highway."

SECT. 3.—"*Highway repairable by the Inhabitants at Large.*"

Highways repairable by the inhabitants at large.

8. The term "repairable by the inhabitants at large" is generally used to denote highways for the repair of which the public alone are liable, as distinguished from highways repairable by individuals, or for the repair of which no one is liable (*h*). But although an individual may be primarily liable to repair a highway, the inhabitants at large may in certain events be secondarily liable to repair it (*i*); so, if the context requires it, the term "repairable by the inhabitants at large" apparently may be construed as including all highways which the public are liable to repair, either primarily or secondarily.

SECT. 4.—"*Turnpike Road.*"

Turnpike roads.

9. All turnpike trusts have now expired, consequently turnpike roads no longer exist as such (*k*); and most disturnpiked roads are now "main roads." A road which was a highway before it became subject to a Turnpike Act remained a highway after the expiration of the Act: in the case, however, of a highway which was first dedicated as such in accordance with a Turnpike Act, the public right of passage came to an end with the Act, at any rate if

(*f*) For a form of the order, see Encyclopædia of Forms and Precedents, Vol. VI., p. 411.

(*g*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 16; Highways and Bridges Act, 1891 (54 & 55 Vict. c. 63), s. 4; *R.* v. *Local Government Board* (1885), 15 Q. B. D. 70, C. A.

(*h*) See *Swansea Improvement and Tramways Co.* v. *Glamorganshire County Roads Board* (1879), 41 L. T. 583; *Gibson* v. *Preston Corporation* (1870), L. R. 5 Q. B. 218; *Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D. 750, C. A. The term appears to be used in this sense in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, and the Private Street Works Act, 1892 (55 & 56 Vict. c. 57).

(*i*) See pp. 84, 87, *post*. As to liability to repair highways, see p. 82, *post*.

(*k*) Turnpike roads were roads for the use of which tolls (as to which see p. 62, *post*) were taken from passengers under statutory authority by the trustees or proprietors, who in return were placed under statutory liabilities in respect of repairs and maintenance (*Northam Bridge and Roads Co.* v. *London and Southampton Rail. Co.* (1840), 6 M. & W. 428; *R.* v. *East and West India Docks and Birmingham Junction Rail. Co.* (1853), 2 E. & B. 466; *R.* v. *French* (1878), 3 Q. B. D. 187; affirmed (1879), 4 Q. B. D. 507, C. A.). Even if a highway can now be dedicated subject to tolls without statutory authority (as to which see p. 47, *post*), such a highway would not be a "turnpike road" (*Midland Rail. Co.* v. *Watton* (1886), 17 Q. B. D. 30, C. A.). The various Turnpike Acts were temporary measures, and the last of them expired in 1896. In 1864 there were in England (excluding the Isle of Wight) and North Wales 1,047 turnpike trusts, comprising 20,189 miles of road. As a rule, turnpike roads were the main arteries of traffic; and the object of a Turnpike Act was to relieve parishes of the burden of maintaining "through" roads, and to place this burden upon the actual users. The fact that almost all turnpike roads on being disturnpiked fell to be repaired by the parish or highway district (see pp. 86, 87, *post*) again placed an undue burden on many localities; and the same object of spreading the liability for their repairs over a wider area has been to some extent attained by modern legislation, under which most old turnpikes have become "main roads"; see p. 12, *ante*.

SECT. 4. "Turnpike Road."

the latter expired before 1871 (*l*), although a fresh dedication might be inferred if the public user was allowed to continue (*m*). Upon the expiration of a turnpike trust the road, unless discontinued, as a general rule continued, or became, repairable by the inhabitants at large (*n*); but the expiration of a trust did not terminate the liability of any person for, or to contribute towards, the maintenance, watering, or lighting of any part of the road, and any contract or obligation creating such liability remained enforceable, unless it was expressly made determinable on the expiration of the trust (*o*).

In the case of turnpike roads disturnpiked after the 5th July, 1865, there are special provisions for the prevention of encroachments and obstructions (*p*); and in the case of turnpike roads within an old "highway district" disturnpiked after the 9th August, 1863, there are special provisions as to getting materials for repair (*q*).

SECT. 5.—"*Street.*"

"Street." Normal meaning.

10. A "street" in its ordinary popular sense means a roadway (*r*), not necessarily a highway, which has on one side or both sides a more or less continuous and regular row of houses (*s*). It is a question of fact whether the houses are sufficiently regular and continuous to constitute the roadway a street (*a*). At the same time the context may show that the term is used as including the houses as well as the roadway (*b*).

Statutory definitions. Public Health Act, 1875.

11. There are, however, certain statutory definitions of the word which are much more comprehensive, and of these the most important is that contained in the Public Health Act, 1875 (*c*), wherein (*d*), if not inconsistent with the context, "street" includes

(*l*) The Annual Turnpike Acts Continuance Act, 1870 (33 & 34 Vict. c. 73), s. 10, appears to regard all roads disturnpiked after 31st December, 1870, as remaining highways; see also the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13.

(*m*) *R.* v. *Winter* (1828), 8 B. & C. 785; *R.* v. *Thomas* (1857), 7 E. & B. 399; *R.* v. *Mellor* (1830), 1 B. & Ad. 32; and see p. 44, *post*.

(*n*) See pp. 86, 87, *post*.

(*o*) Annual Turnpike Acts Continuance Act, 1882 (45 & 46 Vict. c. 52), s. 8.

(*p*) See 166, *post*.

(*q*) See 111, *post*.

(*r*) Including its footpaths, if any.

(*s*) *R.* v. *Fullford* (1864), 33 L. J. (M. C.) 122, C. C. R.; *Taylor* v. *Oldham Corporation* (1876), 4 Ch. D. 395; *Robinson* v. *Barton-Eecles Local Board* (1883), 8 App. Cas. 798, *per* Lord SELBORNE, L.C., at p. 801; *Portsmouth Corporation* v. *Smith* (1883), 13 Q. B. D. 184, C. A.; *Midland Rail. Co.* v. *Watton* (1886), 17 Q. B. D. 30, C. A.; *St. Mary, Islington, Vestry* v. *Barrett* (1874), L. R. 9 Q. B. 278; *Taylor* v. *Metropolitan Board of Works* (1867), L. R. 2 Q. B. 213; *Richards* v. *Kessick* (1888), 59 L. T. 318.

(*a*) *R.* v. *Fullford, supra*.

(*b*) *London, Chatham and Dover Rail. Co.* v. *London Corporation* (1868), 19 L. T. 250, C. A.; and compare *Galloway* v. *London Corporation* (1866), L. R. 1 H. L. 34, 55; *Quinton* v. *Bristol Corporation* (1874), L. R. 17 Eq. 524; *Baker* v. *Portsmouth Corporation* (1878), 3 Ex. D. 4; affirmed (1878) 3 Ex. D. 157 C. A.

(*c*) 38 & 39 Vict. c. 55, s. 4.

(*d*) The same definition and the following remarks will apply also to any subsequent statute directed to be read as one with the Public Health Act, 1875 (38 & 39 Vict. c. 55).

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any highway and any public bridge (not being a county bridge) (*e*), and any road, lane, footway, square, court, alley or passage, whether a thoroughfare or not. The object of this interpretation clause is not to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable, but to enable the word thus used, when there is nothing in the context or the subject-matter to the contrary, to be applied to some things to which it would not ordinarily be applicable (*f*). It is, therefore, necessary in considering any particular provision of the Public Health Acts (*g*) to determine whether the word "street" in that provision is to be construed in its natural or in its more extended sense: when once this has been determined as a matter of law, it is a question of fact whether the *locus* is or is not a "street" (*h*). Similarly it may be necessary to consider whether in any particular section the word "street" means only the actual roadway (*i*), or whether it includes also the adjoining houses (*j*), and also, in the case of a bridge, whether it includes the structure on which the roadway is carried (*k*).

Object of definition.

Where the extended statutory definition, and not the restricted or popular meaning, is properly applicable (*l*), the word "street" may include roads, lanes, and paths with no houses fronting on to them, and also roads, courts, alleys or passages which are private property, and over which the public have no absolute right of passage (*m*); thus it has been held to include a country

What statutory definition includes.

(*e*) Presumably this exception extends to "hundred" bridges; see p. 9, *ante*, and note (*p*) thereto.

(*f*) *Robinson* v. *Barton-Eccles Local Board* (1883), 8 App. Cas. 798, *per* Lord SELBORNE, L.C., at p. 801.

(*g*) See note (*d*), p. 16, *ante*.

(*h*) *Eccles* v. *Wirral Rural Sanitary Authority* (1886), 17 Q. B. D. 107.

(*i*) Which is the normal use of the word; see *Taylor* v. *Oldham Corporation* (1876), 4 Ch. D. 395; *Robinson* v. *Barton-Eccles Local Board*, *supra*; *London, Chatham and Dover Rail. Co.* v. *London Corporation* (1868), 19 L. T. 250, C. A.

(*j*) As it does in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157 (*Baker* v. *Portsmouth Corporation* (1878), 3 Ex. D. 4, 157, C. A.).

(*k*) *Great Eastern Rail. Co.* v. *Hackney Board of Works* (1883), 8 App. Cas. 687. See also *Arnell* v. *London and North Western Rail. Co.* (1852), 12 C. B. 697; *Arnell* v. *Regent's Canal Co.* (1854), 14 C. B. 564; *Beaver* v. *Manchester Corporation* (1857), 8 E. & B. 44.

(*l*) As in the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 16, 32 (see *Taylor* v. *Oldham Corporation*, *supra*; *Hill* v. *Wallasey Local Board*, [1894] 1 Ch. 133, C. A.); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149 (see *Coverdale* v. *Charlton* (1878), 4 Q. B. D. 104, C. A.; *Nutter* v. *Accrington Local Board of Health* (1878), 4 Q. B. D. 375, C. A.); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150 (see *Portsmouth Corporation* v. *Smith* (1883), 13 Q. B. D. 184, C. A.; *Jowett* v. *Idle Local Board* (1887), 57 L. T. 928, affirmed (1888), 36 W. R. 530, C. A.; *Fenwick* v. *Croydon Union Rural Sanitary Authority*, [1891] 2 Q. B. 216; *Walthamstow Urban District Council* v. *Sandell* (1904), 68 J. P. 509 (not following *Maude* v. *Baildon Local Board* (1883), 10 Q. B. D. 394; *R.* v. *Burnup* (1886), 50 J. P. 598)).

(*m*) *Taylor* v. *Oldham Corporation*, *supra*; *Midland Rail. Co.* v. *Watton* (1886), 17 Q. B. D. 30, C. A.; *Jowett* v. *Idle Local Board*, *supra*; *Hill* v. *Wallasey Local Board*, *supra*; *A.-G.* v. *Gibb*, [1909] 2 Ch. 265; and cases cited in following notes, p. 18, *post*. In *Walthamstow Urban District Council* v. *Sandell*, *supra*, BUCKLEY, J., in considering whether a certain passage was a "street" for this purpose, said: "I have no doubt I have to see what sort of a passage this is, whether it is a private approach to a man's house—his avenue leading

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road (*n*) or path (*o*), a *cul de sac* between houses (*p*), a back passage forming a secondary means of access to houses (*q*), a private road open to the public only on payment of a toll (*r*), and a roadway running over land acquired under compulsory powers by a railway company, so long, at any rate, as to treat it as a "street," is not inconsistent with the appropriation of the land to the company's objects (*s*). A strip of land of any considerable size lying between the footpath and roadway of a street, but used by the occupiers of adjoining premises for private purposes, is not necessarily to be regarded as included in the "street" (*t*).

A portion of a street, *e.g.*, a strip of land added to an existing road, may in itself be a "street" (*a*).

Private Street Works Act, 1892.

12. In the Private Street Works Act, 1892 (*b*), the expression "street" means, unless the context otherwise requires, a street as defined by the Public Health Acts (*c*), not being a highway repairable by the inhabitants at large (*d*).

Towns Improvement Clauses Act, 1847.

Town Police Clauses Act, 1847.

13. For the purposes of the Towns Improvement Clauses Act, 1847 (*e*), the word "street" *primâ facie* (*f*) includes any road, square, court, alley, and thoroughfare, and for the purposes of the Town Police Clauses Act, 1847 (*g*), it *primâ facie* (*f*) includes any road, square, court, alley, and thoroughfare, or public passage. The definition in the latter Act—at any rate so far as it relates to hackney carriages plying for hire—includes only places over which the public have rights (*h*).

up to his house from the street—or whether it is something which can properly be dealt with by this Act as a passage way rightly open to any member of the public who is going along an adjacent highway, and as to which DAY, J., said in *R.* v. *Goole Local Board*, [1891] 2 Q. B. 212, 'There is nothing to show that the public cannot pass along it.'"

(*n*) *Coverdale* v. *Charlton* (1873), 4 Q. B. D. 104, C. A.

(*o*) *Woodford Urban District Council* v. *Henwood* (1899), 64 J. P. 148 (a path in Epping Forest).

(*p*) *Walthamstow Urban District Council* v. *Sandell* (1904), 68 J. P. 509.

(*q*) *R.* v. *Goole Local Board*, [1891] 2 Q. B. 212.

(*r*) *Midland Rail. Co.* v. *Watton* (1886), 17 Q. B. D. 30, C. A.

(*s*) *Stretford Urban District Council* v. *Manchester South Junction and Altrincham Rail. Co.* (1903), 68 J. P. 59, C. A.

(*t*) *Le Neve* v. *Mile End Old Town Vestry* (1858), 8 E. & B. 1054.

(*a*) *Richards* v. *Kessick* (1888), 52 J. P. 756; *Property Exchange, Ltd.* v. *Wandsworth Board of Works*, [1902] 2 K. B. 61, C. A.; *White* v. *Fulham Vestry* (1896), 60 J. P. 327; *Portsmouth Corporation* v. *Hall* (1907), 71 J. P. 564, C. A.; *West Hartlepool Corporation* v. *Robinson* (1897), 62 J. P. 35, C. A.

(*b*) 55 & 56 Vict. c. 57, s. 5.

(*c*) *I.e.*, in the sense of the extended statutory definition; see pp. 16, 17, *ante*.

(*d*) As to this expression, see p. 15, *ante*.

(*e*) 10 & 11 Vict. c. 34, s. 3.

(*f*) *I.e.*, if there is nothing in the subject or context repugnant to such a construction.

(*g*) 10 & 11 Vict. c. 89, s. 3.

(*h*) It does not, therefore, include a road which is the private property of a railway company (*Curtis* v. *Embery* (1872), L. R. 7 Exch. 369; *Jones* v. *Short* (1900), 64 J. P. 247); it may include an open space in front of an hotel over which the public are allowed to pass freely (*Marks* v. *Ford* (1880), 45 J. P. 157); but see *Skinner* v. *Usher* (1872), L. R. 7 Q. B. 423; *Hoare & Co.* v. *Lewisham Metropolitan Borough* (1901), 17 T. L. R. 774; affirmed (1902), 18 T. L. R. 816, C. A. For similar cases under London Acts as to cabs, see *Skinner* v. *Usher*

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14. Special definitions of the word also occur in the Acts relating to telegraphs and to electric light, gas, and water undertakings (*i*).

Other special statutory definitions.

15. For the purposes of the London Building Act, 1894 (*k*), the expression "street" means and includes any highway, and any road, bridge, lane, mews, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, mews, footway, square, court, alley or passage.

London Building Act, 1894.

Whether for the purposes of this Act any *locus* is or is not a "street" is largely a question of fact, depending upon the particular facts of the case. Everything included in the definition clause is not necessarily a "street" for all purposes and in all circumstances, there being involved in the idea of a "street" the presence of houses or buildings more or less continuous and in greater or less proximity to one another along it (*l*): thus the drive to a private house is not a "street" (*m*), nor is an approach for pedestrians only by a courtyard to one or two blocks of houses or buildings (*n*), nor is a bridge, unless it is or may be a link in or continuation of a street (*o*); a private road giving access to two or three houses is not necessarily a "street" (*p*). On the other hand, the fact that a roadway is not intended for the use of the general public does not prevent it being a "street" (*q*); thus a road giving access to, and running round a square (*r*), or even a quadrangle surrounded by several blocks of mansions (*s*), may properly be held to be a "street," though intended only for the use of the inhabitants and their visitors: so, too, may a paved space, or market, with shops

(1872), L. R. 7 Q. B. 423; *Case* v. *Storey* (1869), L. R. 4 Exch. 319; *Clarke* v. *Stanford* (1871), L. R. 6 Q. B. 357; *Allen* v. *Tunbridge* (1871), L. R. 6 C. P. 481. As to conveyances plying for hire, see title STREET TRAFFIC.

(*i*) See titles ELECTRIC LIGHTING AND POWER, Vol. XII., p. 549; GAS, Vol. XV., p. 326; TELEGRAPHS AND TELEPHONES; WATER SUPPLY.

(*k*) 57 & 58 Vict. c. ccxiii., s. 5 (1).

(*l*) *Armstrong* v. *London County Council*, [1900] 1 Q. B. 416; *London County Council* v. *Heathman* (1905), 69 J. P. 222.

(*m*) *Ibid.*

(*n*) *Ibid.*; *Metropolitan Board of Works* v. *Nathan* (1885), 50 J. P. 502; *London County Council* v. *Davis* (1895), 59 J. P. 583 (both cases of a courtyard or passage giving access to blocks of artisans' dwellings); but see *Wood* v. *London County Council* (1895), 59 J. P. 615, which was held in *Armstrong* v. *London County Council*, *supra*, to have been wrongly decided.

(*o*) *Armstrong* v. *London County Council*, *supra*; *Brighton Rail. Co.* v. *St. Giles, Camberwell* (1879), 4 Ex. D. 239; *North London Rail. Co.* v. *St. Mary, Islington, Vestry* (1872), 27 L. T. 672.

(*p*) *London County Council* v. *Heathman*, *supra*; *London County Council* v. *Collins* (1905), 69 J. P. 401; *London County Council* v. *King* (1905), 69 J. P. 406.

(*q*) *Daw* v. *London County Council* (1890), 54 J. P. 502; *Armstrong* v. *London County Council*, *supra*, overruling *Wood* v. *London County Council*, *supra*.

(*r*) *Ibid.*

(*s*) In *Wood* v. *London County Council*, *supra*, such a quadrangle was held not to be a "street," but this case was held in *Armstrong* v. *London County Council*, *supra*, to have been wrongly decided: compare with this latter case *Metropolitan Board of Works* v. *Nathan*, *supra*, and *London County Council* v. *Davis* (1904), 68 J. P. 520.

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on both sides, and approached by steps from the adjoining highway (*t*).

Metropolis Management Acts.

16. In the Metropolis Management Acts (*a*) the expression "street" applies to and includes any highway and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage or mews, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, passage or mews. In this case also it would appear that the presence of houses is necessary to constitute a street (*b*). The fact that a roadway is a "new street" for certain purposes of these Acts does not prevent its being a "street" for other purposes thereof (*c*).

Public Health (London) Act, 1891.

17. In the Public Health (London) Act, 1891 (*d*), "street" includes any highway and any public bridge, and any road, lane, footway, square, court, alley or passage, whether a thoroughfare or not, and whether or not there are houses in such street.

SECT. 6.—"*New Street.*"

"New street" in metropolis.

18. In the Metropolis Management Acts (*e*) the term "new street" is (*f*) to apply to and include any street formed or laid out since the 7th August, 1862, and a part of any such street, and also any street the maintenance of the paving and roadway whereof had not before that date been taken over by the local authority (*g*), and a part of any such street, and also any street partly formed or laid out on that date.

Normal meaning.

For the purposes of the provisions (*h*) relating to the paving of "new streets" at the cost of frontagers this application of the term does not cut down the ordinary meaning of the words "new street"; and the term includes any road which, at the crucial date, is or was a "new" street in the ordinary and popular sense (*i*), *i.e.*,

(*t*) *London County Council* v. *Davis* (1904), 68 J. P. 520.

(*a*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 250; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 112.

(*b*) See cases as to "new streets," cited *infra*.

(*c*) *Hampstead Vestry* v. *Hoopel* (1885), 15 Q. B. D. 652; *St. John, Hampstead, Vestry* v. *Cotton* (1886), 12 App. Cas. 1, approving *Sheffield* v. *Fulham Board* (1876), 1 Ex. D. 395; and *St. Giles, Camberwell, Vestry* v. *Weller* (1869), L. R. 6 Q. B. 168, n., and overruling *Sawyer* v. *Paddington* (1870), L. R. 6 Q. B. 164.

(*d*) 54 & 55 Vict. c. 76, s. 141.

(*e*) See note (*a*), *supra*.

(*f*) According to the interpretation clause in the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 112.

(*g*) The section refers to "commissioners, trustees, surveyors or other authorities having control of the pavement or highways," but *semble* these words do not include turnpike trustees, and refer only to the ordinary rate-spending authority (*Davis* v. *Greenwich District Board of Works*, [1895] 2 Q. B. 219, C. A.; *Sawyer* v. *Paddington* (1870), L. R. 6 Q. B. 164).

(*h*) As to which see p. 201, *post*.

(*i*) *Pound* v. *Plumstead Board of Works* (1871), L. R. 7 Q. B. 183; *St. Mary, Islington, Vestry* v. *Barrett* (1874), L. R. 9 Q. B. 278; *St. Giles, Camberwell, Vestry* v. *Crystal Palace Co.*, [1892] 2 Q. B. 33, C. A.; *Davis* v. *Greenwich District Board of Works*, [1895] 2 Q. B. 219, C. A.; *Allen* v. *Fulham Vestry*, [1899] 1 Q. B. 681, C. A.

SECT. 6. "New Street."

a road whether public or private, old or new, on both sides or on one side of which more or less continuous houses have recently been built, so as to give it for the first time the character of a street (*j*). Thus an old country lane or road, repairable by the parish from time out of mind (*k*), a road which was formerly a turnpike road (*l*), a modern road made under statutory powers (*m*), a modern road similarly made in substitution for an old highway (*n*), and a private road not yet dedicated to the public (*o*), have all been held to become "new streets" in consequence of the recent erection of houses along them. It would seem that if a piece of ground is newly laid out for the express purpose of being used as a street it might (*p*) be a "new street" before any houses were actually built along it (*q*); but in general the erection of houses is necessary (*r*). A road along which no new houses have been built for many years, though a few old ones exist, is not a "new street" merely because it has not been taken over by the local authority (*s*).

Erection of houses necessary to bring road within definition.

Whether, and if so at what date, a road has become a "new street" is a question of fact (*t*).

The fact that the paving of the footway of a road, being an ancient public footpath, was taken over by the authority before the 7th August, 1862, the roadway not having been so taken over, does not prevent the whole street, both footway and roadway, being subsequently treated as a new street (*u*).

(*j*) "It means a place which by change of circumstances has within some indefinable period—you cannot say how long, but recently—acquired by building a new character" (*Crosse* v. *Wandsworth District Bodrd of Works* (1898), 62 J. P. 807, *per* WILLS, J., at p. 809). The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 105, treats houses as being the essence of a street (*St. Mary, Battersea, Vestry* v. *Palmer*, [1897] 1 Q. B. 220, *per* WRIGHT, J.; approved in *Allen* v. *Fulham Vestry*, [1899] 1 Q. B. 681, C. A.). The fact that houses have only been built on one side of the roadway does not prevent it being a street (*Simmonds Brothers, Ltd.* v. *Fulham Vestry*, [1900] 2 Q. B. 188). Nor does the fact that it has been laid out without due sanction (*Camberwell Corporation* v. *Dixon*, [1910] 1 K. B. 424).

(*k*) *Pound* v. *Plumstead Board of Works* (1871), L. R. 7 Q. B. 183; *Crosse* v. *Wandsworth District Board of Works, supra; Dryden* v. *Putney Overseers* (1876), 1 Ex. D. 223.

(*l*) *Sawyer* v. *Paddington* (1870), L. R. 6 Q. B. 164; *Davis* v. *Greenwich District Board of Works*, [1895] 2 Q. B. 219, C. A.; *Simmonds Brothers, Ltd.* v. *Fulham Vestry, supra; Hampstead Vestry* v. *Cotton* (1885), 16 Q. B. D. 475, C. A.

(*m*) *Allen* v. *Fulham Vestry, supra.*

(*n*) *St. Giles, Camberwell, Vestry* v. *Crystal Palace Co.*, [1892] 2 Q. B. 33, C. A.

(*o*) *St. Mary, Islington, Vestry* v. *Barrett* (1874), L. R. 9 Q. B. 278; compare *Dodd* v. *St. Pancras Vestry* (1869), 34 J. P. 517.

(*p*) By virtue of the interpretation clause referred to in note (*f*), p. 20, *ante*.

(*q*) *Arter* v. *Hammersmith Vestry*, [1897] 1 Q. B. 646, *per* CAVE, J.

(*r*) See cases in note (*i*), p. 20, *ante*.

(*s*) *Arter* v. *Hammersmith Vestry, supra* (private road existing before 1855); *St. Mary, Battersea, Vestry* v. *Palmer, supra* (highway dedicated in 1866).

(*t*) And if there be evidence to support the finding, it will not be interfered with (*Clerkenwell Vestry* v. *Edmondson & Son*, [1902] 1 K. B. 336, C. A.; *Simmonds Brothers, Ltd.* v. *Fulham Vestry, supra; Allen* v. *Fulham Vestry, supra; Davis* v. *Greenwich District Board of Works, supra; R.* v. *Dayman* (1857), 7 E. & B. 672; *R.* v. *Sheil* (1884), 49 J. P. 68; *Bowles* v. *St. Mary, Islington, Vestry* (1875), 39 J. P. 757; *Holden* v. *St. Mary, Islington, Vestry* (1886), 2 T. L. R. 740).

(*u*) *Wilson* v. *St. Giles, Camberwell, Vestry*, [1892] 1 Q. B. 1 (the paving of the footway was of a temporary character).

SECT. 6. "New Street."

A bridge carrying a new street across a railway may itself form part of such new street (*w*). It is a question of fact whether a bridge is a link in such new street, or whether the new street ends at the bridge (*a*).

Widening of an old street.

Where a road is an old street (*e.g.*, where houses sufficient to make it a street have existed for many years (*b*), or where such houses are modern, but it has already been paved at the cost of the frontagers (*c*)), and it is widened by the addition of a substantial strip of land on the side opposite to the existing houses, such added strip may in itself constitute a new street when houses are built along it (*d*). But an old street, long ago built upon on one side, and not widened, cannot be split up longitudinally when houses are built on the other side so as to enable the authority to pave as a new street that half on which such new houses abut (*e*).

When a "new street" ceases to be such.

When a new street is paved as such by the local authority at the cost of the frontagers it ceases to be a "new street" (*f*); but it does not cease to be a new street merely because the authority do ordinary repairs to it as a highway at the cost of the rates (*g*).

Where a narrow street is widened and substantially altered, the buildings alongside it being pulled down for the purpose and new buildings being erected, the street may be said to be "newly formed or laid out" at the time of such alterations (*h*).

Public Health Acts.

In some sections, at any rate, of the Public Health Acts the term "new street" is used in a wider sense than in the Metropolis Management Acts (*i*).

SECT. 7.—"*Way.*"

"Way."

19. For the purposes of the London Building Act, 1894 (*j*), the expression "way" includes any public road, way, or footpath (not

(*w*) *North London Rail. Co.* v. *St. Mary, Islington, Vestry* (1872), 27 L. T. 672; *Brighton Rail. Co.* v. *St. Giles, Camberwell* (1879), 4 Ex. D. 239.

(*a*) *Ibid.*

(*b*) *Property Exchange, Ltd.* v. *Wandsworth Board of Works*, [1902] 2 K. B. 61, C. A.

(*c*) *White* v. *Fulham Vestry* (1896), 60 J. P. 327.

(*d*) *Property Exchange, Ltd.* v. *Wandsworth Board of Works, supra; White* v. *Fulham Vestry, supra; Richards* v. *Kessick* (1888), 52 J. P. 756.

(*e*) *Clerkenwell Vestry* v. *Edmondson & Son*, [1902] 1 K. B. 336, C. A. (in this case the boundary between two jurisdictions ran along the centre of the street).

(*f*) At any rate, it cannot be paved a second time at the frontagers' cost (*R.* v. *Hackney Board of Works* (1873), L. R. 8 Q. B. 528; *Simmonds Brothers, Ltd.* v. *Fulham Vestry*, [1900] 2 Q. B. 188; *Crosse* v. *Wandsworth District Board of Works* (1898), 62 J. P. 807; *St. Giles, Camberwell, Vestry* v. *Crystal Palace Co.*, [1892] 2 Q. B. 33, C. A.; *St. Giles, Camberwell, Vestry* v. *Hunt* (1887), 52 J. P. 132; *White* v. *Fulham Vestry, supra*).

(*g*) *Simmonds Brothers, Ltd.* v. *Fulham Vestry, supra*; *Pound* v. *Plumstead Board of Works* (1871), L. R. 7 Q. B. 183; *Allen* v. *Fulham Vestry*, [1899] 1 Q. B. 681, C. A.; *Crosse* v. *Wandsworth District Board of Works* (1898), 62 J. P. 807; *Davis* v. *Greenwich District Board of Works, supra; Wandsworth Borough Council* v. *Golds*, [1911] 1 K. B. 60.

(*h*) *A.-G.* v. *Metcalf and Greig*, [1907] 2 Ch. 23.

(*i*) As to these Acts, see note (*a*), p. 20, *ante*. See also pp. 198 *et seq.*, *post*.

(*j*) 57 & 58 Vict. c. ccxiii., s. 5 (2).

being a street); and any private road, way, or footpath which it is proposed to convert into a highway, or to form, lay out, or adapt as a street. SECT. 7. "Way."

SECT. 8.—"*Roadway.*"

20. For the purposes of the London Building Act, 1894 (*k*), the expression "roadway" in relation to any street or way means and includes the whole space open for traffic, whether carriage traffic and foot traffic or foot traffic only. Provision is made for ascertaining and defining "the centre of the roadway" in relation to any street or way (*l*). "Roadway." "Centre of the roadway."

SECT. 9.—"*Churchway.*"

21. The inhabitants of a parish may be entitled by custom to a right of way over land lying within it to the parish church (*m*). The right, it seems, might perhaps be recognised in the case of the inhabitants of a hamlet, or possibly of a manor (*n*), but if so, it must be limited to land lying within that hamlet or manor (*o*). In theory the custom must be an immemorial one, and a churchway cannot be created by dedication at the present day (*p*); but proof of user in accordance with the alleged custom for twenty years, there being no evidence to show that at some earlier date the custom was not in existence, will justify a jury in finding the custom to be an immemorial one (*q*). So far as the churchway lies within the actual churchyard, it would seem that only the Ecclesiastical Courts have jurisdiction in respect of any obstruction or nuisance therein (*r*), and, moreover, that it is the duty of the churchwardens to repair that part of it (*s*). "Churchway." Custom must be immemorial. Obstruction.

Many ways which, because they give access to a church, are spoken of as churchways, are, in fact, public highways; and since a *cul de sac* may be a highway, a road leading to a village church may be a highway, even though it leads to no place beyond (*a*). Whether it is or is not a highway is a question of fact. Churchway may be a highway.

(*k*) 57 & 58 Vict. c. ccxiii., s. 5 (3).

(*l*) *Ibid.*, s. 5 (4).

(*m*) See title CUSTOM AND USAGES, Vol. X., p. 244.

(*n*) *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344. So long as it is a "definite and distinct district known to the law"; see *Edwards* v. *Jenkins*, [1896] 1 Ch. 308.

(*o*) *R.* v. *Ecclesfield* (*Inhabitants*) (1818), 1 B. & Ald. 348, 360; *Sowerby* v. *Coleman* (1867), L. R. 2 Exch. 96.

(*p*) *Farquhar* v. *Newbury Rural Council*, [1909] 1 Ch. 12, C. A.

(*q*) *Brocklebank* v. *Thompson*, *supra*; *Jenkins* v. *Harvey* (1835), 1 Cr. M. & R. 877, 895.

(*r*) *Batten* v. *Gedye* (1889), 41 Ch. D. 507; and see title ECCLESIASTICAL LAW, Vol. XI., p. 730. As to obstruction of such a way generally, see title CUSTOM AND USAGES, Vol. X., p. 245, but compare *R.* v. *Warwick Corporation* (1682), 2 Show. 201.

(*s*) *Walter* v. *Mountague and Lamprell* (1836), 1 Curt. 253; *Miller and Simes* v. *Palmer and Killby* (1837), 1 Curt. 540. As to the general duties of churchwardens, see title ECCLESIASTICAL LAW, Vol. XI., p. 468.

(*a*) See Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 5, and p. 8, *ante*. See also *Thrower's Case* (1672), 1 Vent. 208; *R.* v. *Warwick Corporation*, *supra*.

Part II.—Highway Statutes, Areas, and Authorities.

SECT. 1. Highway Statutes.

SECT. 1.—*Highway Statutes.*

Highway Acts.

22. The collective short title "The Highway Acts, 1835 to 1885," denotes (*b*) the Highway Act, 1835 (*c*) (the "principal Act" (*d*)); the Highway Acts, 1862 (*e*), 1863 (*f*), and 1864 (*g*), which, so far as is consistent with their tenor, are to be construed as one with the principal Act (*h*); the Highways and Locomotives (Amendment) Act, 1878 (*i*); the Highway Rate Assessment and Expenditure Act, 1882 (*k*); and the Highway Act Amendment Act, 1885 (*l*).

Other statute law.

Apart from the "Highway Acts," the statute law relating to highways and streets is contained mainly in the Public Health Acts, 1875 (*m*), 1890 (*n*), and 1907 (*o*); the Towns Improvement Clauses Act, 1847 (*p*); the Local Government Acts, 1888 (*q*) and 1894 (*r*); the Highways and Bridges Act, 1891 (*s*); and the Development and Road Improvement Funds Acts, 1909 (*t*) and 1910 (*u*).

SECT. 2.—*Highway Areas and Authorities.*

SUB-SECT. 1.—*For Ordinary Highways.*

Authorities for ordinary highways.

23. The highway authority for ordinary highways (*v*) within a borough, whether a county borough or not, is the borough council (*w*), and within an urban or a rural district (not being a borough) the district council (*a*). Every such council within its borough or district (to the exclusion of any other person) is

(*b*) Short Titles Act, 1896 (59 & 60 Vict. c. 14), Sched. II.
(*c*) 5 & 6 Will. 4, c. 50.
(*d*) So defined by the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 4.
(*e*) 25 & 26 Vict. c. 61.
(*f*) 26 & 27 Vict. c. 61.
(*g*) 27 & 28 Vict. c. 101.
(*h*) Highway Act, 1862 (25 & 26 Vict. c. 61), s. 42 (1); Highway Act, 1863 (26 & 27 Vict. c. 61), s. 3; Highway Act, 1864 (27 & 28 Vict. c. 101), s. 2.
(*i*) 41 & 42 Vict. c. 77.
(*k*) 45 & 46 Vict. c. 27.
(*l*) 48 & 49 Vict. c. 13.
(*m*) 38 & 39 Vict. c. 55.
(*n*) 53 & 54 Vict. c. 59.
(*o*) 7 Edw. 7, c. 53.
(*p*) 10 & 11 Vict. c. 34.
(*q*) 51 & 52 Vict. c. 41.
(*r*) 56 & 57 Vict. c. 73.
(*s*) 54 & 55 Vict. c. 63.
(*t*) 9 Edw. 7, c. 47.
(*u*) 10 Edw. 7, c. 7.
(*v*) As to the distinction between "ordinary highways" and "main roads," see p. 12, *ante*.
(*w*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 6, 144.
(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 21 (1), 25 (1); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 144.

surveyor of highways (*b*), and has all (*c*) the powers, duties and liabilities of such surveyors, save in so far as may be inconsistent with the Public Health Act, 1875 (*d*), and all the powers, duties, and liabilities which by the Highway Acts (*e*) were vested in the inhabitants in vestry assembled of any parish within the borough or district (*f*). All ministerial acts directed to be done by or to the surveyor of highways may be done by or to the surveyor of the council, or such other person as the council may appoint (*f*).

Powers of authorities not identical.

24. A rural district council which has succeeded to a highway board (*g*) has in certain slight respects different powers and duties from other councils which are the successors only of highway surveyors (*h*).

(*b*) The Highway Act, 1835 (5 & 6 Will. 4, c. 50), which was based upon the common law liability of every parish, or the customary liability of some subdivision thereof, to repair the highways lying within it, established three kinds of highway authority:—(1) a "surveyor of highways" for a single highway parish (*ibid.*, ss. 6—12), *i.e.*, a parish maintaining its own highways (*ibid.*, s. 5); (2) a "district surveyor" for a number of such parishes, grouped together by order of quarter sessions (*ibid.*, ss. 13—17); and (3) a "highway board" (serving the office of "surveyors") in such populous parishes as might prefer such a method of administration (*ibid.*, s. 18). These three authorities had (with slight variations, now immaterial) the same powers and duties. Subsequently, in boroughs and other urban districts the powers and duties of "surveyors" for all the constituent parishes became vested in the borough council, local board of health, or improvement commissioners (Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 117; Local Government Act, 1858 (21 & 22 Vict. c. 98), ss. 4, 6; Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 48, and Public Health Act, 1872 (35 & 36 Vict. c. 79), s. 4). Later still, except in boroughs, the title of the administrative body was changed to that of "urban sanitary authority" (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6), and finally of "urban district council" (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 (1)). In non-urban districts, by the Highway Acts, 1862 (25 & 26 Vict. c. 61) and 1864 (27 & 28 Vict. c. 101), a number of parishes might be combined for highway purposes into a "highway district" under a "highway board," which took over the powers and duties of the "surveyors of highways" for the constituent parishes, together with certain additional powers; and where such a "highway district" was co-terminous with a rural sanitary district, the board of guardians, as the rural sanitary authority, might claim to act as the highway board therefor (Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 4). Finally, by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25 (1), all the powers and duties of every highway authority in a rural district passed to the rural district council. All "postponement" orders under that section have now expired. No individual member of a council can be regarded as "surveyor of highways" for the purpose of a statute imposing duties on that officer (*Buckley* v. *Hanson* (1898), 62 J. P. 119). For further information as to the constitution of local authorities, see title LOCAL GOVERNMENT.

(*c*) Including powers and duties vested in the surveyor by inclosure awards (*A.-G.* v. *Tamworth Rural District Council* (1901), 85 L. T. 190; *A.-G. and Settle Rural District Council* v. *Lunesdale Rural District Council* (1902), 86 L. T. 822; compare *Re Marshland Smeeth and Fen District Commissioners and Marshland Rural District Council* (1895), 65 L. J. (Q. B.) 185; *Neaverson* v. *Peterborough Rural Council*, [1902] 1 Ch. 557, C. A.; *Irving* v. *Carlisle Rural District Council* (1907), 71 J. P. 212), even though such duties are not connected with highways (*A.-G.* v. *Tamworth Rural District Council*, *supra*; compare *A.-G. and Spalding Rural Council* v. *Garner*, [1907] 2 K. B. 480).

(*d*) 38 & 39 Vict. c. 55.

(*e*) See p. 24, *ante*.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 144.

(*g*) See note (*b*), *supra*.

(*h*) A highway board (see note (*b*), *supra*) had certain powers which a parish

SECT. 2. Highway Areas and Authorities.

The powers and duties of the different highway authorities in respect of "streets" also differ, some sections of the Public Health Acts not applying to a rural district unless put in force by order of the Local Government Board, others not applying to any district unless so put in force, and others being adoptive only. Further differences arise by reason of local Acts incorporating provisions of the Towns Improvement Clauses Act, 1847 (*i*), other than those incorporated in the Public Health Act, 1875 (*j*).

Appointment of committees.

25. A borough or district council may appoint committees to deal with highway matters, but in certain cases the acts of such committees require confirmation by the council (*k*). In matters of joint interest the councils of two or more districts or parishes may appoint joint committees (*l*).

Delegation of powers.

A rural district council may in certain cases delegate powers to a parish council (*m*).

SUB-SECT. 2.—*For Main Roads.*

Authorities for main roads.

26. In a county borough the borough council (*n*), and in other areas (subject to the two qualifications mentioned below) the county council (*n*), is responsible for the maintenance and repair of every main road (*o*) (including all bridges carrying the same, if repairable by the highway authority), and for the purpose of the maintenance, repair, improvement and enlargement of, and other dealing with such road, has the same powers and duties as a highway board, and may also exercise any powers vested in the council for the purpose of the maintenance and repair of bridges; such council has also the same powers as a highway board for preventing and removing obstructions and for asserting the right of the public to the use and enjoyment of roadside wastes (*p*).

Roads retained by urban authority.

27. Councils of boroughs, not being "smaller quarter sessions boroughs" (*q*), and other urban authorities, were empowered to elect, on or before the 1st April, 1890, to retain the powers and duties

surveyor had not. A council which has succeeded to an authority formed under a local Act may also, of course, have additional powers under such Act. It is uncertain whether a rural district council which has succeeded to a highway board in one part of its district, and to parish surveyors in other parts, can exercise the powers of a highway board throughout its district.

(*i*) 10 & 11 Vict. c. 34.

(*j*) 38 & 39 Vict. c. 55.

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 22; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 200; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 56; and see title LOCAL GOVERNMENT.

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 57; and see title LOCAL GOVERNMENT.

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 15; and see title LOCAL GOVERNMENT.

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 11 (1), 34.

(*o*) As to what are "main roads," see p. 12, *ante*.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (1). As to the maintenance and repair of bridges, see p. 184, *post*. As to the prevention and removal of obstuctions, see pp. 151 *et seq.*, *post*.

(*q*) Apparently the smaller quarter sessions boroughs dealt with by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 38, have not this power; that section contains no provision similar to s. 35 (4) (b), *ibid.*

of maintaining and repairing any main road then existing within their boroughs or districts (*r*), and also in the future to exercise a similar option as to any newly-created main road within twelve months of its creation.

Powers and duties of urban authority.

For the purpose of the maintenance, repair, improvement and enlargement of and other dealings with a main road so retained by it, the urban authority has the same powers and duties as if the main road were an ordinary road vested in it, and is entitled to receive from the county council an annual payment towards the cost of the maintenance and repair, and reasonable improvement connected with the maintenance and repair, thereof (*s*).

Main roads repaired by district councils.

28. A county council may from time to time contract with the council of any borough or district for the undertaking by the latter of the maintenance, repair, improvement and enlargement of, and other dealing with any main road within such borough or district, and, if the county council so require, such other council must undertake the same (*t*). The repairing council has the same powers, duties and liabilities as if the road were an ordinary road vested in it, and is entitled to receive from the county council an annual payment in consideration thereof (*u*); at the same time, for some purposes, the county council remains the "road authority" in respect of roads so repaired (*x*).

Employment of district council as agent of county council.

A county council may employ a district council as its agent in the transaction of any administrative business on matters arising in, or affecting the interests of, the district of the latter (*a*).

In the case of a main road maintained by a county council, anything authorised or required to be done to or by the highway authority is to be done to or by the council (*b*); and every authority which may break up any road in its district may also break up any main road, but if the road is broken up the authority must repair it to the satisfaction of the county council, or the county council may repair it and recover the cost from the authority (*c*).

(*r*) A road is within an authority's "district" for this purpose if it is under its jurisdiction; thus, where a boundary runs along the centre of a road, but for practical purposes a different boundary is adopted, each of two councils repairing a certain length of road for the full width thereof, the length so repaired by a council is within its "district" (*Middlesex County Council* v. *Willesden and Hendon Urban District Councils* (1896), 60 J. P. 630).

(*s*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (2); as to this payment, see further, p. 127, *post*. A newly-created urban district cannot claim to retain the main roads within it; nor can an old urban district which is extended claim to retain main roads lying within the added areas. Nor can an urban district "disclaim" a main road once retained by it. In 1903 out of 3,890 miles of urban main roads only 370 were "unretained."

(*t*) As to the mode of enforcing repair in accordance with such an undertaking, see p. 128, *post*.

(*u*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (4); Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 (3). As to this payment, see further, p. 127, *post*.

(*x*) *E.g.*, for the purposes of the Tramways Act, 1870 (33 & 34 Vict. c. 78); see *Stockport and Hyde Division of Macclesfield Hundred Highway Board* v. *Cheshire County Council* (1891), 65 L. T. 85.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 64.

(*b*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (12).

(*c*) *Ibid.*

SECT. 2. Highway Areas and Authorities.

SUB-SECT. 3.—*The Road Board.*

Constitution.

29. The Road Board, which exists for the purposes of improving the facilities for road traffic in the United Kingdom and of administering the "road improvement grant," is a body corporate, having a common seal and power to hold land without licence in mortmain. It consists of such and so many persons as the Treasury may determine, and may, subject to the approval of the Treasury, pay a salary to its chairman or vice-chairman, and appoint and pay officers and servants (*d*). It may also acquire, erect, and furnish necessary offices and buildings (*e*).

Powers.

30. The Road Board, with the approval of the Treasury, may make advances to county councils and other highway authorities in respect of the construction of new roads or the improvement of existing roads, and may construct and maintain any new roads which appear to the Board to be required for facilitating road traffic (*f*). Where advances have been so made in respect of the construction of new roads, the Road Board may also contribute towards the cost of maintaining such roads (*g*). The sums expended by the Road Board out of income, other than income derived from surplus land (*h*), on the construction of new roads or on the acquisition of land in connection therewith, or in respect of any loans raised for any such purpose, may not, in any year, exceed one-third of its estimated receipts for that year (*i*).

Application of Highway Acts to roads constructed by Board.

31. Every road constructed by the Road Board (*k*) is a public highway, and the enactments relating to highways and bridges apply accordingly, except that it is maintainable by and at the cost of the Road Board. For the purpose of the maintenance, repair, improvement and enlargement of or dealing with any such road, the Road Board has the same powers (except of levying rates) and duties as a county council has in respect of main roads; it may also exercise any powers vested in a county council for the purposes of the maintenance and repair of bridges, and it has the same powers as a county council for the prevention and removal of obstructions. Communications between a road or path and a road constructed by the Road Board must be made in manner to be approved by it. The Road Board and any highway authority in whose district any part of any such road is situated may contract for the undertaking by such authority of the maintenance and repair of the part of

(*d*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 7. As to the "grant," see Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 90.

(*e*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 11 (2).

(*f*) *Ibid.*, s. 8 (1). The term "roads" includes bridges, viaducts and subways (*ibid.*, s. 8 (5)). As to grants for construction and improvements, see p. 129, *post*; and as to construction of roads, see p. 48, *post*.

(*g*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 8 (2).

(*h*) *Ibid.*, s. 11 (6).

(*i*) *Ibid.*, s. 8 (3).

(*k*) Under *ibid.*, Part II.

such road in the district of that authority. For the purposes of such undertaking the highway authority has the same powers, duties, and liabilities as if the road were one vested in it (*l*).

Annual report.

32. The Road Board must make to Parliament, through the Treasury, an annual report of its proceedings (*m*). With the approval of the Treasury, and subject to certain limits, it may borrow on the security of the road improvement grant to meet expenditure proper to be spread over a term of years (*n*), and there are provisions as to its accounts, which must be laid before Parliament (*o*).

SECT. 3.—*Powers of Parish Councils and Meetings in Relation to Highways.*

Powers of parish councils and meetings.

33. Parish councils and parish meetings are not highway authorities, but they have certain powers in respect of highways, and the Local Government Board may, on the application of the council of any borough or other urban district, confer on that council or some other representative body within the borough or district any powers, duties, or liabilities of a parish council (*p*).

For what purpose consent of parish council necessary.

In a rural parish having a parish council the consent of the council is necessary before any highway in the parish can be stopped up or diverted (*q*), or declared to be no longer repairable at the public cost (*q*). Subject to restrictions on expenditure (*r*), a parish council may undertake the repair and maintenance of public footpaths within the parish, not being footpaths at the side of a public road (*s*); may acquire by agreement and maintain and improve any right of way within its own or an adjoining parish, which will be beneficial to the inhabitants of its parish; and may contribute towards the expense incurred for such purposes by individuals or by another council, and may in a proper case borrow money therefor (*t*). It has also certain powers as to the provision and control of "public walks" (*a*).

Complaint to county council.

Where a rural district council fails properly to maintain and repair any highway (*b*), or neglects to take proper proceedings in respect of any obstruction thereof, or unlawful encroachment on any

(*l*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 9 (1).
(*m*) *Ibid.*, s. 14.
(*n*) *Ibid.*, s. 13.
(*o*) *Ibid.*, ss. 8 (3), (4), 11 (6), 12.
(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 33 (1).
(*q*) *Ibid.*, s. 13 (1); see pp. 73, 98, 99, *post*.
(*r*) As to which, see Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 11, 19 (9), and title LOCAL GOVERNMENT.
(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 13 (2); but see note (*i*), p. 183, *post*.
(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 8 (1) (g), (i), (k), 12; and see title LOCAL GOVERNMENT.
(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1), (b), (d); as to these powers, see title OPEN SPACES AND RECREATION GROUNDS.
(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 16, 63 (2); see 150, *post*.

SECT. 3. Powers of Parish Councils and Meetings in Relation to Highways.

roadside waste, a parish council may complain to the county council (*c*).

A parish council may delegate certain powers to committees, and may join with other parish or district councils in appointing a joint committee for the purpose of matters in which they are jointly interested (*d*).

Power of veto of parish meeting.

Where a parish council resolves to give its consent to a highway being diverted or stopped up or declared to be no longer repairable at the public expense, the parish meeting may veto such resolution before it is duly confirmed (*e*).

In a rural parish not having a parish council the above-mentioned provisions as to stopping up and diversion, declaring highways to be no longer repairable at the public expense, and complaints, apply to the parish meeting (*f*). Other powers of a parish council may also be conferred on the parish meeting by order of the county council (*g*).

SECT. 4.—*Powers and Duties of Individuals Liable to Repair Highways.*

Application of Highway Act, 1835, to individuals.

34. The provisions of the Highway Act, 1835 (*h*), conferring or imposing powers, duties, or liabilities upon surveyors of highways are applicable to all persons liable for the repair of any highway. Apparently, therefore, such persons may exercise the powers of getting materials, making and cleaning ditches, cutting hedges etc., and may be liable to a penalty for not removing obstructions (*i*).

SECT. 5.—*The Local Government Board.*

Local Government Board.

35. The Local Government Board (*k*) now exercises any jurisdiction originally vested in a Secretary of State by the several statutes relating to highways and bridges in England and Wales (*l*).

SECT. 6.—*Special Areas.*

SUB-SECT. 1.—*Isle of Wight.*

Isle of Wight.

36. The highways in the Isle of Wight are regulated by local Acts (*m*), and the highway authorities are the rural district council

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 26 (4), 63 (2); see pp. 162, 163, *post*. For forms of resolution and complaint, and orders subsequent thereto, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 393—401.

(*d*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 56, 57; see title LOCAL GOVERNMENT.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 13 (1).

(*f*) *Ibid.*, s. 19 (8).

(*g*) *Ibid.*, s. 19 (10).

(*h*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 5. The Highway Acts, 1862 (25 & 26 Vict. c. 61), 1863 (26 & 27 Vict. c. 61), and 1864 (27 & 28 Vict. c. 101), are to be construed as one with this Act; see p. 24, *ante*.

(*i*) As to these various powers and duties, see pp. 101 *et seq.*, *post*.

(*k*) See title CONSTITUTIONAL LAW, Vol. VII., p. 103.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. V., Part III., re-enacting Public Health Act, 1872 (35 & 36 Vict. c. 79), s. 36.

(*m*) Isle of Wight Highway Act, 1813 (53 Geo. 3, c. xcii.), and Isle of Wight Highway Act, 1883 (46 & 47 Vict. c. ccxxvi.). These Acts have been amended

of the island and the councils of the various urban districts, who receive contributions from the county council of the island (*n*). SECT. 6. Special Areas.

SUB-SECT. 2.—*South Wales.*

37. In South Wales (*o*) there are three Acts (*p*), which contain special provisions as to discontinuance of maintenance of unnecessary highways, adoption of new roads, width of roads, encroachments, enforcement of the duty to repair, substitution of petty sessions for special highway sessions, and improvement of highways (*q*). In all other respects the general law as to highways applies to the district (*r*). South Wales.

SUB-SECT. 3.—*Scilly Isles.*

38. In the five parishes of the Scilly Isles highways are administered in accordance with a Provisional Order (*a*) of the Local Government Board made under the Local Government Act, 1888 (*b*). Scilly Isles.

SECT. 7.—*Saving Clauses in the Highway Act,* 1835, *and the Public Health Acts.*

39. Nothing contained in the Highway Act, 1835 (*c*), is, (1) to alter or interfere with the powers and provisions of Michael Angelo Taylor's Act, 1817 (*d*), in the metropolis, or of any local Act relating to any particular parish or place for any of the purposes mentioned in the Act of 1835 (*e*); Highway Act, 1835.

by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 12, and the Isle of Wight Provisional Order of 1889 (see the Local Government Board's Provisional Order Confirmation (No. 2) Act, 1889 (52 & 53 Vict. c. clxxvii.)). See, further, as to this subject, *Re Isle of Wight Highway Commissioners and Isle of Wight County Council* (1895), 59 J. P. 438; *Re Isle of Wight Rural District Council and Isle of Wight County Council* (1900), 65 J. P. 87.

(*n*) Until 1889 the authority was a body called the Isle of Wight Highway Commissioners.

(*o*) *I.e.*, the counties of Glamorgan, Brecknock, Radnor, Carmarthen, Pembroke, and Cardigan.

(*p*) Stat. (1815) 14 & 15 Vict. c. 16 (repealed); South Wales Highways Act, 1860 (23 & 24 Vict. c. 68); South Wales Highway Act Amendment Act, 1878 (41 & 42 Vict. c. 34).

(*q*) See South Wales Highways Act, 1860 (23 & 24 Vict. c. 68), ss. 38—42, and South Wales Highway Act Amendment Act, 1878 (41 & 42 Vict. c. 34).

(*r*) See *R.* v. *James* (1863), 3 B. & S. 901. Prior to the Local Government Acts, 1888 (51 & 52 Vict. c. 41) and 1894 (56 & 57 Vict. c. 73), the highways in South Wales were administered by a number of special authorities appointed under various local Acts, whose powers are now transferred to the county, borough, and district councils. See, *e.g.*, Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 13.

(*a*) Confirmed by the Local Government Board's Provisional Order Confirmation (No. 6) Act, 1890 (53 & 54 Vict. c. clxxvi.).

(*b*) 51 & 52 Vict. c. 41, s. 49; see also Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 74.

(*c*) 5 & 6 Will 4, c. 50; as to the "Highway Acts," see p. 24, *ante.*

(*d*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.).

(*e*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 112. But this section and s. 115 (*ibid.*) do not prevent the Highway Acts applying to London except in so far as

SECT. 7. Saving Clauses in the Highway Act, 1835, and Public Health Acts.

(2) to apply to any turnpike roads (*f*), except where expressly mentioned, or to any roads, bridges, ways, or pavements which may be paved, repaired, cleansed, broken up, or divested under the provisions of any local or personal Act (*g*);

(3) to extend, alter, or affect any rights or privileges of the Universities of Oxford or Cambridge (*h*);

(4) to affect the City of London or the rights of the corporation (*i*);

(5) to alter certain of the provisions of a local Act of 1820 (*k*) as to the repair of bridges in Montgomeryshire (*l*); or

(6) to alter or affect the powers given to the Commissioners of Sewers by any Act of Parliament (*m*).

Public Health Acts.

All powers given by the Public Health Acts (*n*) are to be cumulative, and proceedings may be taken either under those Acts or under any local Act which makes provision for the same or similar purposes.

The Public Health Acts (*n*) contain saving clauses (*o*) for the protection of the Commissioners of Sewers and similar bodies, and of the Admiralty or War Office; for the protection of rivers, canals, docks, harbours, locks, reservoirs and basins (*p*), water rights generally (*q*), and of mines and smelting and similar works (*r*), and works belonging to the London County Council (*s*). They do not, in general, affect the Crown (*a*).

their provisions are inconsistent with special legislation applicable to London; therefore s. 72 (*ibid.*) applies to London; see *Back* v. *Holmes* (1887), 56 L. T. 713; *Harvey* v. *Bethnal Green Vestry* (1874), 38 J. P. 743; *St. Mary, Newington* v. *Jacobs* (1871), L. R. 7 Q. B. 47.

(*f*) Turnpike roads are now extinct as such, and the Act applies to disturnpiked roads, whether main roads or ordinary highways. As to turnpike roads, see p. 15, *ante*.

(*g*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 113. "The true meaning of the clause is, I think, that nothing in this Act shall apply in respect of paving, repairing, etc. any roads etc. which are paved etc. under a local Act" (*R.* v. *Paynter* (1849), 13 Q. B. 399, *per* PATTESON, J., at p. 404); see also *Wright* v. *Frant Overseers* (1863), 4 B. & S. 118. But now by the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 44, highways regulated by local or personal Acts may be "diverted" under the Highway Act, 1835 (5 & 6 Will. 4, c. 50).

(*h*) *Ibid.*, s. 114.

(*i*) See *ibid.*, s. 115, for the full terms of this exception.

(*k*) 1 Geo. 4, c. vii.

(*l*) See Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 116, for the full terms of this exception.

(*m*) *Ibid.*, s. 117.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 340, 341; Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 10. As to these provisions, and also as to the power of the Local Government Board to repeal and alter local Acts under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 303, or the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 3 (1), see title LOCAL GOVERNMENT.

(*o*) As to these saving clauses, see title LOCAL GOVERNMENT.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 327—331, 333.

(*q*) *Ibid.*, ss. 332, 333.

(*r*) *Ibid.*, s. 334.

(*s*) *Ibid.*, s. 336; and see title SEWERS AND DRAINS.

(*a*) *Hornsey Urban Council* v. *Hennell*, [1902] 2 K. B. 73; *Cooper* v. *Hawkins*, [1904] 2 K. B. 164; *Gorton Local Board* v. *Prison Commissioners* (1887), [1904] 2 K. B. 165, n.; see also an express saving clause in the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 12.

Part III.—Origin and Proof of Highways.

SECT. 1.—*In General.*

SECT. 1. In General.

Origin of highways.

40. A claim to a public right of way may be based either upon dedication and acceptance, or upon some statute (*b*). There is high authority for saying that a highway may also be acquired by prescription (*c*); but, even if this be so, it is unnecessary, and not the practice, to base a claim on such ground (*d*).

Rights of way which exist by virtue of some custom, *e.g.*, a churchway, are not highways (*e*).

SECT. 2.—*Highways by Dedication and Acceptance.*

SUB-SECT. 1.—*Animus Dedicandi.*

Theory of dedication.

41. Land dedicated by a person legally competent to do so (*f*) to the public for the purposes of passage becomes a highway (*g*) when accepted for such purposes by the public; but whether in any particular case there has been a dedication and acceptance is a question of fact (*h*) and not of law.

Dedication presupposes *animus dedicandi*.

42. Dedication necessarily presupposes an intention to dedicate —there must be *animus dedicandi* (*i*). The intention may be openly expressed in words or writing, but, as a rule, it is a matter of inference; and it is for a jury to say whether such intention is to be inferred from the evidence as to the acts and behaviour of the landowner when viewed in the light of all the surrounding circumstances (*k*).

(*b*) Including a statutory inclosure award.

(*c*) See *Mann* v. *Brodie* (1885), 10 App. Cas. 378, *per* Lord BLACKBURN, at p. 385; *A.-G.* v. *Esher Linoleum Co., Ltd.*, [1901] 2 Ch. 647, 650; and title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 260, 269. The statement has been challenged on the same ground as the statement that a highway is an easement (see p. 49, *post*), namely, that there is no dominant tenement, which prescription ordinarily presupposes.

(*d*) The Prescription Act, 1832 (2 & 3 Will. 4, c. 71), does not apply to public rights of way; therefore, since the common law period of prescription is time immemorial, a claim to a prescriptive highway might be defeated by proof of its origin within the time of legal memory, *i.e.*, since 1189 A.D.; see cases in note (*c*), *supra*. Accordingly in cases of long user it is the practice to rely upon the theory of a presumed dedication in more recent times. As to "prescriptive" rights, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 256—258.

(*e*) As to such customary ways, see p. 23, *ante*, and title CUSTOM AND USAGES, Vol. X., p. 243.

(*f*) As to persons who can dedicate, and against whom an intention to dedicate may be inferred, see p. 34, *post*; and for appropriate forms, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 386, 387.

(*g*) *R.* v. *Petrie* (1855), 4 E. & B. 737; *R.* v. *Lordsmere* (*Inhabitants*) (1850), 15 Q. B. 689.

(*h*) *Ibid.* The date of dedication, if material, is also a question of fact (*ibid.*). "It is not correct to say that the early user established an inchoate right capable of being subsequently matured The proper way of regarding these cases is to look at the whole of the evidence together and the presumption, if it can be made, is then of a complete dedication coeval with the early user" (*Turner* v. *Walsh* (1881), 6 App. Cas. 636, 642, P. C.).

(*i*) *Poole* v. *Huskinson* (1843), 11 M. & W. 827, 830; *Mann* v. *Brodie*, *supra*; *Simpson* v. *A.-G.*, [1904] A. C. 476, 493.

(*k*) *R.* v. *Petrie*, *supra*; *R.* v. *Wright* (1832), 3 B. & Ad. 681; *Eyre* v. *New*

SECT. 2. Highways by Dedication and Acceptance.

Acceptance by public.

43. Acceptance by the public requires no formal act of adoption by any persons or authority (*l*), but is to be inferred from public user of the way in question. Even if an express intention to dedicate is proved, it is necessary to prove also that the way has been in fact thrown open to the public and used by them (*m*).

The evidence from which a jury are asked to infer both dedication and acceptance is, as a rule, open and unobstructed user by the public for a substantial time.

SUB-SECT. 2.—*Capacity to Dedicate.*

Capacity to dedicate.

44. An intention to dedicate land as a highway can only be inferred against a person who was at the material time in a position to make an effective dedication—that is, as a rule, a person who is absolute owner in fee simple and *sui juris* (*n*). When, however, a *primâ facie* case is proved of an intention to dedicate, express or implied, it lies upon the defendant to show that the state of the title to the land is or was such as to render any such intention inoperative (*o*).

A mere right of pre-emption over adjoining land does not render dedication of such land impossible without the consent of the person having such right (*p*).

Copyholders.

45. In the case of copyholds there can be no effective dedication unless the lord and the copyholder concur (*q*). Since, however, the lord, if in actual possession even for a short time, could interrupt any public user of the land, his assent to a dedication may be inferred from public user, unless he proves affirmatively that during the whole period (*r*) of user he was never in possession either by forfeiture or escheat or seizure *quousque*, or in the interval between a surrender or death and the succeeding admission (*s*).

Forest Highway Board (1892), 56 J. P. 517, C. A. An agreement between individuals to make a highway across their own lands amounts to no dedication if they see fit to abandon their plan (*Healey* v. *Batley Corporation* (1875), L. R. 19 Eq. 375).

(*l*) No formal adoption was necessary even when every new highway became *ipso facto* repairable at the public expense; see *R.* v *Leake* (*Inhabitants*) (1833), 5 B. & Ad. 469; *Roberts* v. *Hunt* (1850), 15 Q. B. 17.

(*m*) *A.-G.* v. *Biphosphated Guano Co.* (1879), 11 Ch. D. 327, C. A.; *Cubitt* v. *Maxse* (*Lady Caroline*) (1873), L. R. 8 C. P. 704, 715; *Healey* v. *Batley Corporation, supra; Mackett* v. *Herne Bay Commissioners* (1876), 35 L. T. 202; *Hall* v. *Bootle Corporation* (1881), 44 L. T. 873. In the last case a builder set out a road, but subsequently abandoned any intention of making it.

(*n*) See cases cited in notes (*o*) to (*s*), *infra*, and on pp. 35—38, *post*.

(*o*) *R.* v. *Petrie* (1855), 4 E. & B. 737; *Powers* v. *Bathurst* (1880), 49 L. J. (CH.) 294, and other cases in succeeding notes; compare also title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 259.

(*p*) *Coats* v. *Herefordshire County Council*, [1909] 2 Ch. 579, C. A.

(*q*) *Powers* v. *Bathurst, supra*.

(*r*) And *semble*, proof of user as far back as memory goes may justify an inference of user in the more remote past; see cases cited in note (*m*), p. 36, *post*.

(*s*) *Powers* v. *Bathurst, supra;* and see title COPYHOLDS, Vol. VIII., pp. 1 *et seq.*

46. The Crown may dedicate to the public a right of way over Crown lands, and its intention to do so may be inferred as in the case of private owners (*t*). Crown.

47. A lessee cannot dedicate land as a highway without the consent of the owner of the fee (*a*). If he purports to do so, expressly or impliedly, it is doubtful whether there has been a dedication for the term of his lease (*b*). Upon proof of public user sufficient to justify the inference of an intention to dedicate, it lies, apparently, on the freeholder to show affirmatively that the land has in fact been in lease during the whole period (*c*), and if the land has been in the occupation of a series of tenants, the assent of the freeholder may properly be presumed (*d*). Even when the land has been in lease during the whole period of user proved, still earlier user and a dedication at some time prior to the commencement of the lease may be presumed, if the evidence is not inconsistent with it (*e*). On the determination of a tenancy the freeholder must assert his right to stop any public user without delay, for if it be allowed to continue he may be taken to have acquiesced in it (*f*). Leaseholders.

In the case of a building lease it would seem that assent on the part of the freeholder to the laying out and construction of public highways may be inferred from slight indications (*g*). Building lease.

48. Where land is in settlement there can, apart from an express power in the settlement or apart from the powers of the Limited owners.

(*t*) *Harper* v. *Charlesworth* (1825), 4 B. & C. 574; *R.* v. *East Mark* (*Inhabitants*) (1848), 11 Q. B. 877; *Turner* v. *Walsh* (1881), 6 App. Cas. 636, P. C.

(*a*) "If property is under lease, of course, there can be no dedication by the lessee to bind the freehold" (*R.* v. *East Mark* (*Inhabitants*), *supra*, *per* PATTESON, J., at p. 883), for during the lease the freeholder could not interfere with persons permitted by the tenant to cross the land (*Baxter* v. *Taylor* (1832), 4 B. & Ad. 72). See also *Bermondsey Vestry* v. *Brown* (1865), L. R. 1 Eq. 204; *Wood* v. *Veal* (1822), 5 B. & Ald. 454; *Hall* v. *Bootle Corporation* (1881), 44 L. T. 873; and cases cited in notes (*b*) to (*g*), *infra*. As to a fee farm grantee, see *Smith* v. *Wilson*, [1903] 2 I. R. 45.

(*b*) Probably not; see *Dawes* v. *Hawkins* (1860), 8 C. B. (N. S.) 848, *per* BYLES, J., at p. 850; *Corsellis* v. *London County Council*, [1907] 1 Ch. 704, *per* NEVILLE, J., at p. 713 (the Court of Appeal expressed no opinion on the point, S. C., [1908] 1 Ch. 13, C. A.). See, *contra*, *A.-G.* v. *Biphosphated Guano Co.* (1879), 11 Ch. D. 327, C. A.; *Wood* v. *Veal* (1822), 5 B. & Ald. 454; Selwyn's Nisi Prius, 12th ed., p. 1317. Possibly in some cases a public right of user during the term might be supported on the ground of some contract, irrevocable exercise, or estoppel; see *Corsellis* v. *London County Council*, [1908] 1 Ch. 13, C. A.

(*c*) *R.* v. *Petrie* (1855), 4 E. & B. 737; *Powers* v. *Bathurst* (1880), 49 L. J. (CH.) 294.

(*d*) *R.* v. *Barr* (1814), 4 Camp. 16; *Davies* v. *Stephens* (1836), 7 C. & P. 570; *Smith* v. *Wilson*, *supra*; for at each change of tenancy the landlord might have interfered.

(*e*) *Winterbottom* v. *Derby* (*Lord*) (1867), L. R. 2 Exch. 316; *Wood* v. *Veal*, *supra*; *Young* v. *Cuthbertson* (1854), 1 Macq. 455, 459, H. L.

(*f*) *Rugby Charity Trustees* v. *Merryweather* (1790), 11 East, 375, n.

(*g*) *Pryor* v. *Pryor* (1872), 26 L. T. 758, where the plan showed plainly a contemplated extension of an existing public street; but see *Hall* v. *Bootle Corporation*, *supra*. The mere fact that proposed streets are referred to in a building lease (or a plan) does not necessarily mean that they are intended to be public highways as opposed to private streets (*Espley* v. *Wilkes* (1872), L. R. 7 Exch. 298). See also *Vernon* v. *St. James, Westminster, Vestry* (1880), 16 Ch. D. 449, C. A., where public money had been spent on lighting and cleansing streets.

SECT. 2. Highways by Dedication and Acceptance.

Settled Estates Act, 1877 (*h*), or the Settled Land Acts (*i*), be no valid dedication of any part of such land as a highway unless all parties interested under the settlement are *sui juris*, and concur, or can be presumed to have concurred (*j*). If public user is proved, the *onus* is upon the persons disputing the fact of dedication, who may rebut the inference by showing that at all material times there was no person capable of making a valid dedication (*k*), or by showing, if such a person did exist, that in the circumstances of the case his concurrence ought not to be presumed (*l*).

If the evidence of user goes back as far as the limit of living memory, a jury may (subject to any evidence fixing a date before which there can have been no user) infer a dedication at some time prior to the earliest settlement proved (*m*). A person succeeding as absolute owner to land hitherto under settlement must assert his rights promptly, or he may be deemed to have assented to any public user which originated during the settlement and continues after its expiration (*n*).

Mortgagors.

49. Where a mortgagor is still in possession of mortgaged property, it would seem that the mortgagee's assent to a dedication is necessary, and that a dedication cannot be inferred from user unless the mortgagee can be shown or presumed to have had knowledge thereof (*o*).

Statutory corporations and public trusts.

50. Statutory corporations, such as railway and canal companies (*p*), and trustees may dedicate for use as a highway the surface of land which is vested in them for the purposes of their undertakings or in trust for the public, so long as its use by the

(*h*) 40 & 41 Vict. c. 18, ss. 20—22.

(*i*) See the Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 16, 25, and title SETTLEMENTS.

(*j*) *Farquhar* v. *Newbury Rural Council*, [1909] 1 Ch. 12, C. A.

(*k*) *R.* v. *Petrie* (1855), 4 E. & B. 737; compare *Coats* v. *Herefordshire County Council*, [1909] 2 Ch. 579, C. A.

(*l*) In *R.* v. *Petrie*, *supra*, it was said that the persons disputing dedication must prove impossibility; if this be necessary, where land is limited to A. for life with remainder to B. (an adult) in fee, a dedication might be inferred against B. although he could not control A.'s acts. *Semble*, in such a case there must be something in B.'s conduct to justify the inference of his acquiescence (*Farquhar* v. *Newbury Rural Council*, *supra*, where the remainderman being in possession the court inferred acquiescence on the part of the non-resident life tenant).

(*m*) *Winterbottom* v. *Derby* (*Lord*) (1867), L. R. 2 Exch. 316; *Wood* v. *Veal* (1822), 5 B. & Ald. 454; *Young* v. *Cuthbertson* (1854), 1 Macq. 455, 459, H. L.; *Roberts and Lovell* v. *James* (1902), 18 T. L. R. 777 (in which case a judge refused to infer dedication prior to a settlement in 1810 merely from evidence of user since 1836); *Farquhar* v. *Newbury Rural Council*, *supra*; *Paris* v. *Lymington Rural District Council* (1911), 75 J. P. (Journal) 88. See also *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517, C. A., as to circumstances under which evidence of user during a life tenancy may strengthen slight evidence of earlier user.

(*n*) *R.* v. *Petrie*, *supra*; *Rugby Charity Trustees* v. *Merryweather* (1790), 11 East, 375, n.

(*o*) There appears to be no reported case dealing with this point. In *Smith* v. *Wilson*, [1903] 2 I. R. 45, 69, 81, it was suggested that a fee farm grantee could dedicate without the assent of the owner of the fee farm rent. As to the position of a mortgagor in possession generally see title MORTGAGE.

(*p*) As to which, see generally title RAILWAYS AND CANALS.

public as a highway is not incompatible with the objects for which it is vested in them (*q*). Subject to the same qualification, an intention to dedicate such land may be properly inferred against them from public user (*q*). Where the evidence is conflicting, it is for a jury to say whether any such incompatibility exists (*r*); and it would appear that, where there is no present incompatibility, there may be a limited dedication subject to the right of interfering with the highway in the future in order to carry out statutory powers and duties (*s*).

Cases in which intention has been established.

In accordance with this principle, an intention to dedicate has been established against railway companies in the cases of a disused tramway lying alongside a public road and not fenced therefrom (*t*), a bridge spanning a line and carrying station buildings (*u*), and footpaths crossing a line on the level or running along a line (*a*); against canal companies in the case of a path along a reservoir embankment (*b*), a towing-path (*c*), and a bridge (*d*); and against statutory commissioners and similar bodies in the cases of an embankment in the Fens (*e*), a sea wall (*f*), a pier (*g*), and a quay (*h*).

Dedication incompatible with objects of company or trustees.

On the other hand, an express grant of a private road under railway arches (*i*), the dedication of a path along the embankment of a canal company's reservoir (*k*), the dedication by a railway company of a bridge over its line originally built as a private accommodation bridge (*l*), and the opening of a carriage road along

(*q*) See *Ayr Harbour Trustees* v. *Oswald* (1883), 8 App. Cas. 623; and cases cited in notes (*r*) to (*l*), *infra*, and notes (*m*), (*n*), p. 38, *post*.

(*r*) *R.* v. *Leake* (*Inhabitants*) (1833), 5 B. & Ad. 469.

(*s*) *Arnott* v. *Whitby Urban District Council* (1909), 73 J. P. 369.

(*t*) *Coats* v. *Herefordshire County Council*, [1909] 2 Ch. 579, 601, C. A.; even though the adjoining owner had and, before action, exercised, a right of pre-emption.

(*u*) *North London Rail. Co.* v. *St. Mary, Islington, Vestry* (1872), 27 L. T. 672; but see *Taff Vale Rail. Co.* v. *Pontypridd Urban District Council* (1905), 69 J. P. 351, and note (*l*), *infra*.

(*a*) *A.-G.* v. *London and South Western Rail. Co.* (1905), 69 J. P. 110; *Arnold* v. *Morgan* (1910), 103 L. T. 763 (but see *Taff Vale Rail. Co.* v. *Pontypridd Urban District Council, supra; Holloway* v. *Egham Urban District Council* (1908), 72 J. P. 433; and *Edinburgh Magistrates* v. *North British Rail. Co.* (1904), 6 F. (Ct. of Sess.) 620.

(*b*) *Lancashire and Yorkshire Rail. Co.* v. *Davenport* (1906), 70 J. P. 129; but see *Great Western Rail. Co.* v. *Solihull Rural District Council* (1902), 66 J. P. 772, C. A., *contra*. The test is whether use of the path by the public will materially increase the cost of upkeep and maintenance.

(*c*) *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D. 273, C. A.

(*d*) *Grand Surrey Canal Co.* v. *Hall* (1840), 1 Man. & G. 392.

(*e*) *R.* v. *Leake* (*Inhabitants*), *supra*.

(*f*) *Greenwich Board of Works* v. *Maudslay* (1870), L. R. 5 Q. B. 397; compare *Sandgate Urban District Council* v. *Kent County Council* (1898), 79 L. T. 425, H. L. (esplanade).

(*g*) *Tyne Improvement Commissioners* v. *Imrie, A.-G.* v. *Tyne Improvement Commissioners* (1899), 81 L. T. 174.

(*h*) *Arnott* v. *Whitby Urban District Council, supra*.

(*i*) *Mulliner* v. *Midland Rail. Co.* (1879), 11 Ch. D. 611. In this case the grant was set aside after four years at the instance of a company working the grantors' line under statutory powers.

(*k*) *Great Western Rail. Co.* v. *Solihull Rural District Council*, note (*b*), *supra*.

(*l*) *Taff Vale Rail. Co.* v. *Pontypridd Urban District Council, supra*, where the

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the edge of land held in trust for public golf links (*m*) have been held to be incompatible with the carrying out of the objects of the company, or of the duties of the trustees. Where such incompatibility exists it does not matter whether the land has been acquired under compulsory powers or by agreement (*n*).

SUB-SECT. 3.—*Evidence Justifying or Rebutting Inference of Dedication.*

User.

51. The fact that a way has been used by the public so long and in such a manner that the owner of the land, whoever he was, must have been aware that the public believed that the way had been dedicated, and has taken no steps to disabuse them of that belief, is evidence (but not conclusive evidence), from which a jury may infer a dedication by the owner (*o*). The weight to be attached to evidence of user depends upon a number of circumstances.

Length of user.

52. In the first place the length of such user is important. There is no fixed minumum period which must be proved in order to justify an inference of dedication (*p*), and no fixed maximum period (*q*) which compels such an inference. Where the origin of a way was accounted for, four years has been regarded as insufficient (*r*); where other facts pointed to an intention to dedicate, eighteen months has been held to be sufficient (*s*); so, too, in other cases six years and eight years (*t*). The period is only material as one element from which the owner's intention to dedicate may be inferred against him (*a*).

Nature of *locus in quo*.

53. The nature of the *locus in quo* is also material. If a man builds a row of houses with a road in front opening into an old highway at each end, and sells or lets them, the slightest evidence of

dedication of the bridge would have fettered the company in dealing with the necessity for widening their line and other emergencies. But compare *North London Rail. Co.* v. *St. Mary, Islington, Vestry* (1872), 27 L. T. 672, cited in note (*u*), p. 37, *ante*.

(*m*) *Paterson* v. *St. Andrews (Provost etc.)* (1881), 6 App. Cas. 833. So, too, a corporation in whom a road is vested as a "promenade" cannot allow motor traffic along it (*A.-G.* v. *Blackpool Corporation* (1907), 71 J. P. 478).

(*n*) *Edinburgh Magistrates* v. *North British Rail. Co.* (1904), 6 F. (Ct. of Sess.) 620.

(*o*) *Mann* v. *Brodie* (1885), 10 App. Cas. 378, 386. "It is not necessary to inquire who the individual was from whom the dedication first proceeded" (*R.* v. *Petrie* (1855), 4 E. & B. 737, *per* COLERIDGE, J., at p. 745); but, of course, it may be necessary to fix the date of dedication for incidental purposes, *e.g.*, to determine whether the highway is repairable by the public; see p. 84, *post*.

(*p*) *Woodyer* v. *Hadden* (1813), 5 Taunt. 125, 137.

(*q*) As there is in Scotland; compare *Young* v. *Cuthbertson* (1854), 1 Macq. 455, H. L.; *Macpherson* v. *Scottish Rights of Way and Recreation Society* (1888), 13 App. Cas. 744.

(*r*) *R.* v. *Hudson* (1731), 2 Stra. 909.

(*s*) *North London Rail. Co.* v. *St. Mary, Islington, Vestry, supra.*

(*t*) *Rugby Charity Trustees* v. *Merryweather* (1790), 11 East, 375, n.; see also *Jarvis* v. *Dean* (1826), 3 Bing. 447.

(*a*) Compare *R.* v. *Chorley* (1848), 12 Q. B. 515 (a case of a private right of way).

public user will suffice (*b*). On the other hand, stronger evidence is necessary in the case of a country path, and the weight to be attached to user must depend somewhat upon whether the land is cultivated or rough and unproductive (*c*). An inference of dedication may be drawn in the case of a *cul de sac*, for a highway need not be a thoroughfare (*d*), and in towns many squares, courts and passages with an entrance at one end only are highways (*e*). The fact that a way leads to nowhere is, however, a point for a jury's consideration (*f*); and it is difficult, if not impossible, to establish a public right of way over a *cul de sac* by evidence of user alone, without proof that public money has been spent upon it (*g*). Proof that persons have wandered about at random over open land, or through woods, does not justify the inference that the whole of such land, or, indeed, any particular part of it, has been dedicated as a highway (*h*); where, however, two highways debouch at points on different sides of a tract of land, the fact that persons wander across it, although by varying and undefined routes, may indicate the existence of a highway running straight across from point to point (*i*). It would seem that in a country district it is necessary

(*b*) *Woodyer* v. *Hadden* (1813), 5 Taunt. 125, *per* CHAMBRE, J., at p. 137; compare *Thomas* v. *Williams* (1860), 24 J. P. 821.

(*c*) *Chinnock* v. *Hartley Wintney Rural District Council*, *Figgess* v. *Same*, *Phillips* v. *Same* (1899), 63 J. P. 327; *Macpherson* v. *Scottish Rights of Way and Recreation Society* (1883), 13 App. Cas. 744.

(*d*) See p. 11, *ante*.

(*e*) *Souch* v. *East London Rail. Co.* (1873), L. R. 16 Eq. 108; *Bourke* v. *Davis* (1889), 44 Ch. D. 110, 112; *Vernon* v. *St. James, Westminster, Vestry* (1880), 16 Ch. D. 449, C. A.; *Bateman* v. *Bluck* (1852), 18 Q. B. 870; *A.-G.* v. *Chandos Land and Building Society* (1910), 74 J. P. 401. For instances of squares held to be private, see *A.-G. and London Property Investment Trust* v. *Richmond Corporation* (1903), 68 J. P. 73; *Paul* v. *James* (1841), 1 Q. B. 832 (Ely Place).

(*f*) *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517, C. A.; *Bateman* v. *Bluck*, *supra*, *per* CROMPTON, J.

(*g*) *Bourke* v. *Davis*, *supra*; *A.-G. and London Property Investment Trust* v. *Richmond Corporation*, *supra*; *A.-G.* v. *Antrobus*, [1905] 2 Ch. 188; *Whitehouse* v. *Hugh*, [1906] 1 Ch. 253, affirmed [1906] 2 Ch. 283, C. A.

(*h*) *Chapman* v. *Cripps* (1862), 2 F. & F. 864 (wood); *Schwinge* v. *Dowell* (1862), 2 F. & F. 845 (wood); *Evans* v. *Smith* (1874), 38 J. P. 85; *Blundell* v. *Catterall* (1821), 5 B. & Ald. 268, 315 (foreshore); *Maddock* v. *Wallasey Local Board* (1886), 55 L. J. (Q. B.) 267 (open land above high-water mark); *Robinson* v. *Cowpen Local Board* (1893), 62 L. J. (Q. B.) 619; affirmed 63 L. J. (Q. B.) 235, C. A. (open space in a town surrounded by highways); *McIntosh* v. *Romford Local Board* (1889), 61 L. T. 185 (market place between houses and the roadway); *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), 1 Ch. D. 362, C. A. "You cannot have a public right to stray over a common; it is a very common notion that such a right can be acquired . . . There is no such right . . . known to the law. Therefore, there must be a definite terminus, and a more or less definite direction" (*Eyre* v. *New Forest Highway Board*, *supra*, *per* WILLS, J.). See *Tyne Improvement Commissioners* v. *Imrie*, *A.-G.* v. *Tyne Improvement Commissioners* (1899), 81 L. T. 174, for a suggestion that under some circumstances it may be possible to infer an intention to dedicate for purposes of recreation, if persons are permitted to wander about at will; and compare *Abercromby* v. *Fermoy Town Commissioners*, [1900] 1 I. R. 302, C. A.; see also p. 66, *post*; and title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 566.

(*i*) *Eyre* v. *New Forest Highway Board*, *supra*, *per* WILLS, J. "If from one terminus to another, say from the gateway to the end of a road 200 yards off, persons have found their way from time immemorial across a common, although sometimes going by one track and sometimes by another, I am not

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in order to establish a public right of way by proof of user alone to show that such way leads in a more or less definite direction from one public terminus to another (*k*); if both termini be not public places, *e.g.*, if one be merely a place of interest or a beautiful point of view on private property, mere user only justifies the inference of a licence to the public to visit the spot in question (*l*). In such a case dedication may be inferred if the owner has allowed the public to spend money in improving the road (*m*); but, where this is not the case, an inference unfavourable to him ought not to be drawn from the fact that the public have been freely permitted to derive enjoyment from access to private property (*n*).

Where no presumption of dedication.

If the owner of land leaves a portion of it unbuilt upon for the convenience of himself or persons having business with him, as when he builds out the windows of a shop, leaving an embayment between (*o*), or leaves an open space in front of an inn for vehicles to stand in (*p*), and cannot exclude the public without also excluding his customers, public user does not necessarily raise any presumption of dedication: and, in general, where land adjoins a highway, user which can be explained as a mere deviation by the public from the adjoining highway will carry little weight (*q*).

In the case of an artificial structure designed for other purposes (*r*), or of a private or occupation road (*s*) which individuals

prepared to say that a right of way across the common from one terminus to another may not be validly claimed, and may not be as good as a right over any formed road" (*Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), 1 Ch. D. 362, C. A., *per* JAMES, L.J.).

(*k*) *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517, C. A.

(*l*) *A.-G.* v. *Antrobus*, [1905] 2 Ch. 188 (Stonehenge case), and cases there cited. There appear, however, to have been (prior to the Stonehenge decision) certain unreported cases in which judges have inferred, or have allowed juries to infer, dedication of paths leading only to places of interest or points of view, although no public money had been spent on them. See Lord Eversley on "Commons, Forests, and Footpaths," where he refers to cases of a path leading to the top of a Cumberland mountain and of a woodland path leading to a point of view, and also to the case of the cliff path mentioned by WILLS, J., in *Eyre* v. *New Forest Highway Board*, *supra*, by PHILLIMORE, J., in *Tyne Improvement Commissioners* v. *Imrie*, *A.-G.* v. *Tyne Improvement Commissioners* (1899), 81 L. T. 174, and by FARWELL, J., in *A.-G.* v. *Antrobus*, *supra*. For a case in which tracks leading to coves on the seashore were held not to be highways, see *Behrens* v. *Richards*, [1905] 2 Ch. 614; as to the seashore, see *Brinckman* v. *Matley*, [1904] 2 Ch. 313, C. A. As to licence to enter upon lands generally, see title REAL PROPERTY AND CHATTELS REAL.

(*m*) *A.-G.* v. *Antrobus*, *supra*.

(*n*) *Blount* v. *Layard* (1888), [1891] 2 Ch. 681, n., C. A., *per* BOWEN, L.J., at p. 691, n. (approved in *A.-G.* v. *Antrobus*, *supra*); *Behrens* v. *Richards*, *supra*.

(*o*) *Piggott* v. *Goldstraw* (1901), 65 J. P. 259.

(*p*) *Hoare & Co.* v. *Lewisham Metropolitan Borough* (1901), 17 T. L. R. 774.

(*q*) *Dawes* v. *Hawkins* (1860), 8 C. B. (N. S.) 848, where the landowner obstructed a highway and for twenty years the public deviated over his land, but no dedication was inferred. "If there is an old way near my land, and by my fences decaying, the public come on my land, that is no dedication" (*British Museum* (*Trustees*) v. *Finnis* (1833), 5 C. & P. 460, *per* PATTESON, J.). Compare *A.-G. and Croydon Rural District Council* v. *Moorsom-Roberts* (1908), 72 J. P. 123; *R.* v. *Oldreeve* (1868), 32 J. P. 271.

(*r*) *Greenwich Board of Works* v. *Maudslay* (1870), L. R. 5 Q. B. 397; *Tyne Improvement Commissioners* v. *Imrie*, *A.-G.* v. *Tyne Improvement Commissioners*, *supra*.

(*s*) See *R.* v. *Bradfield* (1874), L. R. 9 Q. B. 552; and note (*i*), p. 41, *post*.

are already entitled to use, strong evidence of public user is necessary.

User must be open.

54. The extent of the landowner's acquiescence is also a material question, and to carry any weight the user must be open and unconcealed (*t*). User of a way is less cogent evidence of dedication if the landowner is non-resident, at any rate if he has no agent upon the spot, than if he is resident (*a*), for if he did not know that the way was being used no inference can fairly be drawn from his non-interference, unless the nature of the *locus in quo* was such that he ought to have been upon his guard. On the other hand, if an owner has been active in asserting his right of ownership, but has not interfered with public user, such user is on that account more cogent evidence (*b*).

User must be as of right.

55. Further, the user must be as of right (*c*). Therefore, user which is referable to a licence granted to individuals, or to a class of workmen (*d*), or to the inhabitants of a parish (*e*), does not justify an inference of dedication. It has been held that such an inference may be drawn if a landowner allows a certain class of persons (and no others) to use a way, unless he expressly informs them that he is granting them a special privilege (*f*); but it may be doubted whether this is so, unless the jury disbelieve his statement as to his intentions (*g*). An owner's acts may in any case be so unequivocal as to override his denial of an intention to dedicate (*h*). Where a limited class of persons is entitled or permitted to use a road, evidence of user by other persons is usually of little value (*i*).

Interruption of user.

56. Upon the question of intention to dedicate, a single act of interruption by the owner is of much more weight than many acts of enjoyment by the public (*k*): thus, the closing of a way for one

(*t*) *Greenwich Board of Works* v. *Maudslay* (1870), L. R. 5 Q. B. 397; see also title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 262, 263.

(*a*) *Chinnock* v. *Hartley Wintney Rural District Council, Figgess* v. *Same, Phillips* v. *Same* (1899), 63 J. P. 327, *per* COZENS-HARDY, J.; compare *Harper* v. *Charlesworth* (1825), 4 B. & C. 574.

(*b*) *Coats* v. *Herefordshire County Council*, [1909] 2 Ch. 579, C. A.

(*c*) *Greenwich Board of Works* v. *Maudslay, supra.*

(*d*) *Leckhampton Quarries Co., Ltd.* v. *Ballinger and Cheltenham Rural District Council* (1904), 68 J. P. 464; *R.* v. *Broke* (1859), 1 F. & F. 514.

(*e*) *Barraclough* v. *Johnson* (1838), 8 Ad. & El. 99.

(*f*) *R.* v. *Broke, supra.*

(*g*) For it is now well recognised that *animus dedicandi* is essential; see p. 33, *ante.*

(*h*) *Barraclough* v. *Johnson, supra, per* LITTLEDALE, J.

(*i*) See *Mildred* v. *Weaver* (1862), 3 F. & F. 30 (user of a farm road); *R.* v. *St. Benedict, Cambridge (Inhabitants)* (1821), 4 B. & Ald. 447; *R.* v. *Bradfield* (1874), L. R. 9 Q. B. 552; *Holloway* v. *Egham Urban District Council* (1908), 72 J. P. 433. If there be no way at all, everyone should be recognised as a trespasser; whilst, if there be a private way, persons not really entitled to use it may easily pass unnoticed. On the other hand, if a large number of persons are entitled as of right to use a way, it may be argued that it is not worth the owner's while to exclude the general public; see *Grand Surrey Canal Co.* v. *Hall* (1840), 1 Man. & G. 392.

(*k*) *Poole* v. *Huskinson* (1843), 11 M. & W. 827, *per* PARKE, B.; *Chinnock* v. *Hartley Wintney Rural District Council, Figgess* v. *Same, Phillips* v. *Same, supra;*

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day in every year disproves any such intention (*l*). If, whenever a person is seen using the way, he has been challenged, and has thereupon turned back, or has asked, or agreed to pay for, permission to go on or to use the way in the future, user by such person is valueless as evidence of dedication, and will usually outweigh evidence of user by other persons (*m*). On the other hand, if persons challenged have defied the owner, and no legal proceedings have followed, it is a fair presumption that the latter knows that the way in question has been dedicated in the past.

Notice boards, bars, and gates.

57. The fact that notice boards declaring a road to be private (*n*), or bars have been erected before the user began, or before it became so general as to justify any inference of dedication, is also important: the erection of a bar across a new street negatives any intention to dedicate at that time (*o*) and should carry weight with a jury even if it has fallen or been knocked down and not been replaced during several years (*p*). A locked gate is in the same category (*q*). From an unlocked gate the inference is not so clear, for the owner may have erected it to keep cattle from straying, and may have intended to dedicate the way subject to his right to maintain the gate (*r*).

Stiles.

The existence of a stile may in some circumstances be evidence of a public footpath (*s*).

User by highway authority.

58. A dedication may also be inferred when a highway authority has used a strip of land adjoining an admitted highway for the deposit of stones or by cutting grips (*t*), or has, as of right

Holloway v. *Egham Urban District Council* (1908), 72 J. P. 433 (where a railway was made across an alleged highway without objection being made).

(*l*) *British Museum (Trustees)* v. *Finnis* (1833), 5 C. & P. 460; compare *Paul* v. *James* (1841), 1 Q. B. 832. Such a periodical closing, even if a recently instituted practice, will, if known to and acquiesced in by the public, soon avail to disprove any dedication in the past.

(*m*) *Stone* v. *Jackson* (1855), 16 C. B. 199; *Healey* v. *Batley Corporation* (1875), L. R. 19 Eq. 375; subject to the qualifications that a man, however sure of his rights, may ask permission or make a small payment rather than embark on litigation (*Mildred* v. *Weaver* (1862), 3 F. & F. 30), and that an owner might deliberately pick out only persons not likely to assert their rights.

(*n*) As to notice boards, see *Poole* v. *Huskinson* (1843), 11 M. & W. 827; *Healey* v. *Batley Corporation*, *supra*. *Semble*, a notice board found *in situ* may be presumed to have been erected by the owner of the soil (*Poole* v. *Huskinson*, *supra*).

(*o*) *Rugby Charity Trustees* v. *Merryweather* (1790), 11 East, 375, n.; *Barraclough* v. *Johnson* (1838), 8 Ad. & El. 99; compare *R.* v. *Lloyd* (1808), 1 Camp. 260.

(*p*) *Roberts* v. *Karr* (1808), 1 Camp. 262, n.; (1809), 1 Taunt. 495; *Lethbridge* v. *Winter* (1808), 1 Camp. 263, n.

(*q*) See *Healey* v. *Batley Corporation*, *supra*.

(*r*) *R.* v. *Bliss* (1837), 1 Jur. 960; compare *dicta* of LITTLEDALE, J., in *Barraclough* v. *Johnson*, *supra*, and Lord DENMAN, C.J., in *Davies* v. *Stephens* (1836), 7 C. & P. 570. As to such restricted dedication, see p. 46, *post*.

(*s*) *E.g.*, on a towpath, where stiles would be useless for the normal traffic of towing horses (*Powers* v. *Bathurst* (1880), 42 L. T. 123).

(*t*) *Coats* v. *Herefordshire County Council*, [1909] 2 Ch. 579, C. A.

and without permission, piped in and levelled the site of a roadside ditch (*a*).

Repair, scavenging, and lighting.

59. The fact that a road has been repaired at the public expense, unless explained, is strong evidence that it is a public way (*b*). Before 1836, the fact that no repairs had ever been done by the public was strong evidence against the road being a highway (*c*); but now it is less cogent, since there are many highways which no one is bound to repair. On the other hand, if an individual repairs a road over his own land, the presumption is that he is seeking to benefit his own property and not the property of the public (*d*); but a man may often for his own convenience do slight repairs to a highway near his house or land (*e*); and in fact, in any case it may be shown that the circumstances, in which the repairs have been done, raise no fair presumption as to the road being a highway or not.

Similar considerations apply to evidence that a road has been swept, scavenged, or lighted at the public expense (*f*); but it must be remembered that local authorities have now power to scavenge and light streets which are admittedly private (*g*).

Evidence of reputation.

60. Upon a question of highway or no highway evidence of reputation, *e.g.*, of statements made verbally or in writing *ante litem motam* by persons no longer alive, is admissible (*h*); as also is a map prepared by or under the direction of, or from information supplied by, deceased persons having knowledge upon the point, or prepared for general purposes and accepted by persons interested (*i*).

(*a*) See *Walmsley* v. *Featherstone Urban District Council* (1909), 73 J. P. 322, and p. 68, *post*, as to such ditches generally.

(*b*) *R.* v. *Thomas* (1857), 7 E. & B. 399; *R.* v. *Wandsworth* (*Inhabitants*) (1817), 1 B. & Ald. 63; *Thomas* v. *Williams* (1860), 24 J. P. 821; *Farquhar* v. *Newbury Rural Council*, [1909] 1 Ch. 12, C. A. In *R.* v. *Edmonton* (*Inhabitants*) (1831), 1 Mood. & R. 24; *R.* v. *Hawkhurst* (1862), 7 L. T. 268; and *Ferrand* v. *Milligan* (1845), 7 Q. B. 730, the fact of repairs having been done by the parish was explained satisfactorily.

(*c*) *Davies* v. *Stephens* (1836), 7 C. & P. 570; *Mildred* v. *Weaver* (1862), 3 F. & F. 30; *Illingworth* v. *Montgomery* (1859), 24 J. P. 101.

(*d*) *R.* v. *Northampton County* (*Inhabitants*) (1814), 2 M. & S. 262.

(*e*) See *Rundle* v. *Hearle*, [1898] 2 Q. B. 83. Especially if, though a highway, it is one which no one can be compelled to repair. See note (*g*), p. 88, *post*.

(*f*) *R.* v. *Lloyd* (1808), 1 Camp. 260; *Vernon* v. *St. James, Westminster, Vestry* (1880), 16 Ch. D. 449, C. A.; *A.-G. and London Property Investment Trust* v. *Richmond Corporation* (1903), 68 J. P. 73.

(*g*) Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the Private Street Works Act, 1892 (55 & 56 Vict. c. 57). Compare *Wood* v. *Veal* (1822), 5 B. & Ald. 454; and see p. 256, *post*.

(*h*) *Crease* v. *Barrett* (1835), 1 Cr. M. & R. 919, *per* PARKE, B, at p. 929; *Barraclough* v. *Johnson* (1838), 8 Ad. & El. 99. But a statement by a deceased person of a particular fact from which a public right might be inferred, *e.g.*, that he planted a tree (still standing) to show the boundary of the road, is not admissible (*R.* v. *Bliss* (1837), 7 Ad. & El. 550). See further, title EVIDENCE, Vol. XIII., p. 469.

(*i*) *R.* v. *Berger*, [1894] 1 Q. B. 823, where an award map was held to be admissible as to the existence of a highway, but not as to its boundaries, against an adjoining owner whose property was not subject to the jurisdiction of the Inclosure Commissioners; *A.-G.* v. *Antrobus*, [1905] 2 Ch. 188 (tithe award plans and "deposited plans" of a railway company); *A.-G. and Croydon Rural District Council* v. *Moorsom-Roberts* (1908), 72 J. P. 123. An ordnance

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A conviction, involving a decision that a way, or a continuation thereof in an adjoining district (*k*), is a highway, is admissible *inter alios* as evidence of reputation on the question of highway or no highway (*l*).

SUB-SECT. 4.—*Dedication of Roads already in Existence.*

Dedication of existing roads.

61. If a road originally set out under an inclosure award as a private way for the use of specified persons be in fact used by the public, a subsequent dedication of it as a highway by the owner of the soil may be inferred (*m*); so, too, if the private right of way were created in any other manner. If a public right of way over a road be created by statute for a limited period, but the public continue to use the road after the expiration of that period, the landowner may be presumed to have dedicated it (*n*). Moreover, where a public right of way exists for certain purposes and the road is used by the public for other purposes, a dedication to them for such other purposes may be inferred, so long as the increased user is not a nuisance to members of the public exercising the rights originally conferred upon them (*o*).

SUB-SECT. 5.—*Restricted or Conditional Dedication.*

Dedication *sub modo*.

62. A landowner may dedicate land to the public for use as a highway subject to restrictions as to the time or mode of user, or subject to the existence of obstructions or dangers (*p*).

map is evidence of the existence of a track or road, but not of the same being a highway (*A.-G.* v. *Antrobus*, [1905] 2 Ch. 188; *A.-G. and Croydon Rural District Council* v. *Moorsom-Roberts* (1908), 72 J. P. 123); *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 8 L. G. R. 375, 380; but see *contra*, as to the latter point, *Giants' Causeway Co., Ltd.* v. *A.-G.* (1905), 118 L. T. Jo. 544. See further, as to maps, *Pollard* v. *Scott* (1790), Peake, 26 [18]; *Pipe* v. *Fulcher* (1858), 1 E. & E. 111; *Wilberforce* v. *Hearfield* (1877), 5 Ch. D. 709; *Vyner* v. *Wirrall Rural District Council* (1909), 73 J. P. 242; *R.* v. *Norfolk County Council* (1910), 26 T. L. R. 269. See also note (*i*), p. 144, *post*, and title EVIDENCE, Vol. XIII., pp. 469, 479, 528, 529, 531.

(*k*) *R.* v. *Brightside Bierlow* (*Inhabitants*) (1849), 13 Q. B. 933.

(*l*) *Petrie* v. *Nuttall* (1856), 11 Exch. 569; see title ESTOPPEL, Vol. XIII., p. 329. See further, as to the effect of convictions for non-repair, p. 145, *post*.

(*m*) *R.* v. *East Mark* (*Inhabitants*) (1848), 11 Q. B. 877; *R.* v. *Horley* (*Inhabitants*) (1863), 8 L. T. 382; *R.* v. *Wright* (1832), 3 B. & Ad. 681; *R.* v. *Bradfield* (1874), L. R. 9 Q. B. 552; *Holloway* v. *Egham Urban District Council* (1908), 72 J. P. 433. For an earlier case in which dedication was not inferred in such circumstances, see *R.* v. *St. Benedict, Cambridge* (*Inhabitants*) (1821), 4 B. & Ald. 447. The dedication must be subject to existing private rights (*Crossley & Sons, Ltd.* v. *Lightowler* (1867), 2 Ch. App. 478); the private right of way still continues (*Allen* v. *Ormond* (1806), 8 East, 4; *Brownlow* v. *Tomlinson* (1840), 1 Man. & G. 484; *Duncan* v. *Louch* (1845), 6 Q. B. 904), and a rentcharge originally granted by the owner of lands adjoining an occupation road in respect of the user thereof is not determined by the dedication of the road (*Merrett* v. *Bridges* (1883), 47 J. P. 775); the private right may, however, be abandoned (see *R.* v. *Chorley* (1848), 12 Q. B. 515; *Crossley & Sons, Ltd.* v. *Lightowler, supra*).

(*n*) *R.* v. *Thomas* (1857), 7 E. & B. 399; contrast *R.* v. *Winter* (1828), 8 B. & C. 785; and *R.* v. *Mellor* (1830), 1 B. & Ad. 32, where there was apparently no user after the expiration of the turnpike trust; and see pp. 15, 16, *ante*.

(*o*) *Sheringham Urban District Council* v. *Halsey* (1904), 68 J. P. 395; *Grand Surrey Canal Co.* v. *Hall* (1840), 1 Man. & G. 392; *Abercromby* v. *Fermoy Town Commissioners*, [1900] 1 I. R. 302, C. A.

(*p*) See also p. 12, *ante*.

Where the legality of an obstruction or restriction is disputed it is a question of fact whether the highway was, or was not, originally dedicated subject thereto, and as a general rule a jury ought to draw the conclusion that it was so dedicated if the obstruction, or restriction, has existed, or has been enforced, as far back as living memory goes (*q*); it will be otherwise, if it is shown that the obstruction or restriction must be, or is, of recent origin (*r*). Where an obstacle of a permanent nature has once been removed and not replaced, or where an owner has for some time not insisted upon restrictions, or not exercised his right of obstructing the highway, it is a question of fact whether he has or has not abandoned the rights originally reserved by him (*s*).

If an owner expressly purports to dedicate land, not as a highway at all, but for some restricted purpose not recognised by the law as an object of dedication, *e.g.*, as a churchway, such dedication is probably void (*t*); on the other hand, if he expressly and unambiguously dedicates it as a highway, purporting at the same time to impose reservations or restrictions of a kind inconsistent with the nature of a highway, the dedication may perhaps be regarded as valid and the reservations void (*a*). Where there has been no such express and unambiguous dedication, the exercise by the owner of, or his admitted intention to exercise, rights inconsistent with a public right of highway should be regarded as negativing any intention to dedicate, the user by the public being referred to an implied and revocable leave and licence (*b*).

Restrictions as to persons using.

63. An attempt to dedicate a highway to a limited portion of the public is no dedication at all (*c*).

Restrictions as to time of user.

64. Apart from statute there can be no dedication of a highway for a limited period (*d*), except possibly by a lessee for the period of his term (*e*). But a bridge may be dedicated for general use as a foot and horse bridge, and as a carriage bridge only when the adjacent ford is dangerous (*f*); and possibly a

(*q*) *Fisher* v. *Prowse* (1862), 2 B. & S. 770; *Mercer* v. *Woodgate* (1869), L. R. 5 Q. B. 26; *Jones* v. *Matthews* (1885), 1 T. L. R. 482; for a nuisance is not to be presumed (*Anon.* (1772), Lofft, 358).

(*r*) *Harrison* v. *Danby* (1870), 34 J. P. 759.

(*s*) See *Tyne Improvement Commissioners* v. *Imrie*, *A.-G.* v. *Tyne Improvement Commissioners* (1899), 81 L. T. 174.

(*t*) *Farquhar* v. *Newbury Rural Council*, [1909] 1 Ch. 12, C. A. As to the nature of a churchway, see p. 23, *ante*.

(*a*) *Arnold* v. *Blaker* (1871), L. R. 6 Q. B. 433, Ex. Ch. But in *Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D. 750, C. A., dedication to the public subject to a right to take varying tolls was held to be no dedication at all.

(*b*) *Stafford* (*Marquis*) v. *Coyney* (1827), 7 B. & C. 257.

(*c*) *Poole* v. *Huskinson* (1843), 11 M. & W. 827; *Bermondsey Vestry* v. *Brown* (1865), L. R. 1 Eq. 204; *Hildreth* v. *Adamson* (1860), 8 C. B. (N. S.) 587; *Farquhar* v. *Newbury Rural Council*, *supra*.

(*d*) "If dedicated at all it must be dedicated in perpetuity" (*Dawes* v. *Hawkins* (1860), 8 C. B. (N. S.) 848, *per* BYLES, J., at p. 858). As to dedication by a statutory body subject to a right to interfere with the road in the future, see p. 37, *ante*.

(*e*) See p. 35, *ante*.

(*f*) *R.* v. *Northampton County* (*Inhabitants*) (1814), 2 M. & S. 262; *R.* v. *Buckingham* (*Marquis*) (1815), 4 Camp. 189.

SECT. 2. Highways by Dedication and Acceptance.

road may be dedicated as a highway though it is impassable in winter (*g*).

A highway may be dedicated only for one or more of the recognised kinds of traffic (*h*). A road may apparently be dedicated as a public carriage way subject to a prohibition against a particular class of wheeled traffic (*i*); or the bank of a navigable river for towing purposes only (*k*).

Restrictions as to mode of user.

65. A highway is frequently dedicated subject to permanent obstructions, such as trees (*l*), projecting doorsteps (*m*), cellar roofs, doors and flaps (*n*), coalshoot plates and area gratings (*o*), gates (*p*), stiles (*p*), streams without bridges or stepping-stones, or inconveniently low bridges overhead (*q*); and a footpath may be dedicated subject to an existing private right of certain individuals to drive or ride thereon (*r*).

Obstructions: (i.) permanent;

(ii.) periodical.

Similarly a highway may be dedicated subject to a right to obstruct it periodically in a particular way, such as to plough up in due course of agriculture a footpath running across an arable field (*s*), and, possibly, to cut a channel across a road to carry off flood water when necessary (*t*). In many cases a highway has been dedicated subject to "market rights," *i.e.*, the right of the owner or other people to hold markets or erect fair booths thereon to the partial obstruction of the public (*a*), or subject to the right of the occupiers of adjoining premises to deposit goods upon it in front of their premises (*b*), and a "mews" may be dedicated subject to a

(*g*) *R.* v. *Brailsford* (*Inhabitants*) (1860), 2 L. T. 508.

(*h*) See pp. 9 *et seq.*, *ante*.

(*i*) *E.g.*, coal carts (*Stafford* (*Marquis*) v. *Coyney* (1827), 7 B. & C. 257).

(*k*) See *Ball* v. *Herbert* (1789), 3 Term Rep. 253; *Peirse* v. *Fauconberg* (*Lord*) (1757), 1 Burr. 292; *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D. 273, C. A.; *Winch* v. *Thames Conservators* (1874), L. R. 9 C. P. 378, Ex. Ch.; compare *River Lee Navigation Conservators* v. *Button* (1881), 6 App. Cas. 685.

(*l*) As to the ownership of trees growing on highways, see pp. 56, 58, *post*.

(*m*) *Cooper* v. *Walker* (1862), 2 B. & S. 770, 773; *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221.

(*n*) *Fisher* v. *Prowse* (1862), 2 B. & S. 770.

(*o*) *Robbins* v. *Jones*, *supra*.

(*p*) *Davies* v. *Stephens* (1836), 7 C. & P. 570; *Bateman* v. *Burge* (1834), 6 C. & P. 391; *James* v. *Hayward* (1630), Cro. Car. 184.

(*q*) *Warner* v. *Wandsworth Board of Works* (1889), 53 J. P. 471.

(*r*) *R.* v. *Chorley* (1848), 12 Q. B. 515; *Duncan* v. *Louch* (1845), 6 Q. B. 904.

(*s*) *Mercer* v. *Woodgate* (1869), L. R. 5 Q. B. 26; *Arnold* v. *Blaker* (1871), L. R. 6 Q. B. 433, Ex. Ch.; *Arnold* v. *Holbrook* (1873), L. R. 8 Q. B. 96; *Brackenborough* v. *Thorseby* (1869), 33 J. P. 565; *Harrison* v. *Danby* (1870), 34 J. P. 759. Probably a right might also be claimed to maintain a gate across a road only when required for the purpose of depasturing land; see *Sutherland* v. *Thomson* (1876), 3 R. (Ct. of Sess.) 485.

(*t*) *Arnold* v. *Blaker*, *supra*; but see *R.* v. *Leake* (*Inhabitants*) (1833), 5 B. & Ad. 469, *per* PARKE, J.

(*a*) *R.* v. *Smith* (1802), 4 Esp. 111; *R.* v. *Starkey* (1837), 7 Ad. & El. 95; *Elwood* v. *Bullock* (1844), 6 Q. B. 383; *Simpson* v. *Wells* (1872), L. R. 7 Q. B. 214; see also *Lawrence* v. *Hitch* (1868), L. R. 3 Q. B. 521, Ex. Ch. Statutes giving local authorities control over streets do not in general affect pre-existing market rights (*Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927; *A.-G.* v. *Horner* (1885), 11 App. Cas. 66; *Stepney Corporation* v. *Gingell, Son and Foskett, Ltd.*, [1909] A. C. 245, affirming [1908] 1 K. B. 115, C. A.).

(*b*) *Morant* v. *Chamberlin* (1861), 6 H. & N. 541; *Le Neve* v. *Mile End Old*

right to wash carriages therein (*c*). So, too, a quay (*d*), a towing-path (*e*), or a sea-wall (*f*) or embankment, may be dedicated as a footway subject to the right of persons towing vessels, or persons responsible for the maintenance of the quay etc., temporarily to obstruct the public or even to alter the highway if necessary for the better execution of public duties. A swing bridge may be dedicated subject to a right to interrupt traffic when necessary to allow vessels to pass (*g*), and a footpath crossing a railway on the level may perhaps be dedicated for such use by the public as is compatible with the safe running of trains (*h*). Again, the user of an esplanade or promenade for purposes of amusement is not inconsistent with its being a highway (*i*). It has been said that there cannot be a highway subject to a right of adjoining owners to lay tram lines across it for the use of collieries, but it is submitted that at the present date there is no objection in law to such a limited dedication (*k*).

Effect of dedication subject to obstruction.

Where a highway is thus dedicated subject to an obstruction, the public must take it as it is, and so long as the obstruction is not increased they cannot hold the owner responsible for accidents occasioned thereby (*l*), nor, apart from some statutory provision (*m*), require him to remove it.

Dedication subject to toll.

66. It is doubtful whether a landowner can, apart from royal grant or statute, dedicate a highway subject to a right to take tolls (*n*).

Town Vestry (1858), 8 E. & B. 1054; *Gerring* v. *Barfield* (1864), 16 C. B. (N. S.) 597; *Spice* v. *Peacock* (1875), 39 J. P. 581; *Whittaker* v. *Rhodes* (1881), 46 J. P. 182.

(*c*) *Chelsea Vestry* v. *Stoddard* (1879), 43 J. P. 782.

(*d*) *Arnott* v. *Whitby Urban District Council* (1909), 73 J. P. 369.

(*e*) *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D. 273.

(*f*) *Greenwich Board of Works* v. *Maudslay* (1870), L. R. 5 Q. B. 397; compare *Tyne Improvement Commissioners* v. *Imrie*, *A.-G.* v. *Tyne Improvement Commissioners* (1899), 81 L. T. 174.

(*g*) *Mercer* v. *Woodgate* (1869), L. R. 5 Q. B. 26, *per* COCKBURN, C.J.

(*h*) See cases in note (*a*), cited p. 37, *ante*; and compare *French* v. *Hills Plymouth Co.* (1908), 24 T. L. R. 644 (private way over a railway).

(*i*) *Sandgate Urban District Council* v. *Kent County Council* (1898), 79 L. T. 425, H. L., *per* Lord WATSON. As to a promenade not being a highway, see *A.-G.* v. *Blackpool Corporation* (1907), 71 J. P. 478.

(*k*) *R.* v. *Charlesworth* (1851), 16 Q. B. 1012, where the highway in question was subject to special Turnpike Acts, and there was apparently no evidence that the right claimed was coeval with the original dedication.

(*l*) See, *e.g.*, *Owen* v. *De Winton* (1894), 58 J. P. 833, and other cases cited in note (*r*), p. 156, *post*.

(*m*) See, *e.g.*, as to widening gates, p. 105, *post*.

(*n*) *Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D. 750, C. A.; but see *Pelham* (*Lord*) v. *Pickersgill* (1787), 1 Term Rep. 660; *Brett* v. *Beales* (1829), Mood. & M. 416, *per* Lord TENTERDEN, C.J., at p. 428; *Midland Rail. Co.* v. *Watton* (1886), 17 Q. B. D. 30, C. A.; *A.-G.* v. *Simpson*, [1901] 2 Ch. 671, 693, C. A., and cases as to tolls cited in note (*t*), p. 62, *post*. See also title CONSTITUTIONAL LAW, Vol. VI., p. 487.

SECT. 3. **Highways by Statute.**

SECT. 3.—*Highways by Statute.*

Statutory highways.

67. A highway may be created by statute even over a road which is already in existence as a private way (*o*). Where a statute in terms confers a public right of way, no user by the public or act of any party is necessary to complete the creation of a highway (*p*); but where it merely authorises the setting out or making of a public road, then, in the absence of user amounting to adoption by the public of the road in an unfinished condition, no highway comes into existence until the road has been set out or made in substantial conformity with the statutory requirements (*q*). On the other hand, if the public regularly use a road which has never been completed in the manner required by statute, a jury may infer a dedication and acceptance of it as a highway in its unfinished condition (*r*).

Construction of new roads by Road Board.

68. The Road Board (*s*) may construct any new road which appears to it to be required for facilitating road traffic. The Treasury's approval is required, and, before giving it, the Treasury must consult with the Local Government Board, and must satisfy themselves that notice of the intention to construct the road has been sent by the Road Board to every highway authority in whose area any part of the road will be situated, and consider any objection received from any such authority (*t*). The Road Board may acquire land for the purpose, and may in addition acquire land on either side of the proposed road within 220 yards of the middle thereof (*u*), and, with the approval of the Treasury, it may sell, lease, and manage any land so acquired and not required for the actual road, the receipts being treated as part of the road improvement grant (*v*). If the Road Board cannot purchase

(*o*) As in the case of turnpike roads and highways set out under Inclosure Acts and awards or under the Commons Act, 1876 (39 & 40 Vict. c. 56), s. 7 (4), as to which see, further, title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 545, 562 *et seq.* For a case where the intention to create a public right of way was held not to be expressed with sufficient clearness, see *Harrod* v. *Worship* (1861), 1 B. & S. 381. For various statutory methods of creating highways, see pp. 92 *et seq.*, *post.*

(*p*) *R.* v. *Lyon* (1825), 5 Dow. & Ry. (K. B.) 497; *R.* v. *Leake* (*Inhabitants*) (1833), 5 B. & Ad. 469.

(*q*) *Cubitt* v. *Maxse* (*Lady Caroline*) (1873), L. R. 8 C. P. 704; compare *R.* v. *French* (1879), 4 Q. B. D. 507, C. A., overruling *R.* v. *Cumberworth* (*Inhabitants*) (1832), 3 B. & Ad. 108; *R.* v. *Cumberworth* (*Inhabitants*) (1836), 4 Ad. & El. 731. In *R.* v. *French*, *supra*, it was held that the whole system of roads authorised need not be completed before any one road could become a highway repairable by the inhabitants at large; compare, on this point, *R.* v. *West Riding of Yorkshire Justices* (1834), 5 B. & Ad. 1003. As to what amounts to "formation and completion" of a road within the meaning of an Inclosure Act, see *Reynolds* v. *Barnes*, [1909] 2 Ch. 361.

(*r*) *R.* v. *Lordsmere* (*Inhabitants*) (1850), 15 Q. B. 689; *Cubitt* v. *Maxse* (*Lady Caroline*), *supra*, *per* BRETT, J.

(*s*) As to the Road Board, see p. 28, *ante.*

(*t*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), ss. 8 (1), 9 (2). The term "roads" includes bridges, viaducts, and subways (*ibid.*, s. 8 (5)).

(*u*) *Ibid.*, s. 11 (1), (4).

(*v*) *Ibid.*, s. 11 (6).

the required land on reasonable terms, the Development Commissioners may make an order empowering the Board to acquire it compulsorily, subject to certain restrictions (*w*).

Every road thus constructed by the Road Board will be a public highway: so, too, will every road constructed by a highway authority to whom the Board has made an advance in respect of such construction (*x*).

Part IV.—Rights in Connection with Highways.

SECT. 1.—*Rights of the Public.*

SUB-SECT. 1.—*Right of Passage.*

69. The right of the public is a right (*y*) to "pass along" (*a*) a highway for the purpose of legitimate travel, not to "be on" it (*b*), except so far as their presence is attributable to a reasonable and proper user of the highway as such (*c*). A person who is found

Right of passage.

(*w*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 11 (5). As to the restrictions, see *ibid.*, ss. 5 (2), 19, and the Development and Road Improvement Funds Act, 1910 (10 Edw. 7, c. 7), s. 3.

(*x*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), ss. 9 (1), 10 (2); see p. 94, *post*.

(*y*) The right is in the nature of an easement. It has, indeed, been judicially called an easement (see *Dovaston* v. *Payne* (1795), 2 Hy. Bl. 527; 2 Smith, L. C., 11th ed. 160, *per* HEATH, J.), but this nomenclature has been objected to (*Rangeley* v. *Midland Rail. Co.* (1868), 3 Ch. App. 306, *per* Lord CAIRNS, L.J., at p. 310), on the ground that in the case of a highway there is no dominant tenement; see also *Hawkins* v. *Rutter*, [1892] 1 Q. B. 668. For a suggestion that the kingdom is the dominant tenement, see *Orr-Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839, 872. The right is not such as will enable the public to claim another easement (*e.g.*, of drainage) in respect of it (*A.-G.* v. *Copeland*, [1901] 2 K. B. 101).

(*a*) "In a highway the King hath but the passage for himself and his people" (1 Roll. Abr. 392, tit. "Chimin"). "A right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance" (*Ex parte Lewis* (1888), 21 Q. B. D. 191, *per* WILLS, J., at p. 197). As to the "rule of the road" and the right of foot passengers to use any portion of the dedicated highway, see title STREET TRAFFIC.

(*b*) See *Dovaston* v. *Payne*, *supra*, where, cattle having been distrained *damage feasant*, a plea was held bad which merely stated that they had escaped from the highway through a broken fence, it not being alleged that they were passing along the highway when they so escaped; *Manchester, Sheffield, and Lincolnshire Rail Co.* v. *Wallis* (1854), 14 C. B. 213; *Coventry (Earl)* v. *Willes* (1863), 9 L. T. 384, where, in an action for trespass on Newmarket Heath, a plea of highway for the purpose of witnessing races was rejected. So, too, there is no right to race on a highway (*Sowerby* v. *Wadsworth* (1863), 3 F. & F. 734), nor to hold meetings thereon, though such meetings are in practice often tolerated if no inconvenience is caused to others having equal rights, and are not necessarily illegal (*Ex parte Lewis*, *supra*; *R.* v. *Graham and Burns* (1888), 16 Cox, C. C. 420; *Burden* v. *Rigler*, [1911] 1 K. B. 337).

(*c*) *Harrison* v. *Rutland* (*Duke*), [1893] 1 Q. B. 142, C. A., *per* Lord ESHER, M.R., at p. 146: "Highways are no doubt dedicated *primâ facie* for the purpose of passage; but things are done upon them by everybody which

SECT. 1. Rights of the Public.

using the highway for other purposes must be presumed to have gone there for such purposes and not with a legitimate object (*d*), and as against the owner of the soil he is to be treated as a trespasser (*e*).

SUB-SECT. 2.—*Right of Deviation.*

Right of deviation when way foundrous.

70. Where a highway passes through open and uninclosed land, the public may have a right to deviate on to the adjoining land (even though cultivated) when the usual track is foundrous and impassable (*f*); but it is uncertain whether this right exists as a matter of law, independently of evidence of user, or not (*g*). It is, however, submitted that unless some evidence of the exercise of a prescriptive right to deviate can be adduced, the existence of such a right will not now be assumed as a matter of law (*h*). There is authority for saying that, if an owner of land

are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such"; *Hickman* v. *Maisey*, [1900] 1 Q. B. 752, C. A., *per* A. L. SMITH, L.J., at p. 756: "For instance, if a man, while using a highway for passage, sat down for a time to rest himself by the side of the road, to call that a trespass would be unreasonable. Similarly . . . if a man took a sketch from a highway, I should say no reasonable man would treat that as an act of trespass."

(*d*) See *Hickman* v. *Maisey*, *supra*, *per* COLLINS, L.J.

(*e*) See *R.* v. *Pratt* (1855), 4 E. & B. 860; followed in *Mayhew* v. *Wardley* (1863), 8 L. T. 504 (killing game on the highway); *Harrison* v. *Rutland* (*Duke*), [1893] 1 Q. B. 142, C. A. (preventing the owner of the soil from killing game); *Hickman* v. *Maisey*, *supra* (watching trials of racehorses); *Fielden* v. *Cox* (1906), 22 T. L. R. 411 (catching moths); *Cox* v. *Burbidge* (1863), 13 C. B. (N. S.) 430; *Hadwell* v. *Righton*, [1907] 2 K. B. 345; *Higgins* v. *Searle* (1909), 100 L. T. 280, C. A. (allowing cattle to stray). In America it has been held that it is a trespass to stand on the highway opposite the house of the owner of the soil and abuse and insult him (*Adams* v. *Rivers* (1851), 11 Barbour (New York), 390).

(*f*) *Arnold* v. *Holbrook* (1873), L. R. 8 Q. B. 96.

(*g*) The authorities for the existence of the right are: *Duncomb's* (*Sir Edward*) *Case* (1634), Cro. Car. 366; 1 Roll. Abr. 390, A, 1; *Henn's Case* (1632), W. Jo. 296; *Absor* v. *French* (1678), 2 Show. 28; *R.* v. *Flecknow* (*Inhabitants*) (1758), 1 Burr. 461; *Taylor* v. *Whitehead* (1781), 2 Doug. (K. B.) 745; *Young* v. ——— (1698), 1 Ld. Raym. 725; *Bullard* v. *Harrison* (1815), 4 M. & S. 387; *Dawes* v. *Hawkins* (1860), 8 C. B. (N. S.) 848; *Steel* v. *Prickett* (1819), 2 Stark. 463; *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517, C. A., *per* WILLS, J.; but see the criticisms in *Arnold* v. *Holbrook*, *supra*. The *dicta* all seem to have been founded on *Duncomb's Case*, *supra*; *Absor* v. *French*, *supra*; and *Henn's Case*, *supra*; but in the first-named case there was in fact an immemorial, or prescriptive, right to deviate; in the second, the adjoining owner had actively obstructed the way; and the third seems to have proceeded upon the assumption that a duty to repair had been neglected.

(*h*) See *Arnold* v. *Holbrook*, *supra*, where COCKBURN, C.J., said, at p. 98: "The right to deviate may be annexed by prescriptive enjoyment to a highway; but it cannot be presumed to exist as an incident to a limited dedication"; and in *R.* v. *Oldreeve* (1868), 32 J. P. 271, WILLES, J., said that the right existed where an adjoining owner obstructed the road, "but if the obstruction is caused by the action of the elements, then no such right accrues to the public." There appear to be two arguments against the general existence of such a right: in the first place, a right of deviation is regarded as the foundation of the liability to repair *ratione clausuræ*, yet the latter has been held to be limited (see pp. 91, 92, *post*); secondly, when an owner dedicates a way to the public, it appears unreasonable to say that he must also keep it in repair, or be taken to have dedicated other land on each side of it, unless indeed the acts of user giving rise to the inference of dedication have extended also to such other land.

adjoining a highway actively obstructs it (*i*), or, being under obligation to repair it, fails to do so, the public may then deviate on to his adjoining land, even through his fences (*k*).

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SECT. 2.—*Rights of Owner of Soil.*

SUB-SECT. 1.—*Presumptions as to, and Evidence of, Ownership of the Soil of Highways.*

Interest of owner after dedication.

71. The public right in a highway being a right of passage only (*l*), an owner who expressly dedicates, or is presumed to have dedicated (*m*), land as a public highway retains at common law (*n*) his property in the soil, and can transfer it by conveyance or lease to others.

General presumption as to ownership of soil.

72. There is a general (*o*) presumption that the owner of land of whatever tenure (*p*) adjoining a highway is owner also of the soil of one half of the highway (*q*), *i.e.*, *usque ad medium filum viæ*; and a similar presumption arises in the case of a private or occupation road (*r*). Such a presumption is, however, *præsumptio juris* and not *juris et de jure*: it may be rebutted by evidence, *e.g.*, by proof of title deduced to another from some person shown to have been the original owner of the highway (*s*), or by proof of acts of ownership on the part of another (*t*); and, indeed, acts of ownership, such as the letting of the roadside herbage, if continued for a sufficiently

(*i*) *Absor* v. *French* (1678), 2 Show. 28; *R.* v. *Oldreeve* (1868), 32 J. P. 271; *Dawes* v. *Hawkins* (1860), 8 C. B. (N. S.) 848; *Neill* v. *Byrne* (1878), 2 L. R. Ir. 287.

(*k*) *Henn's Case* (1632), W. Jo. 296.

(*l*) See p. 49, *ante*.

(*m*) See p. 33, *ante*.

(*n*) As to certain statutes which vest the soil (but not the subsoil) of highways in local authorities, see pp. 57—59, *post*.

(*o*) It has been said not to apply "where a road is defined for the first time under a newly-created authority" (*R.* v. *Hatfield* (*Inhabitants*) (1835), 4 Ad. & El. 156); but as to turnpikes and awarded roads, see p. 54, *post*.

(*p*) *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304.

(*q*) *Dovaston* v. *Payne* (1795), 2 Hy. Bl. 527, 531; 2 Smith, L. C., 11th ed. 160; *Berry and Goodman's Case* (1588) 2 Leon. 147; *Anon.* (1772), Lofft, 358; *Stevens* v. *Whistler* (1809), 11 East, 51; *Cooke* v. *Green* (1823), 11 Price, 736; *Salisbury* (*Marquis*) v. *Great Northern Rail. Co.* (1858), 5 C. B. (N. S.) 174; *Beckett* v. *Leeds Corporation* (1872), 7 Ch. App. 421; and cases cited in the following notes. Since the fee must in theory be in some one, the presumption may perhaps be regarded as an arbitrary rule adopted as the fairest mode of solving difficulties. It has, however, been suggested that it is based on a presumption that adjoining owners each contributed half the land required for a new highway (see *Doe* d. *Pring* v. *Pearsey*, *supra*, *per* BAYLEY, J.; *Holmes* v. *Bellingham* (1859), 7 C. B. (N. S.) 329). This does not, however, explain the similar rule applicable to rivers as boundaries, as to which see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 120 *et seq.*; WATERS AND WATERCOURSES; and compare title FISHERIES, Vol. XIV., p. 583.

(*r*) *Holmes* v. *Bellingham*, *supra*; *Smith* v. *Howden* (1863), 14 C. B. (N. S.) 398; *Noye* v. *Reed* (1827), 1 Man. & Ry. (K. B.) 63; *Frost* v. *Richardson* (1910), 103 L. T. 22.

(*s*) See *Anon.* (1772), Lofft, 358; *Headlam* v. *Hedley* (1816), Holt (N. P.), 463; *Noye* v. *Reed*, *supra*; *Beckett* v. *Leeds Corporation*, *supra*; *Mappin Brothers* v. *Liberty & Co., Ltd.*, [1903], 1 Ch. 118.

(*t*) *Anon.* (1772), Lofft, 358; *Holmes* v. *Bellingham*, *supra*; *Beckett* v. *Leeds Corporation*, *supra*. It may be evidence as to acts of ownership at other points;

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long period, may confer a statutory title, or justify the presumption of a lost grant (*a*).

Presumption in case of sale or lease of land.

73. In the case of a conveyance (*b*), or lease (*c*), of land, of whatever tenure (*d*), adjoining a highway (*e*) by a grantor owning land on one side of it only, if he can be proved, or is presumed, to own also the soil of the highway *usque ad medium filum viæ*, there is in general a *præsumptio juris* that the soil of the highway *usque ad medium filum* is included in the grant or lease (*f*). In such case, if the grantor owns the soil of the highway to some point short of, or beyond, the *medium filum*, the presumption is that he granted it as far as it was vested in him (*g*). If he owns land on both sides of a highway, the soil of which is vested in him, and grants land on one side only, the presumption is that the soil of the highway *usque ad medium filum* passes (*h*); but, if he grants the land on both sides, the presumption is that all the soil of the intervening highway passes, although it is not even mentioned (*i*).

Presumption arises even when deed appears to exclude highway.

74. The above-mentioned presumptions arise even though the parcels in the grant or lease are described as adjoining or bounded by the highway in question, and though the measurements and plans appear to exclude any part of the highway (*k*), and they are applicable to town streets as well as to country roads (*l*); but they

see *University College* v. *Oxford Corporation* (1904), 68 J. P. 470, and cases cited in note (*b*), p. 54, *post*.

(*a*) *Haigh* v. *West*, [1893] 2 Q. B. 19, C. A.; and see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 264 *et seq.*; LIMITATION OF ACTIONS.

(*b*) The presumption arises also in construing a statute (*R.* v. *Strand Board of Works* (1863), 4 B. & S. 526, *per* COCKBURN, C.J., at p. 548. But an assessment of land to land tax does not include half the adjoining highway (*Central London Railway* v. *Land Tax Commissioners*, [1911] W. N. 60), nor does a land tax redemption certificate relating to such land (*ibid.*).

(*c*) It applies to leases (see *Haynes* v. *King*, [1893] 3 Ch. 439; *Dwyer* v. *Rich* (1871), 6 I. R. C. L. 144, Ex. Ch.; *Mappin Brothers* v. *Liberty & Co., Ltd.*, [1903] 1 Ch. 118; *Gillingham* v. *Gwyer* (1867), 16 L. T. 640; *Hodges* v. *Lawrance* (1854), 18 J. P. 347); but see *Landrock* v. *Metropolitan District Rail. Co.* (1886), 3 T. L. R. 162, C. A., *per* Lord ESHER, M.R.

(*d*) *Tilbury* v. *Silva* (1890), 45 Ch. D. 98, C. A.; compare *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304. But in one case a grant of a small piece of copyhold between an old inclosure and the road was held not to include any part of the road (*Salisbury* (*Marquis*) v. *Great Northern Rail. Co.* (1858), 5 C. B. (N. S.) 174).

(*e*) It applies to private roads also (*Noye* v. *Read* (1827), 1 Man. & Ry. (K. B.) 63).

(*f*) 1 Roll. Abr. tit. "Grants" (P), pl. 6; Com. Dig. tit. "Grant," (E, 6); *Micklethwait* v. *Newlay Bridge Co.* (1886), 33 Ch. D. 133, C. A.; *Lord* v. *Sydney City Commissioners* (1859), 12 Moo. P. C. C. 473; *Simpson* v. *Dendy* (1860), 8 C. B. (N. S.) 433, affirmed *sub nom. Dendy* v. *Simpson* (1861), 7 Jur. (N. S.) 1058, Ex. Ch.; *Berridge* v. *Ward* (1861), 10 C. B. (N. S.) 400; *Plumstead Board of Works* v. *British Land Co.* (1874), L. R. 10 Q. B. 16; *Leigh* v. *Jack* (1879), 5 Ex. D. 264, C. A.; *Beckett* v. *Leeds Corporation* (1872), 7 Ch. App. 421; *Pryor* v. *Petre*, [1894] 2 Ch. 11, C. A.; *Mellor* v. *Walmesley*, [1905] 2 Ch. 166, 179, C. A. For there is no reason why he should retain something of no value to him; compare *Dwyer* v. *Rich*, *supra*.

(*g*) *Re White's Charities, Charity Commissioners* v. *London Corporation*, [1898] 1 Ch. 659.

(*h*) *Micklethwait* v. *Newlay Bridge Co.*, *supra*.

(*i*) *Salisbury* (*Marquis*) v. *Great Northern Rail. Co.*, *supra*.

(*k*) *Ibid.*; *Berridge* v. *Ward*, *supra*; *Simpson* v. *Dendy*, *supra*.

(*l*) *Haynes* v. *King*, *supra*; *Beckett* v. *Leeds Corporation*, *supra*; *Re White's Charities, Charity Commissioners* v. *London Corporation*, *supra*; *Salt Union, Ltd.*,

may be rebutted if there is anything either in the language of the deed, or in the nature of the subject-matter of the grant, or in the surrounding circumstances as contemplated by the parties at the time, sufficient to show an intention to exclude the highway (*m*). In the case of building estates such presumption is easily rebutted (*n*), especially if the abutting street is not yet in existence (*o*), or is being made in such circumstances that it cannot be supposed that it was intended to pass to the grantee (*p*); indeed, it has been doubted whether it applies at all to a building estate (*q*), or to the grant of a single house site facing a road through an estate (*r*).

Intervening strips of road-side waste.

75. Where a strip of waste land intervenes between a highway and the adjoining close, of whatever tenure (*s*), a presumption arises, at any rate as between the lord of the manor and the owner of the adjoining close, that such waste land and half the soil of the roadway belong to the owner of the close and pass under a conveyance or lease of it (*t*). This presumption, however, may be rebutted by proof of acts of ownership upon the strip in question (*a*); and where

and Droitwich Salt Co., Ltd. v. *Harvey & Co.* (1897), 13 T. L. R. 297; *London and North Western Railway* v. *Westminster Corporation*, [1902] 1 Ch. 269. See *Mappin Brothers* v. *Liberty & Co., Ltd.*, [1903] 1 Ch. 118, and *Landrock* v. *Metropolitan District Rail. Co.* (1886), 3 T. L. R. 162, C. A., for doubts expressed upon the point.

(*m*) *Salisbury* (*Marquis*) v. *Great Northern Rail. Co.* (1858), 5 C. B. (N. S.) 174, where both parties believed the road to be vested in turnpike trustees; *Beckett* v. *Leeds Corporation* (1872), 7 Ch. App. 421, where an open market place intervened, and continual acts of ownership on the part of the grantor were proved; *Pryor* v. *Petre*, [1894] 2 Ch. 11, C. A., where trees in the close sold had been valued to and paid for by the grantee, but trees in the lane had not. As to river boundaries, see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 121.

(*n*) *Plumstead Board of Works* v. *British Land Co.* (1874), L. R. 10 Q. B. 16, where on the plan the new road was separated from the building plot by a thick line.

(*o*) *Leigh* v. *Jack* (1879), 5 Ex. D. 264, C. A.

(*p*) *Mappin Brothers* v. *Liberty & Co., Ltd.*, *supra* (a lease of land fronting on Regent Street then being made, or recently made, by the Crown under a special Act); compare *Squire* v. *Campbell* (1836), 1 My. & Cr. 459 (the same street).

(*q*) *Leigh* v. *Jack*, *supra*, *per* COTTON, L.J.

(*r*) *Beckett* v. *Leeds Corporation*, *supra*, *per* JAMES, L.J.

(*s*) *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304.

(*t*) *Grose* v. *West* (1816), 7 Taunt. 39; *Headlam* v. *Hedley* (1816), Holt (N. P.), 463; *Doe* d. *Barrett* v. *Kemp* (1831), 7 Bing. 332; (1835), 2 Bing. (N. C.) 102, Ex. Ch.; *Scoones* v. *Morrell* (1839), 1 Beav. 251; *Steel* v. *Prickett* (1819), 2 Stark. 463; *Mellor* v. *Walmesley*, [1905] 2 Ch. 166, C. A., *per* STIRLING, L.J., at p. 179; *Tutill* v. *West Ham Board of Health* (1873), L. R. 8 C. P. 447; *Vaughan* v. *De Winton* (1867), 15 W. R. 1145; *Doe* d. *Harrison* v. *Hampson* (1847), 4 C. B. 267; *Simpson* v. *Dendy* (1860), 8 C. B. (N. S.) 433. The rule is probably based on the assumption that when inclosing his land the adjoining owner left a strip outside his fence so that the public might use it, if the highway became foundrous, instead of breaking his fence; and see title COPYHOLDS, Vol. VIII., p. 4.

(*a*) *Doe* d. *Pring* v. *Pearsey*, *supra*; *e.g.*, digging gravel (*Anon.* (1772), Lofft, 358); depositing manure or cutting trees (*Simpson* v. *Dendy*, *supra*), or grazing (compare *Plumbley* v. *Lock* (1903), 67 J. P. 237). It is a question for a jury whether the presumption is rebutted; see *Doe* d. *Harrison* v. *Hampson*, *supra*; *Doe* d. *Barrett* v. *Kemp*, *supra*. In *Gery* v. *Redman* (1875), 1 Q. B. D. 161,

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the strip communicates with, or lies near to, larger portions of waste, acts of ownership upon such larger portions may be admissible as rebutting evidence (*b*): similarly, acts of ownership by the owner of the close may be proved in order to support the presumption (*c*). This presumption appears to apply only as between the lord of a manor and an owner of adjoining land (*d*), and not as between two grantees of the lord where there is nothing in their conveyances to show under which grant a strip of waste, lying between the land of one grantee and a highway, was intended to pass (*e*).

Soil of highways under Turnpike Acts.

76. Where a highway owes its origin to some statute or statutory award, the ownership of the soil will in general depend upon the terms thereof. In the case of highways formed under Turnpike Acts, if it cannot be shown that the trustees in fact acquired the soil (and the fact that they acquired it at one point on the road is no evidence that they did so at another (*f*)), it is a question for the court whether the scheme and framework of the Act made it reasonably necessary for them to acquire more than a mere easement (*g*). If they are not shown, and cannot be presumed, to have acquired the soil, it remains vested in the

acquiescence in an award treating the strip as waste of the manor was held to rebut the presumption.

(*b*) *Headlam* v. *Hedley* (1816), Holt (N. P.), 463; *Steel* v. *Prickett* (1819), 2 Stark. 463; *Grose* v. *West* (1816), 7 Taunt. 39. It is for the court to say whether the larger and smaller portions are so contiguous or have such unity of character that evidence as to one is admissible in a dispute as to the other (*Doe* d. *Barrett* v. *Kemp* (1831), 7 Bing. 332, (1835) 2 Bing. (N. C.) 102). See also *Stanley* (*Bart.*) v. *White* (1811), 14 East, 332; *Bryan* d. *Child* v. *Winwood* (1808), 1 Taunt. 208; *Hollis* v. *Goldfinch* (1823), 1 B. & C. 205; *Tyrwhitt* v. *Wynne* (1819), 2 B. & Ald. 554; *University College* v. *Oxford Corporation* (1904), 68 J. P. 470; *Simpson* v. *Dendy* (1860), 8 C. B. (N. S.) 433, affirmed *sub nom. Dendy* v. *Simpson* (1861), 7 Jur. (N. S.) 1058, Ex. Ch.; *Jones* v. *Williams* (1837), 2 M. & W. 326; *Vaughan* v. *De Winton* (1867), 15 W. R. 1145; *Clark* v. *Elphinstone* (1880), 6 App. Cas. 164, P. C.; *Tutill* v. *West Ham Board of Health* (1873), L. R. 8 C. P. 447.

(*c*) *Simpson* v. *Dendy*, *supra*.

(*d*) *White* v. *Hill* (1844), 6 Q. B. 487; compare *Smith* v. *Howden* (1863), 14 C. B. (N. S.) 398; *Tutill* v. *West Ham Board of Health*, *supra*.

(*e*) *White* v. *Hill*, *supra*.

(*f*) See *Hollis* v. *Goldfinch*, *supra*; *Northam Bridge and Roads* (*Proprietors*) v. *South Stoneham Rural District Council* (1907), 71 J. P. 345, C. A.

(*g*) "In general, Turnpike Acts have no effect upon the ownership of the soil" (*Salisbury* (*Marquis*) v. *Great Northern Rail. Co.* (1858), 5 C. B. (N. S.) 174, *per* BYLES, J.); "The trustees have only the control of the highway" (*Davison* v. *Gill* (1800), 1 East, 64, *per* Lord KENYON, C.J., at p. 69). A similar rule applies also in the case of towing paths. Contrast *Hollis* v. *Goldfinch*, *supra*; *River Lee Navigation Conservators* v. *Button* (1881), 6 App. Cas. 685; *Lord Advocate* v. *Blantyre* (*Lord*) (1879), 4 App. Cas. 770; *Badger* v. *South Yorkshire Railway and River Don Co.* (1857), 1 E. & E. 347; and *Bruce* v. *Willis* (1840), 11 Ad. & El. 463, with *Northam Bridge and Roads* (*Proprietors*) v. *South Stoneham Rural District Council*, *supra*, in which case the court presumed that the trustees had purchased the fee. The fact that the trustees had power to purchase compulsorily does not necessarily justify the inference that they did in fact purchase (*River Lee Navigation Conservators* v. *Button*, *supra*). In *Foley's Charity Trustees* v. *Dudley Corporation*, [1910] 1 K. B. 317, C. A., it was presumed from long-continued annual payments that the trustees had bought the soil subject to a fee farm rent, and it was held that the defendant corporation as terre-tenants by virtue of their statutory ownership of the surface were liable to continue the payment.

original owner (*h*). If they did acquire it, it is probably still vested in them (*i*).

In the case of highways laid out under an Inclosure Act, an award of herbage rights on the road to adjoining allottees is not sufficient to give them the soil, which *primâ facie* remains in the original owner (*k*): if, however, the effect of the Act is to take away all his former rights not specially reserved, in return for some new allotment, the general presumption apparently applies that the adjoining allottees own the soil of the road, even though the herbage is awarded to the highway authority (*l*).

Under Inclosure Acts.

SUB-SECT. 2.—*Owner's Rights not Inconsistent with Public Rights.*

77. Apart from any statutory provision, the owner of the soil of a highway "has right to all above and underground, except only the right of passage for the King and his people" (*m*), and may exercise all rights of ownership not inconsistent with the public right of passage (*n*).

Rights of owner of soil.

Thus he may sue in ejectment if a person incloses, or encroaches upon, part of his land comprised in the highway (*o*). He may maintain an action for trespass against anyone who unlawfully places anything upon its surface (*p*), and even against the highway authority, if they impose upon his land a burden not justified by the public right, or by their statutory powers (*q*). He may also maintain a like action if persons or cattle are on the highway for any

Rights, how enforced.

(*h*) If he cannot be traced, *semble* the usual presumption may apply. See *Grose* v. *West* (1816), 7 Taunt. 39; *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304; *Hollis* v. *Goldfinch* (1823), 1 B. & C. 205; but see cases cited in note (*l*), *infra*.

(*i*) *Finchley Electric Light Co.* v. *Finchley Urban Council*, [1903] 1 Ch. 437, C. A.

(*k*) *R.* v. *Hatfield* (*Inhabitants*) (1835), 4 Ad. & El. 156, *per* Lord DENMAN, C. J.; compare *Hooper* v. *Bourne* (1877), 3 Q. B. D. 258, C. A., *per* BRAMWELL and BRETT, L.JJ.

(*l*) *Haigh* v. *West*, [1893] 2 Q. B. 19, C. A.; *Neaverson* v. *Peterborough Rural Council*, [1901] 1 Ch. 22 (private road); reversed on other grounds, [1902] 1 Ch. 557, C. A.; but see *Poole* v. *Huskinson* (1843), 11 M. & W. 827, *per* PARKE, B. For earlier doubts as to whether the presumption could apply in the case of awarded roads, see *R.* v. *Hatfield* (*Inhabitants*), *supra*; *R.* v. *Edmonton* (*Inhabitants*) (1831), 1 Mood. & R. 24; compare also *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554 (allotment of land bounded by a river).

(*m*) *Goodtitle* d. *Chester* v. *Alker and Elmes* (1757), 1 Burr. 133, *per* FOSTER, J., at p. 146; 1 Roll. Abr. 392.

(*n*) *St. Mary, Newington* v. *Jacobs* (1871), L. R. 7 Q. B. 47; compare *River Lee Navigation Conservators* v. *Button* (1881), 6 App. Cas. 685 (towing path).

(*o*) *Goodtitle* d. *Chester* v. *Alker and Elmes*, *supra*.

(*p*) *Lade* v. *Shepherd* (1735), 2 Stra. 1004 (end of a footbridge); *Northampton Corporation* v. *Ward* (1745), 2 Str. 1238 (stall). As to trespass generally, see title TRESPASS.

(*q*) *Abercromby* v. *Fermoy Town Commissioners*, [1900] 1 I. R. 302, C. A. (erecting barriers); *Radcliffe* v. *Marsden Urban District Council* (1908), 72 J. P. 475, following *Sutcliffe* v. *Sowerby Highways Surveyors* (1859), 1 L. T. 7, and not following *R.* v. *Healaugh* (*Inhabitants*) (1863), *Times*, 18th April (substituting a bridge for stepping stones); *Arnold* v. *Blaker* (1871), L. R. 6 Q. B. 433, Ex. Ch. (paving a footpath dedicated subject to a right to plough it out); *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264, *per* LINDLEY, J. (depositing an excessive quantity of stones); but see *R.* v. *Barnes* (1884), 1 T. L. R. 24 (slight widening of a bridge).

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purpose not justified by the public right (*r*), and may remove anything unlawfully placed upon the highway, whereas a mere passenger may only do so if he is actually obstructed by it and cannot easily circumvent it (*s*).

Ownership of trees and herbage.

78. Trees growing on a highway, and in general the herbage, belong to the owner of the soil (*t*), who may maintain an action for trespass against a person who grazes his cattle thereon (*a*); but the herbage may, *e.g.*, under an inclosure award, be vested in persons other than the owner of the soil (*b*). The owner, or allottees (as the case may be), may let the right of grazing (*c*).

Interference with the soil.

The owner cannot break the soil open, nor otherwise interfere with the use of it as a public highway (*d*); but, subject as above, he may win the underlying minerals (*e*), or tunnel beneath the road in order to lay pipes (*f*), or for other purposes (*g*); moreover, if once his pipes are laid beneath the road, he may keep them there, although in order to lay them he illegally broke open the surface (*h*). Conversely, apart from statutory authority, his consent is necessary before other persons can lay pipes in the subsoil,

(*r*) *E.g.*, if cattle depasture his herbage (*Stevens* v. *Whistler* (1809), 11 East, 51); and see further, pp. 49, 50, *ante*.

(*s*) *R.* v. *Mathias* (1861), 2 F. & F. 570.

(*t*) 1 Roll. Abr. 392; *Turner* v. *Ringwood Highway Board* (1870), L. R. 9 Eq. 418. The highway authority may fell them if they are an obstruction to the way, but *semble* it cannot sell them (*ibid.*).

(*a*) *Stevens* v. *Whistler*, *supra*.

(*b*) For an allotment of herbage does not necessarily confer any right to the soil; see *R.* v. *Hatfield* (*Inhabitants*) (1835), 4 Ad. & El. 156, and p. 55, *ante*. A grant of herbage or vesture of a wood does not include timber of great trees (see Shep. Touch., p. 97).

(*c*) *Coverdale* v. *Charlton* (1878), 4 Q. B. D. 104, C. A.; *Haigh* v. *West*, [1893] 2 Q. B. 19, C. A.; *A.-G. and Spalding Rural Council* v. *Garner*, [1907] 2 K. B. 480; *Neaverson* v. *Peterborough Rural Council*, [1902] 1 Ch. 557, C. A. In the last case the award imposed restrictions as to the kind of cattle to be permitted to graze, and such restrictions were held to be permanent; compare also, as to restrictions on grazing on roads recently set out under an Inclosure Act, *Haigh* v. *West*, *supra*, and the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 100; and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 567.

(*d*) *Goodson* v. *Richardson* (1874), 9 Ch. App. 221, *per* Lord SELBORNE, L.C.; *A.-G.* v. *Ashby* (1907), 71 J. P. 387, settled (1908) 72 J. P. 449, C. A.; *Benfieldside Local Board* v. *Consett Iron Co.* (1877), 3 Ex. D. 54. In the last-named case it was held that the right to win minerals reserved to a lord of a manor under an Inclosure Act did not justify him in so working them as to let down an awarded road set out under the same Act. So, too, he cannot use a public footpath for private cart traffic if such traffic interferes with the rights of foot-passengers (*Abercromby* v. *Fermoy Town Commissioners*, [1900] I. R. 302, C. A.).

(*e*) *Goodtitle* d. *Chester* v. *Alker and Elmes* (1757), 1 Burr. 133; *Benfieldside Local Board* v. *Consett Iron Co.*, *supra*; see also Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 27; and as to the effect of causing a subsidence by working minerals, see p. 61, *post*.

(*f*) *Goodtitle* d. *Chester* v. *Alker and Elmes*, *supra*; *Poplar Corporation* v. *Millwall Dock Co.* (1904), 68 J. P. 339.

(*g*) *Cattle* v. *Stockton Waterworks* (1875), L. R. 10 Q. B. 453; *Cunliffe* v. *Whalley* (1851), 13 Beav. 411, where the court refused to interfere although the turnpike trustees had power to lower the road if they thought fit, and the tunnel would prevent them doing so; but see, as to streets in urban districts, p. 250, *post*.

(*h*) *Battersea Vestry* v. *County of London and Brush Provincial Electric Lighting Co., Ltd.*, [1899] 1 Ch. 474, C. A.; *Walker* v. *Urban District Council* v. *Wigham, Richardson & Co., Ltd.* (1901), 66 J. P. 152.

tunnel through it, or otherwise interfere with it (*i*); and if such pipes are laid, or tunnel made, under statutory authority, the existence of the highway will not deprive him of a right to compensation (*k*).

Ownership of air.

Similarly the owner of the land, being also the owner of the air above *usque ad cœlum*, may restrain the erection of wires above the highway (*l*), and may himself erect, or permit others to erect, such wires so long as they are high enough not to interfere with the public right (*m*).

Rateability.

79. The owner of a highway is not chargeable to private improvement expenses (*n*), nor rateable in respect thereof; but if he takes tolls he may be rateable in respect of them (*o*).

SUB-SECT. 3.—*Statutory vesting of Certain Highways in Local Authorities.*

Statutory vesting of main roads etc.

80. Every "main road" and the materials thereof, and all drains belonging thereto, vest in the county council (or county borough council, as the case may be), except where an urban authority has retained the power and duty of maintaining and repairing such road (*p*), in which case it vests in the urban authority as a street (*q*).

Statutory vesting of "streets."

Subject as above mentioned in all urban districts, and in rural districts (or contributory places) in which the Public Health Act, 1875, s. 149, has been adopted, all "streets" (*r*) which are for the time being highways repairable by the inhabitants at large, and the pavement, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, vest in and are under the control of the local authority (*s*).

(*i*) And a licence from the local authority to the trespasser is no answer to the action (*Goodson* v. *Richardson* (1874), 9 Ch. App. 221 (pipes); *Wood* v. *Ealing Tenants, Ltd.*, [1907] 2 K. B. 390 (drain to connect house with a public sewer); *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434 (construction of lavatories); *Salt Union, Ltd. and Droitwich Salt Co., Ltd.* v. *Harvey & Co.* (1897), 13 T. L. R. 297 (pipes)). Compare *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304, C. A., and *A.-G.* v. *Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71, where rival companies sought to interfere with the laying of pipes. As to erection of posts under statutory powers, see *Escott* v. *Newport Corporation*, [1904] 2 K. B. 369; *Andrews* v. *Abertillery Urban District Council*, [1911] W. N. 66.

(*k*) *E.g.*, for the taking of his subsoil (*Ramsden* v. *Manchester, South Junction, and Altrincham Rail. Co.* (1848), 1 Exch. 723); or in respect of rights of support acquired against his land, as to which see *Normanton Gas Co.* v. *Pope and Pearson, Ltd.* (1882), 48 L. T. 666. *Semble* if a pipe burst he might, under some circumstances, have a right of action for injury to the subsoil (see *Cattle* v. *Stockton Waterworks Co.* (1875), L. R. 10 Q. B. 453); and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 65. As to the acquisition of a statutory title to a tunnel beneath a highway, see *Bevan* v. *London Portland Cement Co., Ltd.* (1892), 67 L. T. 615.

(*l*) *Wandsworth Board of Works* v. *United Telephone Co.* (1884), 13 Q. B. D. 904, C. A.

(*m*) *Finchley Electric Light Co.* v. *Finchley Urban Council*, [1903] 1 Ch. 437, C. A.

(*n*) See p. 218, *post*. As to land tax, see *Central London Railway* v. *Land Tax Commissioners*, [1911] W. N. 60.

(*o*) See title RATES AND RATING. As to tolls, see p. 62, *post*.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (6).

(*q*) See *infra*. As to the retention of main roads by urban authorities, see p. 26, *ante*.

(*r*) For the definition of "street," see p. 16, *ante*.

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149.

SECT. 2. Rights of Owner of Soil.

Effect of statutory vesting.

81. The effect of these provisions is not to transfer the freehold to the authority, even where it had originally been vested in turnpike trustees (*t*), but merely to vest in the authority the property in the surface of the street or road, and in so much of the actual soil below, and air above, as may reasonably be required for its control, protection, and maintenance as a highway for the use of the public (*a*), and to this extent the former owner is divested of his property. Thus the herbage vests in the authority, and it may let the right of pasturage (*b*); but whether trees growing upon the highway similarly vest in it is, perhaps, doubtful (*c*). The authority may maintain an action of trespass against persons who without authority break open the surface to lay pipes or wires (*d*), or who let down the surface by mining operations (*e*); and an urban authority may itself erect, or authorise others to erect, in a street vested in it such posts and wires as it has authority to provide for the purpose of lighting its area by electricity (*f*). The property of the authority does not, however, extend further than is necessary for the maintenance and user of the street as a street. Thus it cannot interfere with telephone (*g*) or lighting (*h*) wires stretched across the street in such a way, and at such a height, as to cause no danger or inconvenience to the public; it acquires no title to the minerals (*i*); it has no power to

(*t*) *Finchley Electric Light Co.* v. *Finchley Urban Council*, [1903] 1 Ch. 437, C. A.; but as terre-tenant of the surface the authority may be liable for a rent formerly payable by such trustees (*Foley's Charity Trustees* v. *Dudley Corporation*, [1910] 1 K. B. 317, C. A.).

(*a*) *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434; *Finchley Electric Light Co.* v. *Finchley Urban Council*, *supra* ("that which is vested is the area of user," *per* COLLINS, M.R.); *Bagshaw* v. *Buxton Local Board of Health* (1875), 1 Ch. D. 220; *Rolls* v. *St. George the Martyr, Southwark, Vestry* (1880), 14 Ch. D. 785, C. A.; *Poplar Corporation* v. *Millwall Dock Co.* (1904), 68 J. P. 339; *Sydney Municipal Council* v. *Young*, [1898] A. C. 457, P. C.; *Wandsworth Board of Works* v. *London and South-Western Rail. Co.* (1862), 31 L. J. (CH.) 854; and cases cited in the following notes. For cases as to the "vesting" of sewers, see title SEWERS AND DRAINS.

(*b*) *Coverdale* v. *Charlton* (1878), 4 Q. B. D. 104, C. A.

(*c*) *Coverdale* v. *Charlton*, *supra*; *Surbiton Improvement Commissioners* v. *Metcalf* (1888), *Times*, 14th November. In the case of injury to trees in a street vested in an urban authority, the offender may be ordered to pay compensation to the authority (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149), see p. 214, *post*; but, *semble*, the provision may be intended to refer to trees planted by the authority, although in 1875 it had no real power to plant trees in a highway.

(*d*) *Hyde Corporation* v. *Oldham, Ashton, and Hyde Electric Tramway, Ltd.* (1900), 64 J. P. 596, C. A.

(*e*) In such a case the authority must act reasonably in restoring the road, and not necessarily raise it to its original level regardless of cost and of the possibility of providing a reasonably good road at the new level (*Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corporation*, [1908] A. C. 323; compare *A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301).

(*f*) *I.e.*, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161; see *Fareham Local Board and Fareham Electric Light Co.* v. *Smith* (1891), 7 T. L. R. 443; compare *Escott* v. *Newport Corporation*, [1904] 2 K. B. 369; and see title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 642.

(*g*) *Wandsworth Board of Works* v. *United Telephone Co.* (1884), 13 Q. B. D. 904, C. A.

(*h*) *Finchley Electric Light Co.* v. *Finchley Urban Council*, *supra*.

(*i*) See Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 27.

interfere with the subsoil, *e.g.*, by constructing lavatories (*k*); nor can it authorise persons to lay pipes for trading purposes in the subsoil, or even in the macadam of the street (*l*). Moreover, if a person wrongfully opens the street and lays pipes in the subsoil, the authority cannot compel him to remove them when he has restored the surface, since there is no continuing trespass on its property (*m*). Further, it would seem that in the case of a mere trifling encroachment the courts will not necessarily grant an injunction at the suit of the authority (*n*).

Rights of original owner.

82. In the case of streets thus vested in a local authority the original owner's rights and property remain, except so far as they are transferred to the authority; and, even so far as they are thus transferred, they revest in him if the street or road ceases to be a highway (*o*).

SECT. 3.—*Right of Access by Owner of Adjoining Premises.*

Adjoining owner's right of access to highway.

83. An owner of land adjoining a highway is entitled to access to such highway at any point at which his land actually touches it (*p*), even though the soil of the highway be vested in another (*q*); but he has no such right if a strip of land, however narrow, belonging to another and not subject to the public right of passage, intervenes (*r*). Where a footwalk intervenes between the carriage way

(*k*) *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434; *London and North Western Railway* v. *Westminster Corporation*, [1904] 1 Ch. 759, C. A., reversed on the facts, [1905] A. C. 426; but see now the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 47.

(*l*) *Salt Union, Ltd.* v. *Harvey & Co.* (1897), 61 J. P. 375. The subsoil is not given to an authority by the vesting provisions for sewerage purposes (*Tunbridge Wells Corporation* v. *Baird, supra; Finchley Electric Light Co.* v. *Finchley Urban Council*, [1903] 1 Ch. 437, C. A., *per* COLLINS, M.R.; but see *per* BRETT, L. J., in *Coverdale* v. *Charlton* (1878), 4 Q. B. D. 104, C. A.; and *per* KEKEWICH, J., in *Salt Union, Ltd.* v. *Harvey & Co., supra*; and as to special provisions in the metropolis, see *Westminster Corporation* v. *London and North Western Railway*, [1905] A. C. 426.

(*m*) *Battersea Vestry* v. *County of London and Brush Provincial Electric Lighting Co., Ltd.*, [1899] 1 Ch. 474, C. A.; *Walker Urban District Council* v. *Wigham, Richardson & Co., Ltd.* (1901), 66 J. P. 152; *Hyde Corporation* v. *Oldham, Ashton, and Hyde Electric Tramway, Ltd.* (1900), 64 J. P. 596, C. A.

(*n*) *Wandsworth Board of Works* v. *London and South-Western Rail. Co.* (1862), 31 L. J. (CH.) 854, where a railway company proceeded to widen a bridge after its statutory powers had expired, and in so doing encroached slightly on the highway, but the benefit to the public outweighed any inconvenience.

(*o*) *Rolls* v. *St. George the Martyr, Southwark, Vestry* (1880), 14 Ch. D. 785, C. A.

(*p*) *Woodyer* v. *Hadden* (1813), 5 Taunt. 125, 132; *Berridge* v. *Ward* (1860), 2 F. & F. 208, *per* COCKBURN, C.J., at p. 212; *Manchester Corporation* v. *Chapman* (1868), 37 L. J. (M. C.) 173; *Marshall* v. *Ulleswater Co.* (1871), L. R. 7 Q. B. 166, *per* BLACKBURN, J., at p. 172; *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662, *per* Lord SELBORNE, at p. 684; *Cotton's Trustees* v. *Metropolitan Rail. Co.* (1880), *Times*, 10th March; compare *Campbell* v. *Paddington Borough Council* (1911), 27 T. L. R. 232 (obstruction of view).

(*q*) *Ramuz* v. *Southend Local Board* (1892), 67 L. T. 169.

(*r*) See *Marshall* v. *Ulleswater Co., supra*; *Lightbound* v. *Higher Bebington Local Board* (1885), 16 Q. B. D. 577, C. A.; *Williams* v. *Wandsworth Board of Works* (1884), 13 Q. B. D. 211. So, too, he may be unable to exercise his right

SECT. 3. Right of Access by Owner of Adjoining Premises.

and the adjoining premises, the owner of such premises, if he also owns the soil *usque ad medium filum viæ*, is entitled at common law to access across the footwalk to the carriage way for any kind of traffic which is necessary for the reasonable enjoyment of his premises, and will not, as he proposes to conduct it, cause a substantial nuisance (*a*); and, it seems, his rights are the same even if he does not own the soil of the highway (*b*).

Statutory provisions as to exercise of right of access.

84. In districts in which the Public Health Acts Amendment Act, 1907, s. 18 (*c*), is in force, the local authority may permit new means of access to be provided for horses or cattle, or wheeled vehicles exceeding 4 feet in width or 2 cwt. in weight, between any street which has become a highway repairable by the inhabitants at large, and adjoining premises across a kerbed or paved footway, subject to the following conditions:—(1) Notice in writing must be given and detailed plans of the intended means of access must be submitted; (2) the plans must be approved (*d*) by the local authority, and the works executed under its supervision and to its reasonable satisfaction; (3) the new means of access may only be used subject to any restrictions which attach to the use for the like purpose of any carriage way forming part of a highway repairable by the inhabitants at large.

Nature of such right.

85. An adjoining owner's right of access from his premises to the highway is a private right, and is distinct from his right to use such highway as soon as he is upon it, which (at any rate if the soil of the highway is not his) he enjoys only as a member of the public (*e*). Interference with such private right will, if wrongful,

if he has allowed another person to acquire some easement over his land inconsistent with such exercise, *e.g.*, a right to have an advertisement board erected on the frontage; see *Moody* v. *Steggles* (1879), 12 Ch. D. 261.

(*a*) *St. Mary, Newington* v. *Jacobs* (1871), L. R. 7 Q. B. 47, in which case the vestry had refused permission to the owner to make a paved crossing for carts, and it was held that he was properly acquitted of a charge of damaging the flags by his carts.

(*b*) In fact the defendant in *St. Mary, Newington* v. *Jacobs*, *supra*, did not own the soil of the street, which was vested by statute in the vestry, although the judgment was based on the assumption that he did. But *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662, and *Ramuz* v. *Southend Local Board* (1892), 67 L. T. 169, show that an adjoining owner's right of access is not in general dependent upon ownership of the highway.

(*c*) 7 Edw. 7, c. 53. The effect of this enactment is obscure. There is no provision imposing a penalty in case an owner makes an access without the authority's approval; and it may be doubted whether the section takes away existing common law rights. Possibly its effect is to relieve an owner, who obtains the authority's approval, from liability to any vexatious proceedings in which he would have to prove that he was acting within his rights and not causing a nuisance.

(*d*) An appeal lies to quarter sessions against the refusal to approve (*ibid.*, s. 7). As to the procedure on such appeals, see title MAGISTRATES.

(*e*) *A.-G.* v. *River Thames Conservators* (1862), 1 Hem. & M. 1; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542; *Chaplin* (*W. H.*) *& Co., Ltd.* v. *Westminster Corporation*, [1901] 2 Ch. 329. Difficulties may arise in defining exactly where the private and public rights respectively end and begin (*ibid.*); but a lamp-post on the kerb, which impedes only the transference of goods across the pavement to a doorway of premises, is an interference with the public, and not

support an action (*f*), and amounts to "injurious affection" of his premises for compensation purposes (*g*). Accordingly, an adjoining owner may recover damages or compensation where the level of a highway alongside his premises has been altered (*h*), or where an unreasonable use of such highway has rendered access to his shop unnecessarily inconvenient to himself or his customers (*i*). In general, however, where the act complained of is expressly or impliedly authorised by statute no action for damages will lie, and the only remedy is a claim for compensation, if such is provided for by the statute (*k*).

Remedies for interference

86. A highway authority (merely as successor to a surveyor of highways or highway board) cannot justify the raising or lowering of the level of a highway so as to interfere with an adjoining owner's right of access (*l*); but, if a highway subsides, it is entitled to raise the level so far as is necessary for the purposes of ordinary traffic, notwithstanding that the access to adjoining premises (which have also subsided) is thereby interfered with (*m*). It would, indeed, appear that as against adjoining owners the authority may, at any rate if it acts promptly, raise it to its original level, although it is not absolutely necessary to do so (*m*); but as against the persons (if any) liable for the subsidence and damage, the authority must act reasonably in deciding what repairs to do (*n*).

Alteration of level.

with the private right (*Chaplin (W. H.) & Co., Ltd.* v. *Westminster Corporation*, [1901] 2 Ch. 329). Compare *Goldberg & Sons, Ltd.* v. *Liverpool Corporation* (1900), 82 L. T. 362; *Escott* v. *Newport Corporation*, [1904] 2 K. B. 369; *Andrews* v. *Abertillery Urban District Council*, [1911] W. N. 66.

(*f*) *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; *A.-G.* v. *River Thames Conservators* (1862), 1 Hem. & M. 1; *Rose* v. *Groves* (1843), 5 Man. & G. 613; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542.

(*g*) *Moore* v. *Great Southern and Western Rail. Co.* (1859), 10 I. C. L. R. 46, Ex. Ch.; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 46, 47.

(*h*) *Moore* v. *Great Southern and Western Rail. Co., supra; Tuohey* v. *Great Southern and Western Rail. Co.* (1859), 10 I. C. L. R. 98; *R.* v. *Eastern Counties Rail. Co.* (1841), 2 Q. B. 347; *A.-G.* v. *River Thames Conservators, supra;* see also *Bigg* v. *London Corporation* (1873), L. R. 15 Eq. 376, and cases cited in note (*m*), *infra*, and note (*p*), p. 62, *post*.

(*i*) *Fritz* v. *Hobson, supra*. Compare *Barber* v. *Penley*, [1893] 2 Ch. 447 (crowds waiting at the door of theatre).

(*k*) See *Bold* v. *Williams* (1857), 21 J. P. 84; *Wedmore* v. *Bristol Corporation* (1862), 7 L. T. 459; *Boulton* v. *Crowther* (1824), 2 B. & C. 703; *Arnott* v. *Whitby Urban District Council* (1909), 73 J. P. 369; but an action will lie if the act is done oppressively, or so as to cause unnecessary damage (*Milward* v. *Redditch Local Board of Health* (1873), 21 W. R. 429)

(*l*) *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264. To substantially raise the road is a trespass as against the owner of the soil (*ibid.*), and see p. 62, *post*. The *dictum* of BRAMWELL, L.J. (the dissenting judge), in *Nutter* v. *Accrington Local Board of Health* (1878), 4 Q. B. D. 375, C. A., to the effect that an adjoining owner's right to have the level maintained depends upon his ownership of the highway appears to have found no subsequent support, but, of course, in rural districts he does generally own the soil *usque ad medium filum*.

(*m*) Whether the highway be vested in it or not; see *Burgess* v. *Northwich Local Board, supra; Atherton* v. *Cheshire County Council* (1895), 60 J. P. 6, C. A.; *Wednesbury Corporation* v. *Lodge Holes Colliery Co., Ltd.*, [1907] 1 K. B. 78, 84, C. A., reversed, [1908] A. C. 323. So far as the ratepayers are concerned, they may raise it to the original level (*Burgess* v. *Northwich Local Board, supra, per* LOPES, J.).

(*n*) See note (*e*), p. 58, *ante*.

SECT. 3. Right of Access by Owner of Adjoining Premises.

Powers of urban authority.

On the other hand, where an urban authority or a rural authority with urban powers acting under the powers conferred by the Public Health Act, 1875 (*o*), causes the soil of any street vested in it to be raised, lowered, or altered, it must compensate the owner of adjoining premises which are depreciated thereby (*p*). Under this provision the construction of a raised footpath alongside an owner's premises, openings for carriages being left at various places, may be a subject for compensation, but in the absence of unreasonable conduct will not support an action (*q*).

When claim must be based upon public nuisance.

87. Where an obstruction, though possibly near to a person's premises, interferes only with his public right, and not with his private right of access, his claim, if any, must be based upon the ground of a public nuisance causing special damage to him (*r*).

SECT. 4.—*Tolls.*

Classification.

88. The common law recognises two classes of tolls payable under a grant or presumed grant from the Crown (*s*) in respect of the passage of a highway or bridge, namely, "tolls-traverse" and "tolls-thorough."

Toll-traverse.

A toll-traverse is a toll taken in respect of the original ownership of the land crossed by the public (though now perhaps severed therefrom), such land having been at the date of the grant the private property of the grantee, and having been then dedicated by him to the public in consideration of the toll to be taken.

Toll-thorough.

A toll-thorough is independent of any ownership of the soil by the original grantee, the consideration necessary to support it being usually the liability to repair the particular highway or bridge (*t*).

(*o*) 38 & 39 Vict. c. 55, s. 149 (see p. 211, *post*); or under an Act the purposes of which are declared to be purposes of the Public Health Act, 1875 (38 & 39 Vict. c. 55), as in *Arnott* v. *Whitby Urban District Council* (1909), 73 J. P. 369.

(*p*) See Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308; *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264; *Nutter* v. *Accrington Local Board of Health* (1878), 4 Q. B. D. 375, C. A., affirmed *sub nom. Accrington Corporation* v. *Nutter* (1880), 43 L. T. 710, H. L.; *R.* v. *Wallasey Local Board* (1869), L. R. 4 Q. B. 351. If the authority contends that it was only restoring to its original level a road which had subsided many years before, and was therefore exercising the powers of surveyors, the *onus* is on it to satisfy the court that it was acting under those powers and not under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149 (*Pearsall* v. *Brierley Hill Local Board* (1883), 11 Q. B. D. 735, C. A.; affirmed *sub nom. Brierley Hill Local Board* v. *Pearsall* (1884), 9 App. Cas. 595).

(*q*) *Sellors* v. *Matlock Bath Local Board* (1885), 14 Q. B. D. 928. See also *Ely Brewery Co.* v. *Pontypridd Urban District Council* (1903), 68 J. P. 3, C. A., as to alterations in a street causing adjoining premises to be flooded.

(*r*) For nuisances, see pp. 151 *et seq.*, *post*.

(*s*) A toll is a franchise, and may be claimed either by royal grant or by immemorial usage and prescription which presupposes a former grant, or by statute; see title CONSTITUTIONAL LAW, Vol. VI., p. 490; *Weymouth Corporation* v. *Nugent* (1865), 6 B. & S. 22. As to canal tolls, see title RAILWAYS AND CANALS; as to ferry tolls, title FERRIES, Vol. XIV., p. 560; as to harbour and pier tolls, titles SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES; as to market tolls, title MARKETS AND FAIRS. As to the rating of tolls, see title RATES AND RATING.

(*t*) Highway tolls are now almost obsolete, and therefore the law with regard to this distinction appears to deserve no detailed discussion. Reference

A toll reasonable in amount, but varying from time to time according to the value of money, is valid in law (*a*).

Highway and bridge tolls.

89. Highway and bridge tolls may also be payable under statute. Statutory turnpike tolls no longer exist (*b*); but there are still tolls payable in respect of the passage of bridges under special Acts (*c*). It is doubtful whether a bicycle is a "carriage" for the

may be made to Gunning, Law of Tolls (1833), and the cases therein cited, more especially *Pelham (Earl)* v. *Pickersgill* (1787), 1 Term Rep. 660; *Brett* v. *Beales* (1829), Mood. & M. 416, 427; *Truman* v. *Walgham and Key* (1766), 2 Wils. 296; *Smith* v. *Shepherd* (1599), Moore (K. B.), 574; and to the later cases of *R.* v. *Salisbury (Marquis)* (1838), 8 Ad. & El. 716; *Brecon Markets Co.* v. *Neath and Brecon Rail. Co.* (1872), L. R. 7 C. P. 555; *Foreman* v. *Whitstable Free Fishers and Dredgers* (1869), L. R. 4 H. L. 266; *Lawrence* v. *Hitch* (1868), L. R. 3 Q. B. 521, Ex. Ch.; *Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D. 750, C. A.; *Midland Rail. Co.* v. *Watton* (1886), 17 Q. B. D. 30, C. A.; *A.-G.* v. *Simpson*, [1901] 2 Ch. 671, C. A.; reversed, *sub nom. Simpson* v. *A.-G.*, [1904] A. C. 476. Tolls-traverse are rateable, but not tolls-thorough; see, further, title RATES AND RATING.

(*a*) *Lawrence* v. *Hitch*, *supra*.

(*b*) See p. 15, *ante*.

(*c*) In case of dispute reference must be made to the precise terms of the special Act, although decisions under the Turnpike Acts may be useful. The following may be referred to:—As to the proper position for a bridge tollgate, *Royal* v. *Yaxley* (1872), 20 W. R. 903; as to the distinction between imposing fresh tolls and composing new tolls within the meaning of a covenant, *Conway Bridge Commissioners* v. *Jones* (1910), 26 T. L. R. 81, 259, C. A.; as to tolls on floating bridges, *Ward* v. *Gray* (1865), 6 B. & S. 345; *Portsmouth Bridge Co.* v. *Nance* (1843), 6 Man. & G. 229; as to taxed carts, *Purdy* v. *Smith* (1859), 1 E. & E. 511; *Williams* v. *Lear* (1872), L. R. 7 Q. B. 285; as to steam ploughs, *Skinner* v. *Visger* (1873), L. R. 9 Q. B. 199; as to tolls payable according to width of wheels or weight, *Beerling* v. *Terry* (1862), 6 L. T. 186; *James* v. *Dickenson* (1863), 14 C. B. (N. S.) 416; *Chamberlin* v. *Songhurst* (1775), 1 Cowp. 365; *Ridge* v. *Garlick* (1818), 2 Moore (C. P.), 481; *Pickford* v. *Davis* (1834), 4 Moo. & S. 683; as to exemption of military stores, *London and South Western Rail. Co.* v. *Reeves* (1866), L. R. 1 C. P. 580; *Toomer* v. *Reeves* (1867), L. R. 3 C. P. 62; as to exemption of soldiers and volunteers, *Ward* v. *Gray*, *supra*; *Hinds* v. *Thring* (1877), 36 L. T. 216; *Stephenson* v. *Taylor* (1861), 1 B. & S. 95, 101; *Teather* v. *Turner* (1863), 7 L. T. 785; *Humphrey* v. *Bethel* (1866), L. R. 1 C. P. 215; as to exemption of ministers and worshippers, *Temple* v. *Dickinson* (1858), 1 E. & E. 34; *Brunskill* v. *Watson* (1868), L. R. 3 Q. B. 418; *Layard* v. *Ovey* (1868), L. R. 3 Q. B. 415; *Smith* v. *Barnett* (1870), L. R. 6 Q. B. 34; *Lewis* v. *Hammond* (1818), 2 B. & Ald. 206; as to exemption of seafaring persons, *Sharp* v. *Fields* (1864), 10 L. T. 338; as to exemptions of fodder for cattle, *Clements* v. *Smith* (1860), 3 E. & E. 238; of agricultural produce, *Oram* v. *Gait* (1860), 1 L. T. 326; of animals going to pasture, *Harrison* v. *Brough* (1796), 6 Term Rep. 706; *Warmby* v. *Dealkin* (1863), 14 C. B. (N. S.) 124; of manure, *Richens* v. *Wiggins* (1863), 3 B. & S. 953; *R.* v. *Freke* (1856), 5 E. & B. 944; *Foster* v. *Tucker* (1870), L. R. 5 Q. B. 224; *R.* v. *Adams* (1817), 6 M. & S. 52; *Harrison* v. *James* (1787), 2 Chit. 547; *Pratt* v. *Brown* (1838), 8 C. & P. 244; of lime, *King* v. *Gough* (1773), 2 Chit. 655; *Hickinbotham* v. *Perkins* (1819), 3 Moore (C. P.), 185; of implements of husbandry, *R.* v. *Malty* (1858), 8 E. & B. 712; *Rapley* v. *Richards* (1864), 12 W. R. 864; *Ablert* v. *Pritchard* (1866), L. R. 1 C. P. 210; of road materials, *Osmond* v. *Widdicombe* (1818), 2 B. & Ald. 49; *R.* v. *Lord* (1855), 4 W. R. 83; as to passing and repassing on the same day, *Hill* v. *Browning* (1870), 22 L. T. 712; *Loaring* v. *Stone* (1824), 2 B. & C. 515; *Norris* v. *Poate* (1825), 10 Moore (C. P.), 293; *Waterhouse* v. *Keen* (1825), 4 B. & C. 200; *Fearnley* v. *Morley* (1826), 5 B. & C. 25; *Fenton* v. *Swallow* (1834), 1 Ad. & El. 723; *Jackson* v. *Curwen* (1826), 5 B. & C. 31; *Gray* v. *Shilling* (1820), 4 Moore (C. P.), 371; *Chambers* v. *Williams* (1826), 7 Dow. & Ry. (K. B.) 842; *Williams* v. *Sangar* (1808), 10 East, 66; *Hopkins* v. *Thorogood* (1831), 2 B. & Ad. 916;

SECT. 4. Tolls.

purpose of any toll Act passed prior to the invention of bicycles (*d*); but a tramcar has been held to be a "coach chariot or chaise" (*e*).

Merger of right.

90. A common law right to take tolls may become merged in and extinguished by a later statutory right, and in such case will not revive upon the expiration of the statute (*f*). Non-exercise of such a right may perhaps justify a presumption of its surrender; but a statutory right to toll cannot be lost by non-exercise (*g*).

Distress.

91. The power of distress is incident to every legal toll (*h*), and in general an action will lie for tolls unpaid (*i*). Excessive toll paid under protest may be recovered by action (*k*).

Power of highway authority to redeem toll.

92. The freeing of highways and bridges from tolls is an object which county councils and other highway authorities may effect under the Highways and Bridges Act, 1891 (*l*).

Exemptions from toll. The Sovereign.

93. The Sovereign is at common law exempt from tolls (*m*); and the exemption extends to his private horses and carriages when being used by his permission, even though not in his service (*n*).

Niblett v. *Pottow* (1834), 1 Bing. (N. C.) 81; *Ekin* v. *Flay* (1845), 1 New Sess. Cas 561; *Johnson* v. *Cocksedge* (1858), 5 C. B. (N. S.) 286; *James* v. *Dickenson* (1863), 14 C. B. (N. S.) 416; *R.* v. *Ruscoe* (1838), 8 Ad. & El. 386; *Short* v. *Hudson* (1860), 5 H. & N. 559; *Comley* v. *Carpenter* (1865), 18 C. B. (N. S.) 378; *Pearson* v. *Tazewell* (1865), 19 C. B. (N. S.) 384; *Eatwell* v. *Richmond* (1865), 18 C. B. (N. S.) 364; as to compounding for tolls for a fixed period, *Stott* v. *Clegg* (1863), 13 C. B. (N. S.) 619; as to evading tolls, *Maurice* v. *Marsden* (1850), 19 L. J. (C. P.) 152; *R.* v. *Irving* (1848), 12 Q. B. 429; *Veitch* v. *Exeter Turnpike Roads Trustees* (1858), 8 E. & B. 986; *Stanley* v. *Mortlock* (1870), L. R. 5 C. P. 497; *Harding* v. *Headington* (1874), L. R. 9 Q. B. 157; *Hartley* v. *Bowlzer* (1865), 11 L. T. 767; *R.* v. *Cambridge Justices* (1822), 1 Dow. & Ry. (K. B.) 325; *R.* v. *Middlesex Justices* (1843), 2 Dowl. (N. S.) 719; *Barnes* v. *White* (1845), 1 C. B. 192; as to extortion or exaction by toll-collectors, *Waterhouse* v. *Keen* (1825), 4 B. & C. 200; *R.* v. *Hamlyn* (1816), 4 Camp. 379; *R.* v. *Hants Justices* (1830), 1 B. & Ad. 654; *Peacock* v. *Harris* (1808), 10 East, 104. As to the exemption of funerals, see Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), s. 32, and title BURIAL AND CREMATION, Vol. II., p. 484. As to exemption of clergy and those attending places of worship, see title ECCLESIASTICAL LAW, Vol. XI., p. 556.

(*d*) In *Cannan* v. *Abingdon* (*Earl*), [1900] 2 Q. B. 66, a bicycle was held to be a carriage within the words "coach, chariot, berlin, hearse, chaise, chair, calash, wagon, wain, drag, cart, car or other carriage whatsoever"; but this decision was doubted in *Simpson* v. *Teignmouth and Shaldon Bridge Co.*, [1903] 1 K. B. 405, C. A., where a bicycle was held not to be within the words "coach, chariot, hearse, chaise, berlin, landau, phaeton, gig, whiskey, car, chair, coburg, or other carriage being on springs." See also to the same effect, *Smith* v. *Kynnersley*, [1903] 1 K. B. 788, C. A. ("sledge, drag, or such like carriage"); and *Williams* v. *Ellis* (1880), 5 Q. B. D. 175.

(*e*) *Plymouth, Stonehouse and Devonport Tramways Co.* v. *General Tolls Co., Ltd.* (1898), 14 T. L. R. 531, H. L.

(*f*) *New Windsor Corporation* v. *Taylor*, [1899] A. C. 41; *Manchester Corporation* v. *Lyons* (1882), 22 Ch. D. 287, C. A.

(*g*) *Deards* v. *Goldsmith* (1879), 40 L. T. 328.

(*h*) *Simpson* v. *A.-G.*, [1904] A. C. 476, 488.

(*i*) Unless some special and exclusive remedy is given by statute (*Great Eastern Rail. Co.* v. *Harwich Corporation* (1879), 41 L. T. 533, H. L.).

(*k*) See cases cited in note (*d*), *supra*.

(*l*) 54 & 55 Vict. c. 63, s. 3.

(*m*) Apart, of course, from any enactment specially binding him. So also is his consort (Co. Litt. 133 b; *Weymouth Corporation* v. *Nugent* (1865), 6 B. & S. 22).

(*n*) *Westover* v. *Perkins* (1859), 2 E. & E. 57.

Apparently it extends also to servants and vehicles of the Crown employed upon the public service (*o*).

Persons on military service.

All officers and soldiers of the regular forces on duty or on the march, and their horses and baggage, and all prisoners under military escort, and all carriages and horses belonging to the Sovereign, or employed in his military service, when conveying any such persons, or baggage, or stores, or returning from conveying the same, are expressly exempted from payment of any statutory tolls in passing along or over any road or bridge (*p*). For the purpose of this exemption officers and men of the Reserve and Territorial Forces, when going to or returning from any place at which they are required to attend, and for non-attendance at which they are liable to be punished, are to be deemed officers and soldiers of the regular forces on duty (*q*).

Persons on police duty.

94. No toll may be taken on any "turnpike bridge" for any horse, police van, carriage, or cart in the service of the police, if the constable in charge is the chief constable, or is in uniform, or holds a written order from the chief constable (*r*).

Persons on postal service.

No person may demand any toll on the passing of any carriage or horse conveying mail bags; and if any toll collector on a highway or bridge demands toll for any mail, or any person, horse, or carriage going for or employed to go for any mail bag, he is liable to a penalty not exceeding £5 (*s*).

Freeman.

95. In boroughs a freeman may be exempt from tolls (*t*).

(*o*) *R.* v. *Cook* (1790), 3 Term Rep. 519; *Weymouth Corporation* v. *Nugent* (1865), 6 B. & S. 22; *A.-G.* v. *Londonderry Bridge Commissioners*, [1903] 1 I. R. 389; *Cooper* v. *Hawkins*, [1904] 2 K. B. 164; and see title CONSTITUTIONAL LAW, Vol. VII., p. 118.

(*p*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 143, which contains a saving for canal dues. A person demanding and receiving toll in contravention of it is liable to a penalty of not less than 10*s.* and not exceeding £5 (*ibid.*, sub-s. 3). The private carriage of an officer, who is not entitled to a "carriage allowance," nor to charge for carriage hire, is not "employed in the King's military service," though used by the officer in the discharge of his duties (*Craig* v. *Nicholas*, [1900] 2 Q. B. 444). Compare *Stephenson* v. *Taylor* (1861), 1 B. & S. 95, 101; *Humphrey* v. *Bethel* (1866), L. R. 1 C. P. 215; *Hinds* v. *Thring* (1877), 36 L. T. 216.

(*q*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 23 (1); Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28 (2). Compare also *Teather* v. *Turner* (1863), 7 L. T. 785, and cases cited in note (*c*), p. 63, *ante*. As to the military forces generally, see title ROYAL FORCES. Yeomanry were formerly exempt under the Yeomanry Act, 1804 (44 Geo. 3, c. 54), s. 13, and volunteers under the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 45.

(*r*) County Police Act, 1840 (3 & 4 Vict. c. 88), s. 1; and as to persons on police service generally, see title POLICE. The term "turnpike bridge" in this section is not restricted to turnpike "trust" bridges (*Longland* v. *Andrews*, *Longland* v. *Doling* (1865), 3 H. & C. 564).

(*s*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 79; see also Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), s. 32. As to the postal service, see title POST OFFICE.

(*t*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 208. As to a local custom to be "toll-free," see *Paine* v. *Partich* (1690), 1 Show. 243.

Part V.—Width of Highways.

SECT. 1. **Extent of Space subject to Public Right of Passage.**

SECT. 1.—*Extent of Space subject to Public Right of Passage.*

Width of highway.

96. At common law a highway may be of any width; but statutes, such as Inclosure Acts, generally prescribe the width of highways to be set out in pursuance of their provisions (*u*). Apart from any special enactment, the width of a highway, *i.e.*, the extent of land subject to the public right of passage, is a question of fact (*a*).

General presumption where metalled track exists.

97. The existence of a metalled track, or *via trita*, does not necessarily mean that the public are confined to that track; and in many cases strips of land alongside the *via trita* form part of the dedicated highway, and are equally subject to the right of the public (*b*). Where a metalled road crosses uninclosed land, there being no ditch or physical feature to indicate other limits to the highway, the proper inference is that the *via trita* alone forms the highway, unless public user of adjoining land for the purposes of traffic is proved (*c*).

Where fences exist.

Where, however, there are fences (or dykes (*d*)) on both sides of a highway, the public right of passage *primâ facie* extends to the whole space between the fences (*e*); and where there is a fence on one side only, the presumption is equally applicable to the space between the *via trita* and that fence (*f*).

When presumption may be rebutted.

This presumption, however, does not arise in every case, and it

(*u*) As in *Turner* v. *Ringwood Highway Board* (1870), L. R. 9 Eq. 418; and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 565.

(*a*) The (at one time) common notion that an adjoining owner may inclose to within 15 feet of the centre is without foundation (*R.* v. *Johnson* (1859), 1 F. & F. 657), and, *a fortiori*, the footpath is as much a part of the highway as is the roadway (*Loveridge* v. *Hodsoll* (1831), 2 B. & Ad. 602, 610).

(*b*) The existence of such strips is generally accounted for by the fact that before roads were macadamised additional space was required to permit of deviation in wet weather (*Steel* v. *Prickett* (1819), 2 Stark. 463, 469), and even in the case of metalled roads "the space at the sides is also necessary to afford the benefit of air and sun" (*R.* v. *Wright* (1832), 3 B. & Ad. 681).

(*c*) *Easton* v. *Richmond Highway Board* (1871), L. R. 7 Q. B. 69. Proof of indiscriminate user of all parts of an uninclosed common crossed by a metalled road is no evidence that the public right extends beyond the *via trita* (*ibid.*); see also *A.-G.* (*Cork County Council*) v. *Perry*, [1904] 1 I. R. 247, C. A.; *Elwood* v. *Bullock* (1844), 6 Q. B. 383, 409. *Semble*, in order to prove that land outside the *via trita* forms part of the highway, regular user thereof must be proved, and user confined to a reasonably narrow strip; user attributable to persons merely straying from a highway is of little value as evidence of dedication. See also pp. 39, 40, *ante*.

(*d*) *Neeld* v. *Hendon Urban District Council* (1899), 81 L. T. 405, 408, C. A. See also title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 123.

(*e*) *R.* v. *United Kingdom Electric Telegraph Co.* (1862), 31 L. J. (M. C.) 166; *Elwood* v. *Bullock, supra*; *Hutton* v. *Hamboro* (1860), 2 F. & F. 218; *Boss* v. *Litton* (1832), 5 C. & P. 407; *Cotterill* v. *Starkey* (1839), 8 C. & P. 691; *Pullin* v. *Duffell* (1891), 64 L. T. 134. The same rule applies to private roads which a grantee is entitled to use "as fully as if they were public roads" (*Nicol* v. *Beaumont* (1883), 53 L. J. (CH.) 853). It was applied to a highway forming a towing-path in *Thames Conservators* v. *Dennis* (1902), *Times*, 1st November.

(*f*) *Evelyn* v. *Mirrielees* (1900), 17 T. L. R. 152, C. A.

may always be rebutted by evidence. It does not arise at all if the existence of the fence is not in some way referable to the existence of the highway (*g*). Thus the distance of the fence from the roadway may be so great that there cannot be supposed to be any connection between them; or its erection may be satisfactorily accounted for by a wish to separate cultivated land from waste over which the highway happens to run; or the age, or line, of the fence may show that it existed before the highway (*h*). In such circumstances, if the public claim a right of passage over land lying between the *via trita* and the fence, they must prove actual user sufficient to justify an inference of dedication. If, however, the fence is so near to the road that some connection between the two can reasonably be inferred, and its existence cannot otherwise be satisfactorily accounted for, it must be regarded as having been erected with reference to the highway (*i*), and the presumption then arises that the whole intervening space forms part of the highway. But this presumption may be rebutted by acts of ownership inconsistent with the existence of a public right of passage, *e.g.*, by proof that tenants of the manor have been duly admitted in respect of the land in question (*k*), that the owner has granted licences to individuals to take stones therefrom, or has inclosed it at some earlier date without any objection from the highway authority (*l*), or has obstructed passage across it by penning sheep or otherwise (*m*). The mere fact that the strip of land is of considerable size (*n*), or that it is described as manorial waste in a private Act of Parliament (*o*), will not necessarily rebut the presumption; and user by the public or by the highway authority, *e.g.*, for the deposit of road-making materials, may be proved in order to strengthen it (*p*).

Where no defined track across an open space.

Where there is a public right of passage across a field or open space but no defined track exists, the right seems to be confined to

(*g*) *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342; *Neeld* v. *Hendon Urban District Council* (1899), 81 L. T. 405, C. A.; *Friern Barnet Urban District Council* v. *Richardson* (1898), 62 J. P. 547, C. A.; *A.-G. and Croydon Rural District Council* v. *Moorsom-Roberts* (1908), 72 J. P. 123.

(*h*) *Ibid.*

(*i*) *Offin* v. *Rochford Rural Council, supra.*

(*k*) *Friern Barnet Urban District Council* v. *Richardson, supra.*

(*l*) *Neeld* v. *Hendon Urban District Council, supra;* and as to the weight to be attached to evidence of persons wandering off the road over such a strip, see *Locke-King* v. *Woking Urban District Council* (1897), 62 J. P. 167; *A.-G. and Croydon Rural District Council* v. *Moorsom-Roberts, supra; Neeld* v. *Hendon Urban District Council, supra.*

(*m*) *Belmore* (*Countess*) v. *Kent County Council*, [1901] 1 Ch. 873, where the owner's tenants had cut willows off it, made two cartways across it, and erected hurdles for grazing purposes. Compare also *A.-G. and Croydon Rural District Council* v. *Moorsom-Roberts, supra.*

(*n*) *Offin* v. *Rochford Rural Council, supra.* In this case the strip was in places 90 feet broad and contained 1,600 square yards; sheep and cattle had been grazed on it, but had not been penned on it.

(*o*) *Locke-King* v. *Woking Urban District Council, supra.* There were also defined tracks over the strip in certain directions.

(*p*) *Harvey* v. *Truro Rural Council*, [1903] 2 Ch. 638. There was evidence on the contrary that brushwood had been cut by the owner; see also cases cited in note (*l*), *supra.*

SECT. 1. Extent of Space subject to Public Right of Passage.

a strip of reasonable width (having regard to whether the right be a footway or carriage way) running straight from terminus to terminus, subject to a right to deviate if the direct course be impassable (*q*).

Presumption where ditch exists.

98. Where the fence bordering a highway has on the roadway side of it a ditch, such as is usually made by an owner on the margin of his property (*r*), there is probably a presumption that the ditch itself does not form part of the highway (*s*); *a fortiori* when the road has been awarded to be of a certain width and is in fact of that width exclusive of the ditches (*t*); but such a ditch may be piped in and the site subsequently dedicated (*a*). There is no rule of law which prevents a ditch, or land in a condition at present impracticable for traffic, being dedicated as part of a highway; and therefore where a wide drain, proved to be necessary for the existence of the road, runs between a metalled road and the fence, a jury may properly find that the site of the drain has in fact been dedicated as part of the highway (*b*).

User of uninclosed open space.

99. The fact that the public have been allowed to wander at will over a large open space surrounded by highways in a town is not sufficient to establish a dedication of it as a highway (*c*); and a space in front of an inn, not separated from the highway except by a channel, and used as a "draw-up" for carts, may be private property not subject to any public rights (*d*). On the other hand, a piece of waste ground at the side of an approach to a bridge, used for herding droves of cattle till the bridge is clear, may well be part of the highway (*e*).

Public footpath over private carriage way.

100. Where land adjoining a public footpath is devoted to private traffic the presumption ordinarily arises that the owner has dedicated the whole space which has in fact been used by traffic of every kind (*f*). But this presumption is rebuttable; for example, if a public footpath of no prescribed width runs along an occupation cart road of irregular shape and varying width, the fact that at one spot the public are restricted to a hand gate, the private cart gate

(*q*) See *Elwood* v. *Bullock* (1844), 6 Q. B. 383, 409; and p. 39, *ante*, and pp. 91, 92, *post*.

(*r*) *Doe* d. *Pring* v. *Pearsey* (1827), 7 B. & C. 304, 307.

(*s*) *Field* v. *Thorne* (1869), 20 L. T. 563; *Chippendale* v. *Pontefract Rural District Council* (1907), 71 J. P. 231.

(*t*) *Simcox* v. *Yardley Rural District Council* (1905), 69 J. P. 66.

(*a*) *Walmsley* v. *Featherstone Urban District Council* (1909), 73 J. P. 222.

(*b*) *Chorley Corporation* v. *Nightingale*, [1907] 2 K. B. 637, C. A. For a case of a ditch made by turnpike trustees, see *Searby* v. *Tottenham Rail. Co.* (1868), L. R. 5 Eq. 409, questioned in *Pilling* v. *Lancashire and Yorkshire Rail. Co.* (1879), 13 Ch. D. 271, n., C. A. See also title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 107 *et seq.*

(*c*) *Robinson* v. *Cowpen Local Board* (1893), 63 L. J. (Q. B.) 235, C. A.; see also *Maddock* v. *Wallasey Local Board* (1886), 55 L. J. (Q. B.) 267, and cases cited in note (*h*), p. 39, *ante*.

(*d*) *Hoare & Co., Ltd.* v. *Lewisham Metropolitan Borough* (1901), 17 T. L. R. 774; affirmed (1902), 18 T. L. R. 816, C. A.; see also p. 40, *ante*.

(*e*) *St. Ives Corporation* v. *Wadsworth* (1908), 72 J. P. 73.

(*f*) *A.-G.* v. *Esher Linoleum Co., Ltd.*, [1901] 2 Ch. 647; *Grand Surrey Canal Co.* v. *Hall* (1840), 1 Man. & G. 392.

being kept locked, may show that the whole width of the road between the fences has not been dedicated to foot passengers (*g*).

SECT. 1. Extent of Space subject to Public Right of Passage.

101. Where a highway has been set out, *e.g.*, by Inclosure Commissioners, of a prescribed width, the right of the public to use the whole width continues, although for many years only a narrow track has been in fact used (*h*). If a road is set out of a greater width than the Commissioners prescribe, the public may by user establish a right over the whole space, and the general presumption as to land lying between highway fences appears to apply (*i*). Again, if a road is set out of a specified width as a private cart road, and also as a public footpath and bridleway, the public may walk or ride over the whole space, and cannot be restricted to a hand gate or a defined path, although the width of the road was presumably determined with reference to the requirements of the private carts (*k*).

Statutory highways.

SECT. 2.—*Statutory Provisions as to Width of the Via Trita.*

102. Where the space dedicated to the public is sufficiently wide (*l*), it is the duty of the highway authority to make, support, and maintain every public cartway leading to a market town 20 feet wide at least, and every public horseway 8 feet wide at least, and also to support and maintain every public footway by the side of any carriage way or cartway 3 feet wide at least (*m*). This provision, however, does not require the authority to make or form any public footway, unless they think fit (*n*).

Width of *via trita*.

Part VI.—Stopping up or Diversion of Highways.

SECT. 1.—*Common Law.*

103. The common law rule is "once a highway always a highway." The public cannot release rights once acquired by

"Once a highway always a highway."

(*g*) *Ford* v. *Harrow Urban District Council* (1903), 67 J. P. 248. There was evidence of acts of ownership, but foot passengers had been permitted to use the grass margins of the metalled cart road.

(*h*) *Turner* v. *Ringwood Highway Board* (1870), L. R. 9 Eq. 418.

(*i*) *R.* v. *Wright* (1832), 3 B. & Ad. 681; *Harris* v. *Northamptonshire County Council* (1897), 61 J. P. 599. In the former case the road in question was set out as a private road, but the *via trita* was used by the public and repaired by the parish. See also pp. 44, 48, *ante*.

(*k*) *Pullin* v. *Deffell* (1891), 64 L. T. 134; compare *Ford* v. *Harrow Urban District Council*, *supra*; and see pp. 11, 44, *ante*.

(*l*) The authority cannot under this provision interfere with land which has not been dedicated; see *Lowen* v. *Kaye* (1825), 4 B. & C. 3; *Alston* v. *Scales* (1832), 2 Moo. & S. 5. If the dedicated space is insufficient, they can only proceed under the powers indicated later; see p. 104, *post*.

(*m*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 80.

(*n*) *Ibid.*; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 144; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 80.

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them, no authority can bind them in purporting to release such rights, and there is no extinctive presumption or prescription arising from non-exercise thereof (*o*).

Exceptions.

Writ of *ad quod damnum*.

There are certain qualifications of this rule: (1) The stopping or diverting of a highway by writ of *ad quod damnum*. This was an original writ issuing out of Chancery to a sheriff directing him to summon a jury to inquire whether the proposed step would be detrimental to the public; if the jury found in the negative, the Crown might grant a licence authorising the stopping up or diversion (*p*). This procedure has now fallen into desuetude, and has been superseded by the statutory procedure under the Highway Acts (*q*).

Physical destruction.

(2) A highway may be extinguished by natural causes, such as inroads of the sea or landslips. If the sea permanently covers the site of the way, the right of passage and the liability to repair are extinguished (*r*), and there is no authority for any right to deviate on to the nearest land; but, possibly, in other cases, though the liability to repair is extinguished, the right of passage may remain so far as it is still possible to exercise it, *e.g.*, for foot-passengers (*s*).

Loss of access.

(3) A length of highway, though not itself expressly diverted or stopped up, will be extinguished if public access to it at both ends is cut off by the destruction, or lawful stopping up, of the only highways leading into it (*t*).

Dedication *sub modo*.

(4) It would seem that in some circumstances there may be a dedication of a highway subject to a right to divert it at a future date (*a*).

Revesting of site in owner.

104. If a highway be lawfully extinguished the site revests in the owner free from all rights of the public (*b*).

(*o*) *Dawes* v. *Hawkins* (1860), 8 C. B. (N. S.) 848; *Turner* v. *Ringwood Highway Board* (1870), L. R. 9 Eq. 418; *Gerring* v. *Barfield* (1864), 11 L. T. 270, *per* BYLES, J.; *R.* v. *Train* (1862), 2 B. & S. 640; *R.* v. *United Kingdom Electric Telegraph Co.* (1862), 31 L. J. (M. C.) 166; *R.* v. *Platts* (1880), 49 L. J. (Q. B.) 848; *St. Ives Corporation* v. *Wadsworth* (1908), 72 J. P. 73. No length of time can legalise a public nuisance; see p. 152, *post*. But the long-continued existence of what would be an obstruction tends to show that there never was a highway there.

(*p*) The verdict of a jury was insufficient unless followed by a licence (*R.* v. *Warde and Lyme* (1632), Cro. Car. 266). On the subject of such writs, see *Ex parte Vennor* (1754), 3 Atk. 766; *R.* v. *Russell* (1827), 6 B. & C. 566; *Esher and Ditton Urban District Council* v. *Marks* (1902), 86 L. T. 222.

(*q*) See p. 71, *post*. As to the meaning of "Highway Acts," see p. 24, *ante*.

(*r*) As to when natural causes extinguish liability to repair, see p. 98, *post*.

(*s*) Compare *R.* v. *Greenhow* (*Inhabitants*) (1876), 1 Q. B. D. 703, with other cases cited in note (*i*), p. 98, *post*.

(*t*) *Bailey* v. *Jamieson* (1876), 1 C. P. D. 329.

(*a*) See *Arnott* v. *Whitby Urban District Council* (1909), 73 J. P. 369. It is understood that in some stone quarrying districts the practice is recognised of periodically diverting paths as fresh quarries are opened and old ones levelled down and made passable. Such a practice might possibly be justified on the theory of a conditional dedication.

(*b*) See p. 78, *post*.

SECT. 2.—*Statutory Provisions.*

SECT. 2. Statutory Provisions.

SUB-SECT. 1.—*In General.*

By statute.

105. A statute may authorise the stopping up or diversion (*c*) of a highway, either expressly (*d*), or by necessary implication, for instance, if it authorises works inconsistent with the continued existence of the public right of way (*e*).

SUB-SECT. 2.—*Under the Highway Acts.*

(i.) *In General.*

Highway Acts.

106. The most important provisions for the diversion or stopping up of highways are contained in the Highway Acts, 1835 and 1862 (*f*), under which, as varied by the Local Government Acts, 1888 and 1894 (*g*), the great majority of diversions, whether temporary (*h*) or permanent, and stoppings up are now carried out.

Application.

They apply to all highways, whether main roads or ordinary highways, by whomsoever repairable (*i*), except highways which a railway company, or the owners or conservators of a canal or river, are liable by statute to make, maintain, repair, or cleanse (*k*).

(ii.) *Stopping up and Permanent Diversion* (*l*).

(a) *Ordinary Highways* (*m*).

Ordinary highways.

107. By an order of quarter sessions made upon a certificate of two justices who have viewed the *locus in quo*, and upon the consents

(*c*) A diversion is a stopping up of an existing highway plus the substitution of a new highway.

(*d*) Any conditions imposed, *e.g.*, as to making substituted roads, must be complied with (*R.* v. *Scott* (1842), 3 Q. B. 543, and cases there cited).

(*e*) *Yarmouth Corporation* v. *Simmons* (1878), 10 Ch. D. 518, where the deposited plans for a Pier Provisional Order showed that the extinction of a highway must have been contemplated; compare *Melksham Urban District Council* v. *Gay* (1902), 18 T. L. R. 358; *Fortescue* v. *St. Matthew, Bethnal Green Vestry*, [1891] 2 Q. B. 170. The construction of a railway across a highway is not necessarily inconsistent with the continuance of the public right (*Cole* v. *Miles* (1888), 57 L. J. (M. C.) 132 (a footpath); compare *Holloway* v. *Egham Urban District Council* (1908), 72 J. P. 433). There are several public general statutes under which highways in general or highways of a certain class may be stopped up or diverted; see pp. 71—82, *post*. There are also two ancient statutes applicable only to highways in the Weald of Kent and the county of Sussex, *i.e.*, stat. (1523) 14 & 15 Hen. 8, c. 6, and stat. (1534) 26 Hen. 8, c. 7, under which foundrous highways might be diverted upon the certificate of two justices and twelve discreet men of the hundred. These statutes were both repealed by stat. (1767) 7 Geo. 3, c. 42, s. 57, but revived by stat. (1768) 8 Geo. 3, c. 5, s. 3.

(*f*) 5 & 6 Will. 4, c. 50, ss. 25, 84, 93, 113; 25 & 26 Vict. c. 61, s. 44.

(*g*) 51 & 52 Vict. c. 41, s. 11; 56 & 57 Vict. c. 73, ss. 13, 25.

(*h*) Temporary diversions may be made while a highway is being repaired or widened; see p. 80, *post*.

(*i*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 93.

(*k*) Highway Act, 1862 (25 & 26 Vict. c. 61), s. 44, extending the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 113; therefore the difficulty disclosed in *Wright* v. *Frant Overseers* (1863), 4 B. & S. 118, no longer exists.

(*l*) *I.e.*, the substitution of a new way for an existing one; see note (*c*), *supra*. Strictly speaking, a straightening of a road by a "give and take" arrangement is a diversion and can only be carried out under these provisions. But, if only small pieces of land are concerned, a jury would probably find that there was no substantial obstruction caused by an owner who carried out an informal arrangement of this kind; see *R.* v. *Bartholomew*, [1908] 1 K. B. 554, C. C. R., and p. 152, *post*. For a form of agreement, see Encyclopædia of Forms and Precedents, Vol. VI., p. 379.

(*m*) As to special considerations applicable to main roads, see p. 79, *post*.

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Grounds for diverting or stopping up.

of certain local authorities, a highway may be stopped up, diverted, or turned, either entirely or with the reservation of a bridleway or footway (*n*). A proposal to stop up a highway either entirely or partially can only be sanctioned upon proof that the right to be extinguished is "unnecessary"; and a proposal to divert a highway can only be sanctioned upon proof that the proposed new highway will be either "nearer" or (*o*) "more commodious to the public" than the old one. In considering whether a proposed new way is "nearer" than the old one, the measurements must not be taken between any two of several towns or villages ultimately connected by the old and new roads (*p*), the question being whether the distance from one terminus of the length to be stopped to the other terminus will be less by the new than by the old road (*q*). It is not necessary that a proposed "new" road should be actually new, or that its termini should be identical with those of the part to be stopped up, it being sufficient if an existing way be widened or improved so as to make it more commodious than the one to be stopped up (*r*), or if the new road gives access to highways along which the public may reach the termini of the portion of old road to be stopped up (*s*). But the public must have the same permanent and indefeasible right of way over the new road as they had over the old one (*t*).

Where several highways are so connected that one cannot be diverted or stopped up without interfering with the others, they may be included in one certificate and order (*a*).

Procedure. Proposed by individual.

108. If an individual (*b*) desires to stop up or divert an ordinary highway he must give written notice to the council of the borough or urban or rural district (*c*), in which any part of the portion of

(*n*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 84. *Semble*, an order cannot be made for stopping half the width of a road unless its character is altered, *e.g.*, from cartway to footway (*R.* v. *Milverton* (*Inhabitants*) (1836), 5 Ad. & El. 841).

(*o*) Not "and" (see Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 85, and *R.* v. *Phillips* (1866), L. R. 1 Q. B. 648, following *Wright* v. *Frant Overseers* (1863), 4 B. & S. 118, and dissenting on this point from *R.* v. *Shiles* (1841), 1 Q. B. 919). A new way may be deemed more commodious if it is wider, straighter, or better made than the old one, drier, less liable to floods, freer from gates or stiles, inclosed by fences and not liable to be periodically ploughed up etc. In judging of the relative convenience of the two roads, regard must not be paid to possible future events which may never happen, *e.g.*, the anticipated construction of a reservoir which would interfere with the old road (*R.* v. *Midgley Local Board* (1864), 5 B. & S. 621).

(*p*) For, though nearer as between A. and B., it might be farther as between A. and C.

(*q*) *R.* v. *Shiles*, *supra*.

(*r*) *R.* v. *Phillips*, *supra*, not following *Welch* v. *Nash* (1807), 8 East, 394.

(*s*) *De Ponthieu* v. *Pennyfeather* (1814), 5 Taunt. 634.

(*t*) *R.* v. *Winter* (1828), 8 B. & C. 785.

(*a*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 86.

(*b*) Or body corporate, not being the highway authority of the district, or the parish council of any rural parish, within which the highway lies.

(*c*) As successors in highway matters of the surveyor and also of the inhabitants of a parish in vestry assembled (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 144; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25).

highway to be affected lies; and if the council refuses its assent, the matter can go no farther. If, however, it passes a resolution consenting to the proposal (*d*), the next step (*e*) in a borough or other urban district is to request two justices (*f*) to view the highway. Where any portion of highway affected lies in a rural parish or parishes, it is also necessary to obtain the consent of every parish council concerned (*g*); and when a parish council has passed a resolution of approval, it must give public notice thereof, the resolution being inoperative if it is not confirmed at a subsequent meeting held not less than two months after the giving of the notice, or if before such confirmation a parish meeting resolves that consent ought not to be given (*g*). In a rural parish not having a parish council the same provisions apply, with the substitution of the parish meeting for the parish council (*h*). A council cannot apparently make its consent conditional (*i*).

Consent of public bodies.

109. If the proposal be for diversion, the written (*k*) consent of the owner (*l*) or owners of the land through which the new highway is to run is also necessary. Such consent must be obtained before the justices view the highway, and may be given under a power of attorney (*m*), but not by an agent or solicitor (*n*). Should an

Consent of owners.

For a form of such notice, see Encyclopædia of Forms and Precedents, Vol. VI., p. 370.

(*d*) For a form of resolution, see Encyclopædia of Forms and Precedents, Vol. VI., p. 371.

(*e*) In some districts, as soon as the highway authority has approved the proposal, its clerk or surveyor assumes the conduct of the whole proceedings, applies for any consents necessary, and requests two justices to view and certify etc., but in others the author of the proposal takes the necessary steps in the name of the council's surveyor. In both cases the applicant is responsible for the expenses, which, if incurred on his behalf by the authority, are recoverable as forfeitures under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 84, 103; but if the council's officer acts in the matter, he is not entitled (apart from any agreement) to employ a solicitor at the applicant's expense (*United Land Co.* v. *Tottenham Local Board* (1884), 13 Q. B. D. 640).

(*f*) If a highway extends into two petty sessional divisions, concurrent orders must apparently be made by the justices of each; see *R.* v. *Milverton* (*Inhabitants*) (1836), 5 Ad. & El. 841.

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 13. Refusal of consent is fatal to the proposal. As to the giving of notices, see *ibid.*, s. 51. For forms of the necessary resolutions and notices, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 372—374.

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (8).

(*i*) *A.-G.* v. *Biphosphated Guano Co.* (1879), 11 Ch. D. 327, C. A.

(*k*) For a form, see Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 118, Schedule, Form 18, and p. 170, *post*. It need not be under seal. As to a grant of a faculty for dedication of part of a churchyard or burial ground as a highway, see titles BURIAL AND CREMATION, Vol. III., p. 423; ECCLESIASTICAL LAW, Vol. XI., pp. 540, 541.

(*l*) *Quære* whether the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 49, as to renunciation of damages by limited owners (see p. 80, *post*), will allow a limited owner to give a valid consent. For a form of consent and subsequent agreement, see Encyclopædia of Forms and Precedents, Vol. VI., p. 375.

(*m*) Provided the power of attorney be enrolled with the consent (*R.* v. *Kent Justices* (1823), 1 B. & C. 622; *R.* v. *Crewe* (1823), 3 Dow. & Ry. (K. B.) 6).

(*n*) *R.* v. *Kent Justices, supra*; *R.* v. *Crewe, supra*.

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owner die or sell his land after the view, the consent of his successor should be obtained, and the two consents will probably enable a valid order to be made (*o*).

View by justices.

When the necessary consents have been obtained (*p*) two justices having jurisdiction over the *locus in quo* (*q*) must be asked to view the highway affected (*r*). They must view it together (*s*), and if upon such view it appears to them that the part to be stopped up is unnecessary, or that the new road is nearer or more commodious, they must direct the authority's surveyor (*t*) to affix and publish the requisite notices (*a*), which must describe the highway in question and the proposed new road (if any) in such detail as to be intelligible without reference to any plan (*b*), and to convey to a reader the nature of the proposed alterations (*c*). Copies must be affixed (*d*) by the side of the highway at each end of the portion to be dealt with by the justices' certificate (*e*); and also on the door of the church (*f*) of every parish in which any part of the affected

Notices.

(*o*) *R.* v. *Kirk* (1822), 1 B. & C. 21; S. C. *sub nom. R.* v. *Denbighshire Justices* (1822), 2 Dow. & Ry. (K. B.) 52; *R.* v. *Surrey Justices* (1872), 26 L. T. 22.

(*p*) It is uncertain whether the resolutions of a parish council or meeting need be passed before the view. The Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 13, appears to be satisfied if they are both passed before the order is made by sessions; but see the decision of sessions in *R.* v. *Surrey Justices, Ex parte Locke-King* (1907), 24 T. L. R. 185. It is safer to obtain the confirming resolution before the view, and it must be remembered that all proceedings to divert or stop up a highway will be scrutinised most carefully by a court of law (see *R.* v. *Jones* (1840), 12 Ad. & El. 684, *per* COLERIDGE, J., at p. 686).

(*q*) See *R.* v. *Gloucestershire Justices* (1836), 4 Ad. & El. 689.

(*r*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 84. As the applicant is the person concerned in seeing that the documents are all in order, he generally prepares them. Presumably, the justices are entitled to have the services of their clerk to advise them if they think necessary; but apparently he cannot charge the applicant with any fee; see *ibid.*, s. 110. For a form of request, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 292.

(*s*) *R.* v. *Cambridgeshire Justices* (1835), 4 Ad. & El. 111.

(*t*) Or person authorised by the council to act for it in the matter (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 144).

(*a*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 85. A form of notice is given in *ibid.*, Schedule, Form 19, and Encyclopædia of Forms and Precedents, Vol. VI., p. 378; and see p. 170, *post*.

(*b*) At any rate, unless such plan be annexed to the notice (*R.* v. *Horner* (1831), 2 B. & Ad. 150).

(*c*) See *R.* v. *Surrey Justices* (1870), L. R. 5 Q. B. 466, 471.

(*d*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 85. "Affixed," not "affixed and maintained," see *R.* v. *Kent Justices*, [1905] 1 K. B. 378, C. A.; nevertheless the copy should be replaced if known to be destroyed, see note (*f*), *infra*.

(*e*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 85, as construed in *R.* v. *Surrey Justices*, [1892] 1 Q. B. 867, C. A., *per* FRY, L.J., at p. 870. If three roads in the shape of a letter Y are dealt with in different certificates, the point of intersection is an "end" (*R.* v. *Surrey Justices* (1870), L. R. 5 Q. B. 466).

(*f*) The word "church" includes a chapel of the Church of England (Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 5; *Ormerod* v. *Chadwick* (1847), 16 M. & W. 367). "On" the door, not "on or near"; *quære*, therefore, whether if a notice board be provided at the church door, publication thereon will suffice, as in *Empson* v. *Metropolitan Board of Works* (1861), 3 L. T. 624. If several ecclesiastical parishes are united in one civil parish, so that there is no

length (*g*) of highway lies, on four successive Sundays next after the view; and the notice must be inserted in a local newspaper for four successive weeks after the view (*h*). If the justices decline to approve the proposal, two other justices may, if they see fit, grant a certificate (*i*).

Justices' certificate.

110. As soon as the notices have been affixed and published, which may be less than four weeks after the view (*k*), the same two justices may proceed to certify. Before doing so they must require (*l*) proof of the publication of the notices, and a plan, verified by a competent surveyor, describing the old and new ways by metes, bounds, and admeasurements (*m*). The usual practice is to take in the form of depositions evidence as to the plan, the publication and advertisements, the passing of the resolutions, and the owner's consent. The justices then certify under their hands that they have viewed the highway, and that the new way is nearer or more commodious than the old one; if nearer, the number of yards or feet by which it is nearer, and if more commodious, the reasons why it is so; or, as the case may be, that the highway to be stopped up is unnecessary, stating the reasons (*n*). The certificate should recite (*o*) the request to view, and that the justices viewed "together" (*p*); and it must show unequivocally (*q*) that they formed their conclusion from their joint view, and that

parish church of the civil parish, *semble*, the notice should be affixed on some public building, *e.g.*, the town hall, and also on the door of the church of the ecclesiastical parish (see *R.* v. *Wolferstan*, [1893] 2 Q. B. 451). As to the time for affixing the notice, see *Burnley* v. *Methley Overseers* (1859), 1 E. & E. 789; and as to replacing it if destroyed, see *R.* v. *Hayhurst, Ex parte Machin* (1897), 61 J. P. 88.

(*g*) *R.* v. *Surrey Justices*, [1892] 1 Q. B. 867, C. A.

(*h*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 85. An insertion in one weekly local paper in each of the four weeks is sufficient (*R.* v. *Kent Justices*, [1905] 1 K. B. 378, C. A.).

(*i*) *R.* v. *Kent Justices*, [1904] 2 K. B. 349, reversed on another point, [1905] 1 K. B. 378, C. A.

(*k*) *R.* v. *Kent Justices*, [1905] 1 K. B. 378, C. A.

(*l*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 85.

(*m*) The course of the new road must be defined, and not left to the discretion of the surveyor (*R.* v. *Newmarket Rail. Co.* (1850), 15 Q. B. 702). The plan must give measurements, and not merely a scale from which they can be ascertained (*R.* v. *Surrey Justices*, [1908] 1 K. B. 374; compare *Davison* v. *Gill* (1800), 1 East, 64).

(*n*) In cases of diversion it is not necessary after certifying that the new road will be more commodious to go on to say that the old road will be unnecessary and may be stopped up (*R.* v. *Wallace* (1879), 4 Q. B. D. 641; *R.* v. *Phillips* (1866), L. R. 1 Q. B. 648).

(*o*) As to its contents, see *R.* v. *Harvey* (1874), L. R. 10 Q. B. 46, not following *R.* v. *Worcestershire Justices* (1854), 3 E. & B. 477, 485, *per* COLERIDGE, J.

(*p*) *R.* v. *Cambridgeshire Justices* (1835), 4 Ad. & El. 111.

(*q*) *R.* v. *Downshire* (*Marquis*) (1836), 4 Ad. & El. 698; *R.* v. *Milverton* (*Inhabitants*) (1836), 5 Ad. & El. 841; *R.* v. *Jones* (1840), 12 Ad. & El. 684; *R.* v. *Worcestershire Justices* (1828), 8 B. & C. 254; *R.* v. *Cambridgeshire Justices*, *supra*; *R.* v. *Kent Justices* (1830), 10 B. & C. 477; *R.* v. *Middlesex Justices* (1836), 5 Ad. & El. 626; *R.* v. *Wallace* (1879), 4 Q. B. D. 641. If it does this it will not be vitiated by the fact that it shows that they also made inquiries from third persons (*R.* v. *Kent Justices*, [1904] 2 K. B. 349.

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they have before them the necessary proofs (*r*) and plan. It need not recite the applications to, and resolutions of, the various councils, or the consent of the landowners (*s*); but in practice such recitals are generally included.

Lodgment of certificate.

The certificate, proofs and plan, and the various consents, must then be lodged with the clerk of the peace (*t*).

Enrolment of certificate.

111. At the quarter sessions (*a*) held next after the expiration of four weeks from the day of lodgment, a motion must be made in court for the enrolment of the certificate and other documents, and for the desired order (*b*), and the certificate should be read by the clerk of the peace, and the justices' signatures to it formally proved. If no notice of appeal against the certificate has been given, the justices should satisfy themselves that everything is in order (*c*), and, if so, they must (*d*) make an order for the diversion or stopping up and for the enrolment (*e*) of the documents. The certificate is inoperative until enrolled at quarter sessions (*f*). Before enrolment any person is entitled to inspect the certificate and plan, and to have a copy thereof on payment (*g*).

Second certificate in cases of diversion.

112. If the order is for diversion, the old road must not be stopped up until the new one has been viewed by two justices and certified to have been completed and put into good condition. This certificate also must be lodged with the clerk of the peace, and a motion made at the next quarter sessions for its enrolment (*h*).

Appeal.

113. Any person who thinks that he will be aggrieved (*i*) or injured by the proposed diversion or stopping up, and perhaps also the district council of an adjoining district (*j*), may appeal to

(*r*) *I.e.*, proof of the publication of the notices (*R.* v. *Surrey Justices* (1870), L. R. 5 Q. B. 466; *R.* v. *Harvey* (1874), L. R. 10 Q. B. 46).

(*s*) *R.* v. *Kent Justices*, [1904] 2 K. B. 349; *R.* v. *Surrey Justices* (1872), 26 L. T. 22; *R.* v. *Harvey*, *supra*; *R.* v. *Maule* (1871), 41 L. J. (M. C.) 47.

(*t*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 85.

(*a*) As to what quarter sessions, see note (*n*), p. 77, *post*. As to courts of quarter sessions generally, see title MAGISTRATES.

(*b*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 85.

(*c*) *R.* v. *Worcestershire Justices* (1818), 2 B. & Ald. 228; *R.* v. *Harvey*, *supra*; *R.* v. *Worcestershire Justices* (1854), 3 E. & B. 477; *R.* v. *Surrey Justices*, [1908] 1 K. B. 374; *R.* v. *Middlesex Justices* (1900), Pratt and Mackenzie, Law of Highways, 15th ed., p. 284.

(*d*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 91. But they are the judges whether the documents are in order, and the High Court will not interfere with their decision (*R.* v. *Surrey Justices*, [1908] 1 K. B. 374).

(*e*) "Filing" will be sufficient without actual "enrolment"; see *De Ponthieu* v. *Pennyfeather* (1814), 5 Taunt. 634.

(*f*) *R.* v. *Surrey Justices* (1869), L. R. 5 Q. B. 87, *per* HANNEN, J., at p. 92.

(*g*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 85.

(*h*) *Ibid.*, s. 91. It is sufficient for them to recite that they have viewed the road and found it completed and in good repair (*De Ponthieu* v. *Pennyfeather*, *supra*). In making the new road there must be no deviation from the course sanctioned by sessions (*R.* v. *Newmarket Rail. Co.* (1850), 15 Q. B. 702). For a form of the certificate, see Encyclopædia of Forms and Precedents, Vol. XI., p. 114.

(*i*) As to what is a sufficient grievance, see cases cited in note (*q*), p. 77, *post*.

(*j*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26 (1), (3).

quarter sessions against the certificate (*k*); and, if it deals with more than one highway, may appeal against part of it (*l*).

Procedure on appeal.

Notice of appeal must be served on the council's surveyor fourteen (*m*) clear days before the sessions (*n*) at which the motion for enrolment is to be made; and, unless the proposal originated with the council, the surveyor must within forty-eight hours deliver a copy of the notice to the original applicant (*o*). The appellant must also serve a statement of his grounds of appeal (*p*), expressly stating that he is aggrieved by the certificate, or setting out facts necessarily showing that he is so aggrieved. He must have some special grievance of his own, greater than the common grievance of other members of the public (*q*).

Functions of courts.

So far as the objections are points of law, the justices must decide them (*r*), their decision being final unless they consent to state a case, or unless there is a defect of jurisdiction forming ground for a writ of *certiorari* (*s*). They may amend a defective certificate if satisfied that all requirements were in fact complied with, and their decision to amend or not is final (*t*).

Functions of jury.

If the certificate is good, or is amended, a jury (*u*) must try the following issues of fact:—(1) Whether the new way will be nearer or more commodious to the public, or whether the highway proposed to be stopped up is unnecessary; and (2) whether the appellant will be injured or aggrieved (*a*). The appeal will be

(*k*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 88. *I.e.*, to the sessions at which the certificate is to be enrolled. As to procedure at quarter sessions generally, see title MAGISTRATES.

(*l*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 87, which should be read as applicable to stopping up as well as diversion (*R.* v. *Midgley Local Board* (1864), 5 B. & S. 621).

(*m*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 1; *R.* v. *Maule* (1871), 41 L. J. (M. C.) 47.

(*n*) This means the original quarter sessions for the whole county (or riding), and not any adjournment thereof for the district in which the highway lies (*R.* v. *Lancashire Justices* (1857), 8 E. & B. 563; *Swift* v. *Lancashire Justices* (1873), 22 W. R. 76; *R.* v. *Suffolk Justices* (1848), 17 L. J. (M. C.) 143; *R.* v. *Kent Justices*, [1904] 2 K. B. 349).

(*o*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 88. For a form, see Encyclopædia of Forms and Precedents, Vol. XI., p. 106.

(*p*) Highway Act, 1835 (5 & 6 Will. 4, c. 50). No recognisance is necessary.

(*q*) *R.* v. *Essex Justices* (1826), 5 B. & C. 431; *R.* v. *Williamson* (1796), 7 Term Rep. 32; *R.* v. *Somersetshire Justices* (1828), 7 B. & C. 681, n.; *R.* v. *West Riding of Yorkshire Justices* (1833), 4 B. & Ad. 685; *R.* v. *Taunton St. Mary (Inhabitants)* (1815), 3 M. & S. 465; *R.* v. *West Riding of Yorkshire Justices* (1828), 7 B. & C. 678; *R.* v. *West Riding of Yorkshire Justices* (1833), 1 Nev. & M. (K. B.) 426; *R.* v. *Adey* (1835), 4 Nev. & M. (K. B.) 365. To reside in the immediate neighbourhood is sufficient (*R.* v. *Surrey Justices* (1870), L. R. 5 Q. B. 466; *R.* v. *Yeadon* (1883), 47 J. P. 260). But the court of quarter sessions may amend the grounds or notice of appeal (Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 3), and no appeal lies from their decision to do so or not (*ibid.*, s. 9).

(*r*) *R.* v. *Worcestershire Justices* (1854), 3 E. & B. 477.

(*s*) *R.* v. *Worcestershire Justices, supra*; *R.* v. *Harvey* (1874), L. R. 10 Q. B. 46; *R.* v. *Surrey Justices, supra*; *R.* v. *Kent Justices, supra*. As to writs of *certiorari*, see title CROWN PRACTICE, Vol. X., pp. 155 *et seq.*

(*t*) Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 9; *R.* v. *Harvey, supra*.

(*u*) As to the jury, see Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 89. As to juries generally, see title JURIES.

(*a*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 89.

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allowed, and the certificate quashed, if the jury answers the first question in the negative, or the second in the affirmative (*b*), or if the court decides against the validity of the certificate; otherwise the appeal will be dismissed, the certificate and other documents enrolled, and the order made (*c*). The successful party is entitled to costs, even though the other party does not appear (*d*).

The court may state a special case on points of law, including the question whether the chairman properly summed up the evidence to the jury (*e*).

Effect of an order for diversion.

114. When a highway is lawfully stopped up or diverted under an order of quarter sessions or Act of Parliament, the owner of the soil owns it freed from the public right of passage (*f*), but not, apparently, from any private right of way that may have co-existed with the public right (*g*). Even if the surface has been vested by statute in a highway authority, it revests in the owner of the subsoil (*h*).

Duty to fence at point of diversion.

115. A person who diverts a highway under statutory authority must protect, by fencing or otherwise, reasonably careful persons from going astray and incurring danger at the point of diversion (*i*).

Status of substituted way.

116. A way thus substituted for an old highway becomes at once a public highway (*k*). In regard to repair it follows the status

(*b*) See *Walker* v. *York Corporation*, [1906] 1 K. B. 724.

(*c*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 91. Where the certificate deals with more than one road, the appeal may be successful in part only, and part of the certificate may be quashed; see *R.* v. *Midgley Local Board* (1864), 5 B. & S. 621. As to the documents to be enrolled, see p. 76, *ante*.

(*d*) *R.* v. *Finchley* (*Surveyors*), *Ex parte Pouncey* (1854), 2 C. L. R. 1593; *R.* v. *West Riding of Yorkshire Justices* (1862), 2 B. & S. 811; but the order for costs cannot be made out of sessions (*Lock* v. *Sellwood* (1841), 1 Q. B. 736). As to orders for costs, see Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 90; they will be recoverable summarily (*ibid.*, s. 103; *Sellwood* v. *Mount* (1841), 1 Q. B. 726), or under the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45). Except by agreement, the costs can only be taxed before the close of sessions; see *Midland Rail. Co.* v. *Edmonton Union*, [1895] A. C. 485; *R.* v. *Cumberland Justices* (1904), 68 J. P. 153. As to costs at quarter sessions generally, see title MAGISTRATES.

(*e*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 108; *R.* v. *Shiles* (1841), 1 Q. B. 919.

(*f*) *Re Great Eastern Rail. Co. and London County Council* (1908), 72 J. P. 1, C. A.; *Melksham Urban District Council* v. *Gay* (1902), 18 T. L. R. 358. As to what kind of user will operate as a stopping up by him and disprove any intention to re-dedicate, see the former case. The liability to repair ceases even if it is not actually stopped up (*R.* v. *Milverton* (*Inhabitants*) (1836), 5 Ad. & El. 841).

(*g*) *Wells* v. *London, Tilbury and Southend Rail. Co.* (1877), 5 Ch. D. 126, C. A.; *R.* v. *Ifield* (*Inhabitants*) (1856), 20 J. P. 262.

(*h*) *Rolls* v. *St. George the Martyr, Southwark, Vestry* (1880), 14 Ch. D. 785, C. A.

(*i*) *Hurst* v. *Taylor* (1885), 14 Q. B. D. 918; compare *Evans* v. *Rhymney Local Board* (1887), 4 T. L. R. 72; and see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 129.

(*k*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 91. As to the liability to repair when a substituted road is made wider than is provided for by the certificate, see *R.* v. *Crompton Urban District Council* (1902), 86 L. T. 762. If an old footway, repairable by the inhabitants at large, is diverted so as to "run along" a new road consisting of both roadway and footpaths, it is a question

of the old way, and the liability rests upon the same persons, even though it lies in another parish or district (*l*). But if it is repairable by individuals, proceedings must be taken subsequently to transfer the liability to the inhabitants at large (*m*).

Finality of order.

117. Proceedings under a diversion order are expressly declared to be binding and conclusive on all persons whomsoever (*n*). Nevertheless an order, if made without jurisdiction, may be quashed on a writ of *certiorari* (*o*); and it would seem that its validity might also be challenged in an action of trespass (*p*).

Presumption of lost order or writ.

118. Although no diversion order can be found amongst the Records of Sessions, the due making of such an order in the past (*q*) or a lawful stoppage by means of a writ of *ad quod damnum* (*r*) may be presumed by the court in a proper case.

Proposal by highway authority or parish council.

119. Where a highway authority itself initiates a proposal for the diversion or stopping up of a highway, it must pass a formal resolution and apply for the other consents necessary. A parish council originating such a proposal applies for the consent of the highway authority, and its own resolution requires confirmation (*s*). In other respects the procedure is the same as above.

(b) *Main Roads.*

Main roads.

120. In the case of main roads retained by an urban authority, the procedure for diversion or stopping up is the same as in the case of an ordinary highway (*a*).

In the case of other main roads, whether in an urban or a rural district, and apparently whether repaired directly or indirectly by the county council, that body exercises the powers of the vestry of any parish in which the main road lies so far as that road is concerned (*b*). The consent of the county council is

of fact whether the whole width of such new road is a substituted road, and therefore repairable by the inhabitants at large (*Kingston-on-Thames Corporation* v. *Baverstock* (1909), 73 J. P. 378).

(*l*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 92; compare *Esher and Ditton Urban District Council* v. *Marks* (1902), 86 L. T. 222 (a case of a road diverted under a writ of *ad quod damnum*). As to transfer of liability, see p. 96, *post*.

(*m*) See p. 97, *post*.

(*n*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 91.

(*o*) See p. 77, *ante*, and title CROWN PRACTICE, Vol. X., p. 160.

(*p*) *R.* v. *Cambridgeshire Justices* (1835), 4 Ad. & El. 111; *Davison* v. *Gill* (1800), 1 East, 64; *Welch* v. *Nash* (1807), 8 East, 394; *R.* v. *Phillips* (1866), L. R. 1 Q. B. 648.

(*q*) In accordance with the principle *omnia præsumuntur rite esse acta*; see *Williams* v. *Eyton* (1858), 2 H. & N. 771, affirmed (1859), 4 H. & N. 357, Ex. Ch.; *Leigh Urban Council* v. *King*, [1901] 1 K. B. 747; *Manning* v. *Eastern Counties Rail. Co.* (1843), 12 M. & W. 237.

(*r*) Compare *Esher and Ditton Urban Council* v. *Marks* (1902), 71 L. J. (K. B.) 309; *R.* v. *Montague* (1825), 4 B. & C. 598, where it was presumed that a channel once navigable had been lawfully stopped.

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 13.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (2).

(*b*) *Ibid.*, s. 11 (12). It would seem that a main road is still "maintained" by a county council though actually repaired by a district council as its agents.

SECT. 2. Statutory Provisions.

therefore necessary, and it is its duty to apply to two justices to view the road and grant a certificate. The consent of the boroughs or districts and rural parishes in which the length of highway affected lies is also necessary (*c*).

(iii.) *Temporary Diversion.*

Temporary diversion.

121. When any part of a highway is ruinous or narrow, and is to be repaired or widened, the highway authority (*d*) may make a temporary road through the adjoining lands, unless such lands are the site of a house, or a garden, lawn, yard, park, plantation, or avenue, or are inclosed ground set apart for building, or as a nursery for trees; and it must pay such compensation as may be fixed by justices (*e*). But the claim for compensation may be waived, even by persons (*f*) whose interest in the land is limited (*g*).

SUB-SECT. 3.—*Under the Defence of the Realm Acts.*

Defence of the Realm Acts.

122. The Secretary of State for War may, without adopting any legal proceeding, stop up or divert or alter the level of any highway over or adjoining lands taken by him or comprised in a declaration made and signed by him, but must, if necessary, substitute another good and sufficient way (*h*).

SUB-SECT. 4.—*Under the Military Lands Act.*

Military Lands Act.

123. Where a footpath crosses, or runs inconveniently or dangerously near to, any land leased under the Military Lands Act, 1892 (*i*), it may be diverted or stopped up. The procedure of the Highway Acts (*k*) is to be followed; but the justices' certificate is conclusive as to the fact that they have viewed the path and that the substituted path is convenient (*l*) for the public.

Where a highway crosses, or runs inconveniently or dangerously near to any land, the use of which may be regulated by bye-laws

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 13. The resolution of a parish council or meeting requires confirmation (*ibid.*).

(*d*) Including a county or county borough council in the case of main roads repaired by either; see p. 26, *ante*.

(*e*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 25. The compensation may be fixed either at special or petty sessions (see Highway Act, 1864 (27 & 28 Vict. c. 101), s. 46), and is recoverable in the manner provided by the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 103.

(*f*) See definition of "tenant for life" in the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (5).

(*g*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 49; as to its effects, see *Re Jones* (1884), 26 Ch. D. 736, 741, C. A.; *Re Clitheroe Estate* (1885), 31 Ch. D. 135, C. A.; *Re Morgan* (1883), 24 Ch. D. 114; *Re Atkinson, Atkinson* v. *Bruce* (1886), 31 Ch. D. 577, C. A.; *Re Hale and Clark* (1886), 34 W. R. 624; *Re Strangways, Hickley* v. *Strangways* (1887), 34 Ch. D. 423, C. A.

(*h*) Defence Act, 1842 (5 & 6 Vict. c. 94), s. 16; Defence Act, 1860 (23 & 24 Vict. c. 112), s. 40.

(*i*) 55 & 56 Vict. c. 43, s. 13; and see title ROYAL FORCES. The use of a rifle range which is dangerous to persons using a highway may be restrained by injunction (*Bannister* v. *Bigges* (1865), 29 J. P. 531).

(*k*) See pp. 71 *et seq.*, *ante*. As to the meaning of "Highway Acts," see p. 24, *ante*.

(*l*) It need not be equally or more convenient.

under the same Act (*m*), a bye-law may be made with the consent of the highway authority for its temporary diversion, or for the restriction of its use. Such highway, if a footway, may also be stopped up or diverted as if it were a footpath (*n*).

SUB-SECT. 5.—*Under the Military Manœuvres Act.*

Military Manœuvres Act.

124. When an order in council has authorised the execution of military manœuvres (*o*), two justices, not being military officers in command of the forces, may, on the application of an officer in command of the forces or of part thereof, by order, suspend, for not exceeding forty-eight hours, any right of way over any road or footpath within the specified limits and within their jurisdiction. In the case of any county, or main, or parish (*p*) road, the order must be made in petty sessions by at least two such justices in the petty sessional division within which the road to be stopped is situate, and for a time not exceeding twelve hours; and seven days' notice of the application must be given by publication in a local newspaper. The justices may impose conditions for the protection of individuals, or of the public.

The officer in command of the forces must cause such notice as the justices may require to be given not less than twelve hours before the order comes into force, and must give all reasonable facilities for traffic whilst the order is in force.

SUB-SECT. 6.—*Under the Church Building Act.*

Church Building Act.

125. The Ecclesiastical Commissioners (*q*) may, by order, stop up, discontinue, or alter any entrance or gate leading into any churchyard or burial ground of any parish or chapelry, and the paths, footways, and passages into, through, or over the same (*r*). They must previously obtain the consent of two local justices, and give public notice (*s*) in the manner prescribed by the Highway Act, 1815 (*t*). If the order is properly made, no appeal lies against it (*u*).

(*m*) Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 16. Bye-laws may be made regulating the use of land appropriated for any military purpose, or which a Secretary of State, or a volunteer or yeomanry corps, has the right of using for any military purpose (*ibid.*, ss. 14, 15, 19). See Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28 (3).

(*n*) See p. 80, *ante*.

(*o*) Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43); and see title ROYAL FORCES.

(*p*) *I.e.*, it would seem, a road repairable by the inhabitants at large.

(*q*) Originally Church Building Commissioners, whose powers were transferred by the Church Building Commissioners (Transfer of Powers) Act, 1856 (19 & 20 Vict. c. 55). And see title ECCLESIATICAL LAW, Vol. XI., pp. 794, 801.

(*r*) Church Building Act, 1819 (59 Geo. 3, c. 134), s. 39.

(*s*) The object of the notice is to enable objections to be urged before the Commissioners; and, if it be not given before the order is made, the order may be quashed (*R.* v. *Arkwright* (1848), 12 Q. B. 960).

(*t*) Stat. (1815) 55 Geo. 3, c. 68, s. 2, and Sched. A. This Act was repealed by the Highway Act, 1835 (5 & 6 Will. 4, c. 50), but the provisions incorporated in the Church Building Act, 1819 (59 Geo. 3, c. 134), are still applicable to diversions thereunder; see cases cited in note (*u*) *infra*.

(*u*) *R.* v. *Arkwright*, *supra*; *R.* v. *Stock* (1838), 8 Ad. & El. 405.

SECT. 2. SUB-SECT. 7.—*Under the Inclosure Acts.*

Statutory Provisions.

Inclosure Acts.

126. The Inclosure Acts of 1801 and 1845 (*a*) provide for the stopping up or diversion of roads and paths over the lands to be inclosed (*b*).

SUB-SECT. 8.—*Under the Housing of the Working Classes Acts.*

127. Highways may also be diverted for the purposes of an improvement or reconstruction scheme (*c*).

Part VII.—Liability to Repair Highways.

SECT. 1.—*In General.*

Liability to repair highways.

128. As regards liability to repair, highways fall into three main classes: (1) highways repairable by "the inhabitants at large," *i.e.*, highways which are now repaired by highway authorities, although the ultimate legal liability (*d*) for the repair rests upon the inhabitants of the parish (*e*) in which they lie; (2) highways repairable by private individuals or corporate bodies (other than highway authorities); and (3) highways which no one is liable to repair. In the future there will be a fourth class, namely, highways repairable by the Road Board (*f*).

SECT. 2.—*Highways repairable by the Inhabitants at Large.*

Common law.

129. At common law every highway (whether carriage way, bridle way, or footpath) is repairable by some person or body of persons; and *primâ facie* by the inhabitants (*g*) of the parish within which it lies (*h*). The inhabitants may, however, transfer their liability to the inhabitants of some other legally recognised area (usually a township (*i*)) in which the highway lies, by proving an immemorial custom in accordance with which the inhabitants of such other area have always borne, and are liable to bear, the burden of repairing all highways within it (*k*).

(*a*) Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), and Inclosure Act, 1845 (8 & 9 Vict. c. 118).

(*b*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 562 *et seq.*

(*c*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 22; Housing, Town Planning etc. Act, 1909 (9 Edw. 7, c. 44), s. 23. See also title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*d*) Enforceable by indictment; see pp. 138 *et seq.*, *post.*

(*e*) Or some other recognised area, *e.g.*, a township. In the case, however, of main roads not retained by an urban authority, it may be that the liability to indictment for non-repair has now been transferred from the inhabitants of the parish (or township) to the county council; see p. 140, *post.*

(*f*) See p. 48, *ante.*

(*g*) *I.e.*, the inhabitant occupiers of land (*R.* v. *Ecclesfield* (*Inhabitants*) (1818), 1 B. & Ald. 348, 357; *R.* v. *Kershaw* (1856), 6 E. & B. 999).

(*h*) "If it be a public way, of common right the parish is to repair it unless a particular person be obliged by prescription or custom" (*per* HALE, J., in *Austin's* (*Katherine*) *Case* (1672), 1 Vent. 189); see also *R.* v. *Great Broughton* (*Inhabitants*) (1771), 5 Burr. 2700; *R.* v. *Leake* (*Inhabitants*) (1883), 5 B. & Ad. 469; and the liability, being of common right, is judicially noticed.

(*i*) See note (*n*), p. 83, *post.*

(*k*) See *R.* v. *Midville* (*Inhabitants*) (1843), 4 Q. B. 240; *R.* v. *Kingsmoor*

SECT. 2.
Highways repairable by the Inhabitants at Large.

The liability of the "inhabitants at large."

In either case the liability of the inhabitants, whether the common law liability of the parish (*l*), or the customary liability of some other area, is spoken of as a liability of "the inhabitants at large," and may not incorrectly be described as a liability of the "parish," since for the purposes of the various Highway Acts (*m*) the word "parish" includes any township, tithing, rape, vill, wapentake, division, city, borough, liberty, market town, franchise, hamlet, precinct, chapelry, or other place or district maintaining its own highways (*n*). The liability of the inhabitants at large cannot be avoided by any agreement or arrangement with some individual or other parish to repair the roads for them (*o*).

Common law parish.

The common law liability attaches primarily to the ancient common law parish; but, where a parish is constituted or altered in area under a statute which declares the new parish to be a parish for all purposes (*p*), the liability apparently attaches to the new civil parish.

Civil parish.

Extra-parochial place.

The liability never attached to an extra-parochial place (*q*), although such a place, if an area recognised by law, might, by custom, be liable to repair all highways within it (*r*). All extra-parochial places have now, with trifling exceptions, been merged by statute in the adjoining parishes, or constituted separate parishes.

(*Inhabitants*) (1823), 2 B. & C. 190; but see *R.* v. *Ecclesfield* (*Inhabitants*) (1818), 1 B. & Ald. 348, where it was held that there could not be a valid custom for the inhabitants of one area to repair a highway lying in another area. As to the origin of such a custom, see *R.* v. *Barnoldswick* (*Inhabitants*) (1843), 4 Q. B. 499, 502, *per* PARKE, B. See also note (*f*), p. 88, *post*, but in special cases (see p. 79, *ante*, and pp. 97, 100, *post*) by statute a parish may be liable to repair a road in another parish.

(*l*) At the present day a dispute as to whether a parish or one of its townships is liable is hardly likely to arise; but in such cases the parish must plead the custom specifically (*R.* v. *St. Andrews, Holborn* (1674), 1 Mod. Rep. 112; *R.* v. *Sheffield* (*Inhabitants*) (1787), 2 Term Rep. 106; *R.* v. *Penderryn* (*Inhabitants*) (1788), 2 Term Rep. 513; *R.* v. *St. Giles, Cambridge* (*Inhabitants*) (1816), 5 M. & S. 260; *R.* v. *Kingsmoor* (*Inhabitants*) (1823), 2 B. & C. 190), although no consideration for it need be alleged (*R.* v. *Ecclesfield* (*Inhabitants*), *supra*). As to the evidence necessary to establish such a custom, see *R.* v. *Sheffield* (*Inhabitants*), *supra*; *R.* v. *Lordsmere District* (*Inhabitants*) (1886), 54 L. T. 766, C. C. R.; *R.* v. *Kings Newton* (*Inhabitants*) (1831), 1 B. & Ad. 826; *Fawcett* v. *Fowlis* (1827), 7 B. & C. 394; *R.* v. *Pembridge* (*Inhabitants*) (1841), Car. & M. 157; *R.* v. *Freeman* (1859), 7 W. R. 556; *R.* v. *Ardsley* (1878), 3 Q. B. D. 255, C. C. R.

(*m*) As to the meaning of "Highway Acts," see p. 24, *ante*.

(*n*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 5. Notwithstanding the wide words of this definition, there is (except one unsatisfactory case, *R.* v. *Yarton* (*Inhabitants*) (1663), 1 Sid. 140, commented on in *R.* v. *Kingsmoor* (*Inhabitants*), *supra*) no authority for the existence of the customary liability except in the case of townships or other subdivisions of a parish. Two or more townships might be jointly liable (*R.* v. *Bishop Auckland* (*Inhabitants*) (1834), 1 Ad. & El. 744).

(*o*) *R.* v. *Liverpool Corporation* (1802), 3 East, 86; *R.* v. *Scarisbrick* (*Inhabitants*) (1837), 6 Ad. & El. 509; *Dawson* v. *Willoughby with Sloothby* (*Highways Surveyor*) (1864), 5 B. & S. 520; *R.* v. *Ashby Folville* (1866), L. R. 1 Q. B. 213; *R.* v. *Ardsley*, *supra*.

(*p*) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 6; Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 1 (3), 36 (2); and titles ECCLESIASTICAL LAW, Vol. XI., p. 443; LOCAL GOVERNMENT.

(*q*) *R.* v. *Midville* (*Inhabitants*) (1843), 4 Q. B. 240.

(*r*) *R.* v. *Kingsmoor* (*Inhabitants*), *supra*.

SECT. 2. Highways repairable by the Inhabitants at Large.

If they were so dealt with under the Extra-Parochial Places Act, 1857 (*s*), it would appear that the inhabitants are still not indictable for non-repair of the highways (*t*); if, however, they were merged in an adjoining parish under the Poor Law Amendment Act, 1868 (*u*), apparently the inhabitants of such parish are, at common law, *primâ facie* liable for the repair of highways in the added portion (*v*).

Outlying portions of parishes may have been dealt with under special statutory powers (*a*).

Presumptive liability of inhabitants.

130. The liability of the inhabitants at large has not, except possibly in the case of main roads (*b*), been affected by the fact that they now carry out their highway duties through the councils of districts, boroughs and counties, instead of through parochial officers. *Primâ facie* it exists in the case of every highway, whether ancient or modern (*c*), and even though no repairs have ever been done to it by the public (*d*), but it may always be displaced in one or other of the following ways:—

Ways in which presumption may be displaced.

(1) The liability of the inhabitants at large, though formerly existing, may have been extinguished (*e*), or shifted by statutory re-apportionment (*f*).

(2) It may be shown that some individual (*g*), or body corporate, is liable to repair the highway in question either by prescription, *ratione tenuræ*, *ratione clausuræ*, or under statute. If one of the first three kinds of liability is established, the inhabitants at large will be discharged, at any rate so long as the persons primarily liable are solvent (*h*). If a statutory liability be proved, it is a question of construction whether the inhabitants are discharged or remain concurrently liable (*i*).

(*s*) 20 Vict. c. 19; compare Highway Acts, 1862 (25 & 26 Vict. c. 61), s. 32; 1864 (27 & 28 Vict. c. 101), s. 9.

(*t*) *R.* v. *Wingland* (1877), 2 Q. B. D. 349.

(*u*) 31 & 32 Vict. c. 122, s. 27.

(*v*) *R.* v. *Oswestry Hundred* (*Inhabitants*) (1817), 6 M. & S. 361.

(*a*) Highway Act, 1862 (25 & 26 Vict. c. 61), s. 33.

(*b*) As to the liability to indictment in the case of main roads, see p. 140, *post*.

(*c*) *R.* v. *Lordsmere* (*Inhabitants*) (1850), 15 Q. B. 689, 696; *R.* v. *Netherthong* (*Inhabitants*) (1818), 2 B. & Ald. 179; *R.* v. *Hatfield* (*Inhabitants*) (1820), 4 B & Ald. 75.

(*d*) *R.* v. *Newbold* (*Inhabitants*) (1869), 33 J. P. 115, C. C. R.; and see an elaborate summing up of WILLS, J., in *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517, C. A., described by the Court of Appeal (*ibid.*, at p. 519) as "copious and clear, and a complete exposition of the law on the subject."

(*e*) See p. 97, *post*.

(*f*) See p. 99, *post*.

(*g*) As to the liability of individuals, see p. 87, *post*.

(*h*) If they are insolvent, apparently the liability of the inhabitants may be enforced (*Anon.* (1698), 1 Ld. Raym. 725, *per* Lord HOLT, C.J.; *R.* v. *Bradfield* (1874), L. R. 9 Q. B. 552; *R.* v. *Brightside Bierlow* (*Inhabitants*) (1849), 13 Q. B. 933).

(*i*) In the case of Turnpike Acts there was usually concurrent liability (see p. 86, *post*); and in any case clear language was necessary to relieve the inhabitants of their duty (*R.* v. *St. George, Hanover Square* (*Inhabitants*) (1812), 3 Camp. 222; *R.* v. *Lordsmere* (*Inhabitants*), *supra*; *Little Bolton* (*Inhabitants*) v. *R.* (1843), 12 L. J. (M. C.) 104; *Bussey* v. *Storey* (1832), 4 B. & Ad. 98; *R.* v. *Netherthong* (*Inhabitants*), *supra*; *R.* v. *Brightside Bierlow* (*Inhabitants*), *supra*).

SECT. 2. Highways repairable by the Inhabitants at Large.

(3) It may be shown that the highway in question has been dedicated since the date when the Highway Act, 1835, s. 23 (*k*), came into operation, and is one to which that section applies. If so, it is not repairable by the inhabitants at large unless it was originally dedicated, or has since been adopted by the public, in accordance with enactments hereafter dealt with (*l*).

Effect of Highway Act, 1835, s. 23.

The section above referred to (*m*) provides that no road or occupation way made, or thereafter (*n*) to be made, by and at the expense of any private individual or corporation, nor any road set out, or to be set out, as a private driftway or horsepath (*o*) under any inclosure award, shall be deemed to be a highway repairable by the inhabitants at large unless certain requirements are complied with (*p*). It does not apply to highways dedicated before the date in question (*q*); and where a road was dedicated about that date, it is a question of fact whether dedication had then taken place, or whether it was still open to the owner to close the road to the public if he had seen fit (*r*). It does not, in express terms, apply to footpaths (*s*), nor to private carriage or cart ways set out under inclosure awards (*t*). With these possible exceptions, it appears to apply to all newly dedicated highways (*u*) not made by the highway authority itself (*v*), and to strips of land added by a landowner to an existing highway (*a*).

(*k*) 5 & 6 Will. 4, c. 50. It is not clear whether this provision operates as from 20th March, 1836 (see *ibid.*, s. 119, since repealed), or from 31st August, 1835, the date of its enactment, probably the former; see *Wood* v. *Riley* (1867), L. R. 3 C. P. 26, *per* BOVILL, C.J., and titles STATUTES; TIME; and the construction put upon the word "hereafter" as used in the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 21, by the Annual Turnpike Acts Continuance Act, 1870 (33 & 34 Vict. c. 73), s. 12. See also *Wood* v. *Hunt* (1868), L. R. 4 C. P. 18, n.

(*l*) As to the various ways in which a highway dedicated since 1835 may become repairable by the inhabitants, see pp. 92 *et seq.*, *post*.

(*m*) *I.e.*, the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 23. It was intended to lessen the burden of the public, who were liable at common law to maintain every highway which individuals might see fit to dedicate; see *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517, C. A. It is in consequence of this section that there are now many highways for the repair of which no one is liable.

(*n*) See note (*k*), *supra*.

(*o*) As to these words, see *Reynolds* v. *Barnes*, [1909] 2 Ch. 361.

(*p*) As to such requirements, see p. 92, *post*. The section, of course, does not prevent a road being dedicated as a highway, but merely prevents liability for its repair attaching to the parish. The person dedicating it is also free from any liability (*Roberts* v. *Hunt* (1850), 15 Q. B. 17; *Fawcett* v. *York and North Midland Rail. Co.* (1851), 16 Q. B. 610, 614, n.; *Sunderland Corporation* v. *Herring* (1853), 17 J. P. 741; *R.* v. *Wilson* (1852), 18 Q. B. 348).

(*q*) *R.* v. *Westmark Tithing* (1840), 2 Mood. & R. 305.

(*r*) *Eyre* v. *New Forest Highway Board*, *supra*.

(*s*) It may well be that footpaths were omitted, because in 1835 such paths would seldom be regarded as requiring any repairs.

(*t*) See *Reynolds* v. *Barnes*, *supra*. Possibly it was assumed that Commissioners would always give directions as to the "making" of cart and carriage ways by the allottees, in which case the opening words of the section would apply; see *Falmouth (Earl)* v. *Richardson* (1825), 3 B. & C. 837.

(*u*) See, *e.g.*, *Eyre* v. *New Forest Highway Board*, *supra*; *Leigh Urban Council* v. *King*, [1901] 1 K. B. 747. But there are cases where it has been held not to apply unless the landowner intends to dedicate, and has made the road at his own expense (*R.* v. *Thomas* (1857), 7 E. & B. 399; *Healey* v. *Batley Corporation* (1875), L. R. 19 Eq. 375, 393).

(*v*) See *Kingston-upon-Hull Local Board of Health* v. *Jones* (1856), 1 H. & N. 489; *Leigh Urban Council* v. *King*, *supra*.

(*a*) See p. 93, *post*.

SECT. 2. Highways repairable by the Inhabitants at Large.

(4) If the highway in question was formed (*b*) under some statute, such as an Inclosure Act, which provided that no highway set out under it should become repairable by the inhabitants until its completion was certified by two justices, the grant of a certificate is a condition precedent to its becoming so repairable (*c*). Probably the court would presume the certificate on proof that the highway was made in substantial accordance with the award, and had ever since been in use by the public (*d*).

Powers of Inclosure Commissioners.

Commissioners under Inclosure Acts had, under the ordinary provisions of such Acts, no power to declare private roads to be repairable by the parish (*e*). They had no power to declare highways in one parish to be repairable by another (*f*); but in certain cases a valuer under an Inclosure Act had power to declare in what parish a road was deemed to be situate (*g*).

Highways constructed under Turnpike Acts.

A highway constructed under a Turnpike Act was not prevented from becoming repairable by the inhabitants merely by the fact that it had not been completed exactly in accordance with statutory provisions not declared to be conditions precedent (*h*), nor by the fact that branch roads included in the proposed scheme were never completed (*i*).

When a highway repairable by the inhabitants at large became subject to a Turnpike Act, the liability of the inhabitants remained concurrently with that of the trustees (*k*); and when a highway was constructed under a Turnpike Act, the usual common law liability

(*b*) Or, though previously existing, was deemed to have been set out afresh under the Act (*R.* v. *Hatfield* (*Inhabitants*) (1835), 4 Ad. & El. 156; *R.* v. *Cricklade, St. Sampson* (*Inhabitants*) (1850), 14 Q. B. 735; *R.* v. *East Hagbourne* (*Inhabitants*) (1859), Bell, C. C. 135, C. C. R.). A local "paving" Act may also have the effect of preventing a highway becoming repairable by the public; see *Willes* v. *Wallington* (1862), 32 L. J. (C. P.) 86, Ex. Ch.; *Hirst* v. *Halifax Local Board* (1870), L. R. 6 Q. B. 181; *Birkenhead Improvement Commissioners* v. *Sansom* (1876), 40 J. P. 406.

(*c*) *R.* v. *Hatfield* (*Inhabitants*), *supra*; *R.* v. *East Hagbourne* (*Inhabitants*), *supra*; *R.* v. *Midville* (*Inhabitants*) (1843), 4 Q. B. 240. But where a statute authorised the making of several roads, apparently any independent one might be certified by itself (*R.* v. *French* (1879), 4 Q. B. D. 507; *R.* v. *West Riding of Yorkshire Justices* (1834), 5 B. & Ad. 1003).

(*d*) *Williams* v. *Eyton* (1859), 4 H. & N. 357, Ex. Ch.; *Leigh Urban Council* v. *King*, [1901] 1 K. B. 747.

(*e*) *R.* v. *Cottingham* (*Inhabitants*) (1794), 6 Term Rep. 20; *R.* v. *Wright* (1832), 3 B. & Ad. 681, 682. But if the parish accepted an allotment under the award they might be bound by the direction; see *A.-G.* v. *Tamworth Rural District Council* (1901), 85 L. T. 190; and of course a private road, if subsequently dedicated to the public before 1835, would become repairable by them (*R.* v. *Horley* (*Inhabitants*) (1863), 8 L. T. 382; *R.* v. *Bradfield* (1874), L. R. 9 Q. B. 552; *R.* v. *Wright* (1832), 3 B. & Ad. 681). No indictment lies for not repairing a private road (*R.* v. *Richards* (1800), 8 Term Rep. 634).

(*f*) *A.-G. and Settle Rural District Council* v. *Lunesdale Rural District Council* (1902), 86 L. T. 822.

(*g*) Inclosure Acts, 1849 (12 & 13 Vict. c. 83), s. 1, and 1852 (15 & 16 Vict. c. 79), s. 28.

(*h*) *R.* v. *Lordsmere* (*Inhabitants*) (1850), 15 Q. B. 689; *R.* v. *French*, *supra*; but see *R.* v. *Edge Lane* (*Inhabitants*) (1836), 6 Nev. & M. (K. B.) 81. See also *A.-G. and Settle Rural District Council* v. *Lunesdale Rural District Council*, *supra*, as to an Inclosure Act specifying a certain width for roads.

(*i*) *R.* v. *French*, *supra*, overruling earlier cases.

(*k*) *R.* v. *Lordsmere* (*Inhabitants*), *supra*.

of the inhabitants at once attached to it (*l*). The same liability also attached if an existing road not repairable by the inhabitants was taken over by turnpike trustees (*m*). A new road made by turnpike trustees ceased to be a highway upon the expiration of the Turnpike Act, but if it were still used by the public a fresh dedication might be inferred (*n*). The expiration of a Turnpike Act did not put an end to the liability of the inhabitants if the road continued a highway (*o*).

SECT. 3.—*Highways repairable by Individuals.*

SUB-SECT. 1.—*In General.*

Liability of individuals to repair.

131. Individuals, or bodies politic or corporate, may be liable to repair highways under some statute, by prescription (*p*), *ratione tenuræ* (*q*), or *ratione clausuræ* (*r*). All the powers, duties, and liabilities given by the Highway Acts (*s*) to surveyors of highways are made applicable also to individuals or bodies liable for the repair of any highway (*t*).

The liability is enforceable by indictment. It is an open question whether an individual or body thus liable can be sued for damages by one who has sustained injury by his neglect to repair (*u*); but such an action will lie against a corporate body liable to repair a highway under charter (*a*).

Where the liability for one highway is divided between the inhabitants and others, it may in certain cases be re-apportioned in a more convenient manner (*b*). There are also certain statutory provisions by which highways repairable by individuals may be made repairable by the inhabitants at large (*c*).

SUB-SECT. 2.—*Liability under Statute.*

Statutory liability.

132. Where an obligation to repair a highway is imposed by statute, an indictment for non-repair will lie against the persons so

(*l*) *R.* v. *Netherthong* (*Inhabitants*) (1818), 2 B. & Ald. 179.

(*m*) *R.* v. *Lordsmere* (*Inhabitants*) (1850), 15 Q. B. 689.

(*n*) *Ibid.* But not if there was no further user, in which case the highway and liability were extinguished (*R.* v. *Mellor* (1830), 1 B. & Ad. 32); and see pp. 15, 16, *ante*.

(*o*) *R.* v. *Thomas* (1857), 7 E. & B. 399; Annual Turnpike Acts Continuance Act, 1867 (30 & 31 Vict. c. 121), s. 3. Similar provisions are contained in later Acts of the same class; and see note (*n*), *supra*.

(*p*) See p. 88, *post*.

(*q*) See p. 88, *post*.

(*r*) See p. 91, *post*.

(*s*) As to the meaning of "Highway Acts," see p. 24, *ante*.

(*t*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 5. And nothing in the Local Government Act, 1888 (51 & 52 Vict. c. 41), as to main roads is to affect the liability of individuals to repair; see *ibid.*, s. 97.

(*u*) *Rundle* v. *Hearle*, [1898] 2 Q. B. 83. Authorities for the liability in damages are: *Russell* v. *Men of Devon* (1788), 2 Term Rep. 667, *per* Lord KENYON, C.J.; *Lyme Regis Corporation* v. *Henley* (1832), 3 B. & Ad. 77, *per* Lord TENTERDEN, C.J.; *M'Kinnon* v. *Penson* (1853), 8 Exch. 319, *per* POLLOCK, C.B.; *Bathurst Borough* v. *Macpherson* (1879), 4 App. Cas. 256, 267, P. C. For the contrary view, see *Young* v. *Davis* (1862), 7 H. & N. 760, *per* MARTIN, B.

(*a*) *Lyme Regis Corporation* v. *Henley* (1834), 1 Bing. (N. C.) 222, H. L.

(*b*) See p. 99, *post*.

(*c*) See pp. 92 *et seq.*, *post*.

SECT. 3. Highways repairable by Individuals.

made liable (*d*); but, at any rate where the highway came into existence before 1836, the inhabitants may be concurrently liable (*e*).

SUB-SECT. 3.—*Prescriptive Liability.*

Liability by prescription.

133. Individuals, or bodies politic or corporate, may be liable to repair highways by prescription, but in the case of individuals such a prescriptive liability can only be supported by proof of some consideration (*f*), such as the taking of toll or the tenure of lands. This liability is established by showing that for a number of years the persons charged and their predecessors have repaired the road in question, from which evidence an immemorial usage to repair it may properly be inferred (*g*). This inference may be negatived by proof that either the road or the usage originated within the time of legal memory (*h*), unless the court presumes a lost grant, as it may do where a consideration for the usage is alleged (*i*).

SUB-SECT. 4.—*Liability Ratione Tenuræ.*

Liability *ratione tenuræ.*

134. Individuals (*k*), or bodies politic or corporate, may be liable to repair highways *ratione tenuræ:* that is, by reason of their tenure of particular lands. Such a liability is generally established by proving that for a number of years the persons charged and their predecessors (or their tenants) have repaired the road in question, this evidence being sufficient to justify the assumption that the usage is immemorial (*l*). It has been said that a liability to repair

Proof of.

(*d*) *R.* v. *Sheffield Canal Co.* (1849), 13 Q. B. 913.

(*e*) Express words are necessary to relieve the inhabitants of their common law liability (*R.* v. *Brightside Bierlow* (*Inhabitants*) (1849), 13 Q. B. 933).

(*f*) 1 Hawk. P. C, 7th ed., c. 76. It is doubtful whether the inhabitants of a parish or township can be liable by prescription to repair a highway in another parish or township (*R.* v. *St. Giles, Cambridge* (*Inhabitants*) (1816), 5 M. & S. 260; *R.* v. *Bishop Auckland* (*Inhabitants*) (1834), 1 Ad. & El. 744; *R.* v. *Denton* (*Inhabitants*) (1852), 18 Q. B. 761; *R.* v. *Ashby Folville* (1866), L. R. 1 Q. B. 213). In any case such a prescription would require a lawful consideration to support it, and the consideration cannot be the levying of rates in the other area (*R.* v. *Ashby Folville, supra*); nor the tenure of land (see also note (*k*), p. 82, *ante*, and note (*k*), *infra*).

(*g*) *R.* v. *Hatfield* (*Inhabitants*) (1820), 4 B. & Ald. 75; *R.* v. *Skinner* (1805), 5 Esp. 219 (in which only twenty-five years' usage to repair a ditch was proved); *London and North Western Rail. Co.* v. *Fobbing Level Sewers Commissioners* (1896), 75 L. T. 629. If a person has done repairs whenever called upon by the authority to do so, the inference of liability is overwhelming, unless it be shown that he was under a mistaken notion as to his liability (see *R.* v. *Barker* (1890), 25 Q. B. D. 213, C. C. R.); on the other hand, if a person voluntarily does repairs to a road or stile which is his own property, or which is mainly used by him, the inference is only slight (see *R.* v. *Northampton County* (*Inhabitants*) (1814), 2 M. & S. 262; *R.* v. *Allanson* (1828), 1 Lew. C. C. 158; *Rundle* v. *Hearle*, [1898] 2 Q. B. 83; *Hudson* v. *Tabor* (1877), 2 Q. B. D. 290, C. A.).

(*h*) *R.* v. *Hayman* (1829), Mood. & M. 401, *per* TINDAL, C.J.; *R.* v. *Hatfield* (*Inhabitants*), *supra*; *R.* v. *Sutton* (*Lady*) (1838), 8 Ad. & El. 516.

(*i*) See p. 89, *post*. On the subjects of prescription and lost grant, see title EASEMENTS and PROFITS À PRENDRE, Vol. XI., pp. 260, 264.

(*k*) The inhabitants of a parish, not being incorporated, cannot hold lands, and therefore cannot be liable to repair a highway *ratione tenuræ* (*R.* v. *Machynlleth and Pennegoes* (*Inhabitants*) (1823), 2 B. & C. 166).

(*l*) See cases cited in note (*g*), *supra*, and *R.* v. *Blakemore* (1852), 2 Den. 410, C. C. R. An admission by a former occupier is not conclusive (*R.* v. *Cotton* (1813), 3 Camp. 444), and evidence of reputation is not admissible (*R.* v. *Wavertree* (*Township, Inhabitants*) (1841), 2 Mood. & R. 353).

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ratione tenuræ must be immemorial (*m*); and, if so, liability may be negatived by showing that either the road or the usage originated within legal memory (*n*). But it is submitted that a liability to repair a highway as a consideration for holding land may have arisen within the time of legal memory under some statute (*o*), grant (*p*), or licence (*q*); that such a liability may be as properly called a liability *ratione tenuræ* as is one based upon immemorial usage (*r*); and that the court may presume the existence of a lost grant, where many years' usage to repair is shown, even though it be admitted that either the road or the usage did not exist at the date when legal memory begins (*s*).

Enforcement.

A liability to repair *ratione tenuræ* can only be enforced against the occupier (*t*) of the land, although he is in general entitled to be reimbursed by the owner (*a*). The liability is imposed upon

(*m*) *Anon.* (1481), Y. B. 21 Edw. 4, 38; *R.* v. *Kerrison* (1813), 1 M. & S. 435, and cases cited in note (*h*), p. 88, *ante*; this was, however, doubted by Lord DENMAN, C.J., in *R.* v. *Beeby* (1839), 8 L. J. (M. C.) 38, and *R.* v. *Sheffield Canal Co.* (1849), 13 Q. B. 913, 926; see also *R.* v. *Scarisbrick* (*Inhabitants*) (1837) 6 Ad. & El. 509.

(*n*) See cases cited in note (*h*), p. 88, *ante*.

(*o*) In *R.* v. *Sheffield Canal Co.*, *supra*, an attempt was made to prove a statutory liability *ratione tenuræ*, but it failed because the statute did not connect the liability which it imposed with the land acquired under it.

(*p*) If "tenure" is to be construed in the strict sense, no liability *ratione tenuræ* can have originated by any grant since the statute *Quia Emptores* (1289—90), 18 Edw. 1, c. 1, except a royal grant (see *Ferrand* v. *Bingley Urban Council*, [1903] 2 K. B. 445, *per* WILLS, J., at p. 451); but it seems clear that a royal grant since that date may have created such a liability (see *R.* v. *Buckeridge* (1691), 4 Mod. Rep. 48; *R.* v. *Bucknall* (1702), 2 Ld. Raym. 792, 804, *per* HOLT, C.J.; *Lyme Regis Corporation* v. *Henley* (1832), 3 B. & Ad. 77, affirmed (1834), 2 Cl. & Fin. 331, H. L.; *Ferrand* v. *Bingley Urban Council*, *supra*). In two cases attempts to establish such a liability on the strength of private grants have failed (*R.* v. *Scarisbrick* (*Inhabitants*), *supra*; *R.* v. *Beeby*, *supra*); and *quære*, whether any private grant or covenant could give rise to a liability to indictment; compare *Lyme Regis Corporation* v. *Henley* (1834), 2 Cl. & Fin. 331, H. L.). See also Callis, Reading on the Statute of Sewers (1647), p. 89: "If, before the Statute of Westminster the Third, a man had made a feoffment in fee, or if since that statute one had made a gift in tail, to hold the same by repairing a bridge, the said feoffee and donee and his heirs should have been bound to repair the said bridge"; *Anon.* (1496), Y. B. 11 Hen. 7, folio 12, *per* FINEUX, J.; see also Y. B. (1497), 12 Hen. 7, fo. 18; *Porter's Case* (1592), 1 Co. Rep. 16 b, 26 a.

(*q*) *Esher and Dittons Urban Council* v. *Marks* (1902), 71 L. J. (K. B.) 309.

(*r*) In the one case the liability is proved by showing its actual origin; in the other it is carried back to the reign of Richard I., and thereupon its origin—probably an earlier grant or agreement with the Crown, as in the *Stratford Bridge Case* (1313), 2 M. & S. 520, n.—is presumed; compare the opinion of the judges in *Lyme Regis Corporation* v. *Henley* (1834), 2 Cl. & Fin. 331, 354, H. L.

(*s*) See *London and North Western Railway* v. *Fobbing Levels Sewers Commissioners* (1896), 66 L. J. (Q. B.) 127; *Kingston-upon-Hull Corporation* v. *Horner* (1779), 1 Cowp. 102, where a lost grant of tolls between 1382 and 1441 was presumed; *Philips* v. *Halliday*, [1891] A. C. 228.

(*t*) 1 Roll. Abr. 300; *R* v. *Barker* (1890), 25 Q. B. D. 213, C. C. R.; *Daventry Rural Council* v. *Parker*, [1900] 1 Q. B. 1, C. A.; *Cuckfield Rural Council* v. *Goring*, [1898] 1 Q. B. 865; *R.* v. *Sutton* (1835), 3 Ad. & El. 597, where the guardian of an infant owner was in occupation. *Semble*, an infant occupier is liable to indictment (*ibid.*). For a form of notice to repair, see Encyclopædia of Forms and Precedents, Vol. VI., p. 393.

(*a*) *Baker* v. *Greenhill* (1842), 3 Q. B. 148.

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the land liable to the burden, and upon every part of it: therefore an agreement by a vendor to repair operates only as between him and the purchaser, and does not discharge the latter from liability to the public (*b*); and if the land is divided, several persons may be concurrently liable for the whole burden; but if one be compelled to bear it, he may claim contribution from the others (*c*).

A liability to repair *ratione tenuræ* is not released merely by the fact that the highway in question became subject to a turnpike trust (*d*), or by the highway becoming a main road (*e*), but it comes to an end if the highway is so altered by widening or change of character as to be practically destroyed (*f*). Physical destruction of the highway and its site terminates a liability *ratione tenuræ*, as it does a public liability (*g*).

Exemption from highway rates.

135. A liability to repair *ratione tenuræ* sometimes carried with it an exemption of the premises so liable and their occupiers from any liability in respect of the repair of other highways in the parish or township (*h*); and where, prior to 1835, property or its owners or occupiers was or were, on any grounds, legally exempt, such property and its owners and occupiers are still exempt from liability to pay highway rates (*i*), and also, apparently, from liability to pay such portion of other rates as is levied to meet highway expenses (*k*).

The mere fact that highway rates have not been levied in respect of premises *primâ facie* rateable is not in itself sufficient to establish a legal exemption, the presumption being that the premises have been omitted from the rates by mistake, unless consideration for an exemption is also proved (*l*); but liability *ratione tenuræ* to

(*b*) *R.* v. *Buccleugh* (*Duchess*) (1704), 1 Salk. 358; *London and North Western Railway* v. *Fobbing Levels Sewers Commissioners* (1896), 66 L. J. (Q. B.) 127; *Esher and Dittons Urban Council* v. *Marks* (1902), 71 L. J. (K. B.) 309.

(*c*) *R.* v. *Buccleugh* (*Duchess*), *supra*; *R.* v. *Brightside Bierlow* (*Inhabitants*) (1849), 13 Q. B. 933; *R.* v. *Buckeridge* (1691), 4 Mod. Rep. 48; *R.* v. *Oxfordshire* (*Inhabitants*) (1812), 16 East, 223.

(*d*) *R.* v. *St. George, Hanover Square* (*Inhabitants*) (1812), 3 Camp. 222; *R.* v. *Barker* (1890), 25 Q. B. D. 213, C. C. R.

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 97.

(*f*) *R.* v. *Pickering* (*Township*) (1877), 41 J. P. 564; *R.* v. *Barker*, *supra*.

(*g*) See p. 98, *post*.

(*h*) See *R.* v. *Heath* (1866), L. R. 1 Q. B. 218; *Heath* v. *Weaverham* (*Township*) *Overseers*, [1894] 2 Q. B. 108; *Carter* v. *Wareham Highway Board* (1866), 30 J. P. 341.

(*i*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 33; *North Eastern Railway* v. *Dalton Overseers*, [1899] 1 Q. B. 1026, C. A.; affirmed, [1900] A. C. 345; *Lonsdale* (*Lord*) v. *Lowther Overseers* (1896), 60 J. P. 297 (quarter sessions), and other cases cited in succeeding notes. See also, generally, title RATES AND RATING.

(*k*) *North Eastern Railway* v. *Dalton Overseers*, *supra*; *R.* v. *Heath*, *supra*; *Heath* v. *Weaverham* (*Township*) *Overseers*, *supra*. These were poor rate cases; but, *semble*, the principle applies (notwithstanding *Dyson* v. *Greetland Local Board* (1884), 13 Q. B. D. 946, C. A.) to general district rates, and see, to this effect, *Ferrand* v. *Bingley Urban Council*, [1903] 2 K. B. 445, *per* Lord ALVERSTONE, C.J.

(*l*) *Great Western Rail. Co.* v. *Denchworth* (*Highways Surveyors*) (1861), 25 J. P. 342; *R.* v. *Freeman* (1859), 7 W. R. 556; *Freeman* v. *Read* (1863), 4 B. & S. 174; *R.* v. *Rollett* (1875), L. R. 10 Q. B. 469, 475; *Heath* v. *Weaverham* (*Township*) *Overseers*, *supra*; compare also *R.* v. *Barnoldswick* (*Inhabitants*) (1843), 4 Q. B. 499; *Dawson* v. *Willoughby with Sloothby* (*Highways Surveyor*) (1864), 5 B. & S. 920.

repair some highway within the old highway parish is sufficient consideration (*m*); and if it be proved that premises have never been rated since 1835, and also that the occupiers thereof are under a *ratione tenuræ* liability, a legal exemption is to be inferred (*n*).

The mere existence of a liability *ratione tenuræ* does not establish a right to exemption, unless non-contribution is also proved (*o*).

Such an exemption continues although the liability *ratione tenuræ* be commuted and the highway made repairable by the inhabitants at large (*p*): it is uncertain whether it continues if the liability be extinguished by the destruction or physical alteration of the highway (*q*).

SUB-SECT. 5.—*Liability Ratione Clausuræ.*

Liability *ratione clausuræ.*

136. Where a highway crosses uninclosed land, and the public have acquired a right to deviate on to such land when the way is impassable, if the owner incloses his land by a fence, he or his tenant becomes liable *ratione clausuræ* to repair the highway (*r*). If he owns the land, and erects fences on both sides, he is liable to repair the whole width of the road; as also if on one side there is an ancient inclosure and he owns the land, and erects a fence, on the other side. If, however, the road is unfenced on both sides and he erects a fence on one side only, he is liable to repair half the width of the road (*s*). The liability is upon the occupier, whether he be owner or not (*t*); and it ceases if the fence which gave rise to it is removed (*a*).

Proof of liability.

137. A liability to repair *ratione clausuræ* cannot be established unless the public have been deprived of a right to deviate (*b*); it does not, therefore, arise when the origin of the road is by modern dedication, or where from the circumstances of the case the reasonable presumption is that only the road itself was dedicated, without any right to go on the land adjoining (*c*). It is submitted,

(*m*) *R.* v. *Heath* (1866), L. R. 1 Q. B. 218; *Heath* v. *Weaverham (Township) Overseers*, [1894] 2 Q. B. 108; *Ferrand* v. *Bingley Urban Council*, [1903] 2 K. B. 445. In several of the cases cited in note (*l*), p. 90, *ante*, the exemption was claimed on behalf of all inhabitants of a tithing or vill, who jointly repaired the roads within it. *Semble*, such a tithing or hamlet is a "highway parish," which ought under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), to have appointed a surveyor (see p. 25, *ante*), and is now rateable as part of the district, the exemption being confined to individuals separately liable to repair particular roads.

(*n*) *Ferrand* v. *Bingley Urban Council*, *supra.*

(*o*) *Ibid.*

(*p*) *North Eastern Railway* v. *Dalton Overseers*, [1899] 1 Q. B. 1026, C. A.

(*q*) *Quære*, whether on this point *Heath* v. *Weaverham (Township) Overseers*, *supra*, must be regarded as overruled by *North Eastern Railway* v. *Dalton Overseers*, *supra*.

(*r*) *Duncombe's Case* (1634), Cro. Car. 366; *Henn's Case* (1632), W. Jo. 296; *Arnold* v. *Holbrook* (1873), L. R. 8 Q. B. 96, and cases cited in notes *infra*.

(*s*) *Steel* v. *Prickett* (1819), 2 Stark. 463.

(*t*) *R.* v. *Ramsden* (1858), E. B. & E. 949.

(*a*) *Ibid.*, *per* CROMPTON, J.

(*b*)) For a criticism of earlier cases which seem to suggest that the liability arises in every case, see *R.* v. *Ramsden*, *supra*; *Arnold* v. *Holbrook*, *supra*.

(*c*) *R.* v. *Ramsden*, *supra*; *R.* v. *Flecknow (Inhabitants)* (1758), 1 Burr. 461. If the highway and fence come into existence at the same time, no liability arises; see *R.* v. *Hatfield (Inhabitants)* (1820), 4 B. & Ald. 75.

SECT. 3. Highways repairable by Individuals.

further, that proof of actual usage to deviate is necessary, and that, in the absence of such proof, the owner may fence up to the track actually in use without incurring liability (*d*).

If the fences are erected with the written (*e*) consent of the highway authority, the owner of the land is not liable for the repair of the road (*f*).

SECT. 4.—*Highways repairable by no one.*

Highways which no one is liable to repair.

138. As a general rule, if a highway, dedicated since the Highway Act, 1835, s. 23 (*g*), came into operation, is not repairable by the inhabitants at large (*h*), no one is liable to repair it (*i*).

SECT. 5.—*Dedication or Adoption of Highways as Highways repairable by the Inhabitants at Large* (*k*).

SUB-SECT. 1.—*Dedication of New Highway under the Highway Act, 1835, s. 23.*

By person proposing to dedicate.

139. If a person proposing to dedicate a highway gives three months' notice in writing to the highway authority, describing the situation and extent of the new highway, and makes it up in a substantial manner and of the width required by the Act (*l*), to the satisfaction of the authority (*m*), and to the satisfaction of two justices expressed in a certificate (*n*) given after a joint view (*o*), then, after the highway has been used by the public and kept in repair for twelve months (*p*) by the person dedicating it, it

(*d*) In other words, the rule as to liability *ratione clausuræ* recognises that the whole of a wide space of land cannot be presumed to have been dedicated as a highway merely because an undefined right of way exists across it from point to point, and persons have exercised their right along different routes; and that the owner may rid himself of the burden of permitting deviation by restricting the public to a track of reasonable width, so long as he keeps such track in repair. See also pp. 39, 67, 68, *ante*.

(*e*) *Semble*, a parol consent is sufficient unless the authority has succeeded to the powers and duties of a highway board.

(*f*) Highway Act, 1862 (25 & 26 Vict. c. 61), s. 46.

(*g*) 5 & 6 Will. 4, c. 50. As to this date, see note (*k*), p. 85, *ante*; and as to the effect of this provision, see p. 85, *ante*.

(*h*) As to the provisions regulating the dedication and adoption of highways as highways repairable at the public expense, see *infra*.

(*i*) In the case of such a modern highway there can be no prescriptive liability, but an individual or body corporate may be liable by statute. Roads constructed by the Road Board will be repairable by the Board; see p. 28, *ante*.

(*k*) There are a number of statutes dealt with in the text, *infra*, under which a highway dedicated since 1836, which would otherwise be repairable by no one (see p. 85, *ante*), may become repairable by the inhabitants at large.

(*l*) It is only in certain cases that any minimum width is prescribed; see p. 69, *ante*. But where a width is so prescribed, the road throughout its length must be of that width (*R.* v. *Surrey Justices* (1861), 3 L. T. 808).

(*m*) An urban authority may refuse to be "satisfied" unless the road is sewered, levelled, paved, flagged, and channelled (*R.* v. *Dukinfield* (*Inhabitants*) (1863), 4 B. & S. 158); and see pp. 215, 216, *post*.

(*n*) A form of certificate will be found in the Highway Act, 1835 (5 & 6 Will. 4, c. 50), Schedule No. 7; see also *ibid.*, s. 118.

(*o*) *R.* v. *Cambridgeshire Justices* (1835), 4 Ad. & El. 111.

(*p*) *Semble*, the twelve months run from the date of the certificate.

becomes repairable by the inhabitants at large (*q*). If the highway authority considers the proposed new highway not to be of sufficient utility to justify its being repaired at the public expense, it may, by summons, require the question of its utility to be decided by the justices (*r*) at special or petty sessions, from whose decision an appeal lies to quarter sessions (*s*).

The certificate must be enrolled at the next quarter sessions; nevertheless its absence is not necessarily conclusive, for in a proper case the court may draw the inference that it has been lost (*t*).

SUB-SECT. 2.—*Dedication of New Highway under the Public Health Act, 1875, s. 146.*

Agreement with local authority.

140. An urban or rural (*a*) authority may agree (*b*) with any person for the making (*c*) of public roads within its district through the lands and at the expense of such person, and that such roads shall become repairable by the inhabitants at large; and the authority may also, with the consent of two-thirds of its number, agree to pay any portion of the expense of making such roads (*d*).

SUB-SECT. 3.—*Construction or Widening of Streets under the Public Health Act, 1875, s. 154.*

Purchase of premises for construction or widening of highways.

141. An urban (*e*) authority may purchase any premises for the purpose of widening, opening, or improving any street, or (with the sanction of the Local Government Board) for the purpose of making any new street (*f*), and such new street or new portion will be repairable at the public expense (*g*); but if an owner for his own purposes throws land into an existing street, the added portion does not become repairable at the public expense (*h*).

(*q*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 23.

(*r*) *Semble*, it may apply to the justices at any time before a certificate is given, even if the three months specified in the original notice have elapsed; see *R.* v. *Norfolk Justices* (1874), 31 L. T. 585.

(*s*) *R.* v. *Derbyshire Justices* (1858), E. B. & E. 69.

(*t*) See cases cited in note (*d*), p. 86, *ante*. As to presuming notice of intention to dedicate, see also *Kingston-on-Thames Corporation* v. *Baverstock* (1909), 73 J. P. 378.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25.

(*b*) Such an agreement should be under seal (*Tunbridge Wells Improvement Commissioners* v. *Southborough Local Board* (1888), 60 L. T. 172); but the court gave effect to an oral agreement in *Bromley Local Board* v. *Lansbury* (1894), *Times*, 5th December.

(*c*) This provision, apparently, does not justify an agreement "to adopt and dedicate an existing" private road, *Tunbridge Wells Improvement Commissioners* v. *Southborough Local Board*, *supra*.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 45), s. 146.

(*e*) Or a rural authority invested with urban powers under this provision.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 154; compare the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 67.

(*g*) *Kingston-upon-Hull Local Board of Health* v. *Jones* (1856), 1 H. & N. 489; *Portsmouth Corporation* v. *Hall* (1907), 71 J. P. 564, C. A.

(*h*) See *Richards* v. *Kessick* (1888), 52 J. P. 756; *White* v. *Fulham Vestry* (1896), 60 J. P. 327; *Property Exchange, Ltd.* v. *Wandsworth Board of Works*, [1902] 2 K. B. 61, C. A.

SECT. 5. **Dedication or Adoption of Highways etc.**

SUB-SECT. 4.—*Dedication under the Housing of the Working Classes Acts, 1890—1909.*

Improvement or reconstruction schemes.

142. A local authority may dedicate as a highway land acquired by it for an improvement (*i*) or reconstruction scheme (*k*), or in order to demolish an "obstructive building" (*l*), and such highways will be repairable at the public expense (*m*).

SUB-SECT. 5.—*Construction of New Roads under other Highway Acts.*

New highways.

143. New highways constructed under the Highways and Bridges Act, 1891 (*n*), or as "improvements" under the Highway Act, 1864 (*o*), or substituted for old ones under the Highway Act, 1835 (*p*), are repairable by the inhabitants at large.

SUB-SECT. 6.—*Construction of New Roads under the Development and Road Improvement Funds Act, 1909.*

Advances by Road Board for construction.

144. The Road Board, with the approval of the Treasury, may make an advance to a county council or other highway authority in respect of the construction of a new road, and may authorise the authority to construct the road (*q*). When so authorised the authority may construct the road, and do all such acts as may be necessary for the purpose (*r*). It may acquire the necessary land, and, if it cannot do so by agreement, may obtain compulsory powers by order of the Development Commissioners (*s*). Where the authority is a county council, the new road when constructed will be a main road; in any other case it will be a highway repairable by the inhabitants at large (*t*), but the Road Board may contribute towards its maintenance (*u*).

SUB-SECT. 7.—*Adoption of Existing Private Roads under the Highway Act, 1862, s. 36.*

Adoption of existing private road.

145. A highway authority, which is the successor to a highway board (*v*) may undertake the repair and maintenance of any drift-way, or private carriage or occupation way, "in return for the use

(*i*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 12 (3); Housing, Town Planning etc. Act, 1909 (9 Edw. 7, c. 44), s. 6.

(*k*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 39 (1).

(*l*) *Ibid.*, s. 38 (12). An "obstructive building" is one which, though not itself unfit for human habitation, affects the sanitary condition of other buildings (*ibid.*, s. 38 (1)).

(*m*) See, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*n*) 54 & 55 Vict. c. 63; and see p. 106, *post*.

(*o*) 27 & 28 Vict. c. 101, s. 48 (2); and see p. 105, *post*.

(*p*) 5 & 6 Will. 4, c. 50, ss. 85, 93; and see p. 78, *ante*.

(*q*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), ss. 8 (1) (a), (10) (1). The term "roads" includes bridges, viaducts, and subways (*ibid.*, s. (8)(5)). As to the maintenance of new roads constructed by the Road Board itself, see p. 28, *ante*.

(*r*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 10 (1).

(*s*) *Ibid.*, s. 11 (3), (4), (5); but see *ibid.*, s. 19, as to commons, open spaces, and allotments.

(*t*) *Ibid.*, s. 10 (2).

(*u*) *Ibid.*, s. 8 (2).

(*v*) As to such authorities, see p. 25, *ante*.

thereof" (*w*); but must first obtain the written consent of the owner or occupier (*x*) of every part of the way in question and an order of justices (*y*) at petty sessions.

SUB-SECT. 8.—*Adoption of Streets under the Public Health and Private Street Works Acts.*

Adoption of streets on being made up

146. In districts in which the Public Health Act, 1875, s. 152 (*a*), or the Public Health Acts Amendment Act, 1890, s. 41 (*b*), or the Private Street Works Act, 1892 (*c*), is in force the authority may by the affixing of notices "adopt" streets, which will then become repairable by the inhabitants at large. The work which must be done before adoption is permissive varies, and in some cases owners may veto the adoption (*d*). Under the Private Street Works Act, 1892 (*e*), the authority may be required by owners to adopt a street which has been fully made up.

SUB-SECT. 9.—*Adoption of Streets under the Towns Improvement Clauses Act, 1847, s. 54.*

Adoption of streets under Towns Improvement Clauses Act, 1847.

147. Where there is in force a local Act incorporating the Towns Improvement Clauses Act, 1847 (*f*), if any street not being a public highway at the passing of the incorporating Act is made good to the authority's satisfaction, then on the application of the greater part in value of the occupiers of the houses and lands

(*w*) These words seem to show that the provision cannot apply where there exists a carriage way already dedicated to the public.

(*x*) A person having a mere right of way over a private road is not an "occupier" of it whose consent is necessary (*R.* v. *Somers*, [1906] 1 K. B. 326). For a form of order, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 294.

(*y*) Highway Act, 1862 (25 & 26 Vict. c. 61), s. 36. The consent of the vestry is no longer required (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 144; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25).

(*a*) 38 & 39 Vict. c. 55.

(*b*) 53 & 54 Vict. c. 59.

(*c*) 55 & 56 Vict. c. 57.

(*d*) As to the work necessary to be done, see pp. 213 *et seq.*, *post*. Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 152, an authority can adopt "a street," but cannot validly do so until all the works specified in the section have been satisfactorily done either by the owners or by the authority (*A.-G.* v. *Bidder* (1881), 47 J. P. 263), even if the authority has approved the plans with a view to adopting it when made. A majority of the "proprietors" may veto the proposal (*Saunders* v. *Brading Harbour Improvement Rail. and Works Co.* (1885), 52 L. T. 426). Under the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 41, the authority can adopt "a part of" a street, and it can do so when any of the specified works have been done by the authority. A majority of the owners can veto the adoption. Under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 19, it can adopt a "part of" a street, and it is sufficient if any of the works specified have been done, no matter by whom. There is no power of veto. If an owner suffers loss by an authority thus declaring a private street to be a highway, he can, it would seem, claim compensation under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308. As to the effect of covenants to repair a road "until taken over," see *Moore* v. *Todd* (1903), 68 J. P. 34, C. A.; *Scott* v. *Brown* (1904), 69 J. P. 89, C. A.; *Read* v. *Bullen* (1882), 46 J. P. 359. For forms applicable to this procedure, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 83—88.

(*e*) 55 & 56 Vict. c. 57, s. 20.

(*f*) 10 & 11 Vict. c. 34, s. 54.

SECT. 5. Dedication or Adoption of Highways etc.

therein, the authority must under seal declare (*g*) it to be a public highway, and it will thereafter be repairable by it. Streets will also become repairable by the inhabitants at large after the authority has carried out paving works at the frontagers' expense (*h*).

SECT. 6.—*Transfer of Liability from Individuals to Inhabitants at Large.*

SUB-SECT. 1.—*Under the Public Health Act*, 1875, *s.* 148.

Public Health Act, 1875, s. 148.

148. Any urban or rural (*i*) authority may by agreement with any person liable to repair any street or road, or any part thereof (*k*), take on itself the maintenance, repair, cleansing, or watering of such street or road or part, or of any part of the streets or roads within its district, upon such terms as may be agreed upon (*l*).

SUB-SECT. 2.—*Under the Highway Act*, 1835, *s.* 62.

Highway Act, 1835, s. 62.

149. Any person or body liable to repair a highway, *ratione tenuræ* or otherwise, may apply with the consent of the highway authority, or the highway authority may itself apply, to a justice to have such highway declared to be repairable by the inhabitants at large. The respondent must be summoned to special or petty (*m*) sessions, and the justices may then, after hearing evidence, make the necessary order (*n*). If they do so, they must also fix an annual or lump sum (*o*) to be paid to the authority in discharge of all future liability (*p*). The compensation awarded (or the interest upon it, if it is a lump sum exceeding £100) must be applied to the repair of the highways within the parish; and a composition paid under this provision apparently entitles a rural parish to a reduction in its rates (*q*).

(*g*) Notice of the declaration is required to be put up in some conspicuous place in or near the street.

(*h*) As to this, see p. 213, *post*.

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25.

(*k*) These words apparently allow an authority to take over only the roadway or only the footway; see *per* COTTON, L.J., in *Nutter* v. *Accrington Local Board of Health* (1878) 4 Q. B. D. 375, C. A.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 148. Although this section enables an authority to take over in perpetuity the maintenance of an existing highway repairable *ratione tenuræ* (*Re Stamford and Warrington (Earl), Payne* v. *Grey*, [1911] W. N. 93, it has been said that it does not authorise an agreement to "adopt and dedicate" an existing private road as a highway (*Tunbridge Wells Improvement Commissioners* v. *Southborough Local Board* (1888), 60 L. T. 172).

(*m*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 46. As to courts of special and petty sessions see, generally, title MAGISTRATES.

(*n*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 62. An appeal lies against such an order; see p. 171, *post*.

(*o*) The justices should fix such a sum as in their judgment is adequate having regard to the liability from which they are relieving the person; see *North Eastern Railway* v. *Dalton Overseers*, [1899] 1 Q. B. 1026, C. A., affirmed *sub nom. Dalton Overseers* v. *North Eastern Railway*, [1900] A. C. 345.

(*p*) Not only is the person discharged from any duty to repair the particular highway, but he will still enjoy any exemption from rates to which he has hitherto been entitled by reason of his liability *ratione tenuræ* (as to which see p. 90, *ante*) (*Dalton Overseers* v. *North Eastern Railway*, *supra*).

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 29 (d).

SUB-SECT. 3.—*Under the Highway Acts*, 1862, *s.* 35, *and* 1864, *s.* 24.

SECT. 6.
Transfer of Liability from Individuals to Inhabitants at Large.

150. In the case of roads repairable by private persons or corporations, *ratione tenuræ* or otherwise, which are within the jurisdiction of an authority which has succeeded to the powers and duties of a highway board (*r*), an alternative mode of procedure is provided by the Highway Acts, 1862 (*s*) and 1864 (*t*). The application does not require the consent of the authority, and is heard at petty sessions; and the justices must fix a lump sum in full discharge of all claims, which is to be invested if it exceeds £50. In other respects the provisions are the same as those above mentioned (*u*), and the same considerations apply.

Highway Acts, 1862 and 1864.

SUB-SECT. 4.—*Under the Highway Act*, 1835, *s* 93

151. When a highway repairable by individuals, *ratione tenuræ* or otherwise, is widened or diverted (*v*), the justices, in special or petty sessions (*a*), must, by order, place it under the control of the highway authority, upon which it will become repairable by the inhabitants at large (*b*). It must first be viewed and reported on by two of their number, upon whose report the justices must fix an annual or lump sum (*c*) to be paid to the authority by the persons liable for the repair of the highway in redemption of their liability.

Highway Act 1835, s. 93.

SECT. 7.—*Extinction of Liability to Repair.*

SUB-SECT. 1.—*Highway Stopped up or Altered.*

152. When a highway is lawfully stopped up (*d*), any liability to repair it is at an end. When, however, it is diverted—*i.e.*, when the old course is stopped up and a new one substituted—under the Highway Act, 1835 (*e*), the new highway is repairable by the same persons as the old one, even although it may lie in a different parish.

Highway stopped up or altered.

Where under lawful authority a highway is completely altered in character, as when a narrow trackway is converted into a wide macadamised road, the liability of an individual to repair the old road is extinguished (*f*).

(*r*) *I.e.*, some rural district councils and county councils, in respect of main roads repaired by them.
(*s*) 25 & 26 Vict. c. 61, s. 35.
(*t*) 27 & 28 Vict. c. 101, s. 24.
(*u*) See p. 96, *ante*.
(*v*) See pp. 69 *et seq.*, *ante*.
(*a*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 46.
(*b*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 93.
(*c*) Such sum may be recovered as a penalty (*ibid.*). As to the principle to be followed in fixing the sum, see note (*o*), p. 96, *ante*.
(*d*) See, as to stopping up highways, pp. 69 *et seq.*, *ante*.
(*e*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 92. This is one of the two cases in which, under the Highway Acts, a parish may be liable to repair a highway lying in another parish; see pp. 79, 82, *ante*, and p. 100, *post*.
(*f*) *R.* v. *Barker* (1890), 25 Q. B. D. 213, C. C. R.; *R.* v. *Pickering* (*Township*) (1877), 41 J. P. 564.

SECT. 7.

Extinction of Liability to Repair.

SUB-SECT. 2.—*Physical Destruction of Highway.*

Highway destroyed.

153. Where the actual site of a road, whether natural ground (*g*) or an artificial embankment (*h*), has been destroyed by the sea, any liability to repair is extinguished, and the persons (*i*) previously liable for repairs cannot be required to reconstruct it. Where, however, a landslip has destroyed the surface, but not the site or foundation of a road, it is a question of fact whether it can be said to be annihilated, and apparently the test is whether the cost of repair would be out of reasonable proportion to the value of the road (*k*).

SUB-SECT. 3.—*Highway declared to be Unnecessary.*

Highway declared unnecessary.

Procedure.

154. If an authority liable to repair any highway considers that so much thereof as lies within any parish is unnecessary and ought not to be maintained at the public expense, it may apply for an order of justices declaring such highway to be no longer repairable by the public (*l*). The procedure is as follows:—The highway must be viewed by two or more justices (*m*), and, if they think that the application ought to be proceeded with, one month's notice in writing of the time and place of hearing objections must be given to the owners or occupiers of all lands abutting upon the highway in any district. The applicants must also give public notice (*n*) by advertisement in a local newspaper, with a description of the highway, for four weeks before the hearing, and by fixing a copy of the notice on the doors of every church and chapel in the parish, or in a conspicuous place near the highway, fourteen days before the hearing. The consent of the parish council (*o*) must be obtained, expressed in a resolution, which requires confirmation at a subsequent meeting held not less than two months later; and public notice (*p*) of the resolution must be given, and it may be annulled by a parish meeting (*q*) held before the confirmation. The court of

(*g*) *R.* v. *Bamber* (1843), 5 Q. B. 279; *R.* v. *Hornsea* (*Inhabitants*) (1854), Dears. C. C. 291, C. C. R.

(*h*) *R.* v. *Paul* (*Inhabitants*) (1840), 2 Mood. & R. 307.

(*i*) Whether the inhabitants at large (*R.* v. *Paul* (*Inhabitants*), *supra*; *R.* v. *Hornsea* (*Inhabitants*), *supra*), or an individual liable *ratione tenuræ* (*R.* v. *Bamber*, *supra*; *R.* v. *Barker* (1890), 25 Q. B. D. 213, C. C. R.). Persons liable to repair a viaduct carrying a road across fens need not rebuild it, if it is swept away by floods; see *R.* v. *Paul* (*Inhabitants*), *supra*, *arg.*, and *Keighley's Case* (1609), 10 Co. Rep. 139 a.

(*k*) *R.* v. *Greenhow* (*Inhabitants*) (1876), 1 Q. B. D. 703.

(*l*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 24. The public right of passage continues, notwithstanding the order.

(*m*) They should view together (*R.* v. *Cambridgeshire Justices* (1835), 4 Ad. & El. 111).

(*n*) For a form of notice, see Encyclopædia of Forms and Precedents, Vol. VI., p. 388.

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 13. Where there is no parish council the provisions apply with the substitution of the parish meeting for the parish council (*ibid.*, s. 19 (8)).

(*p*) Such notice must be given in the manner required for giving notice of vestry meetings, and by posting the notice in a conspicuous place or places in the parish, and in such other manner (if any) as appears desirable (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 51).

(*q*) As to the notice required for a parish meeting, see *ibid.*, Sched. I., Part I., and title LOCAL GOVERNMENT.

summary jurisdiction (*r*), after proof of the consent and notices, must hear objectors, and make or refuse the order, and an appeal from such decision lies to quarter sessions (*s*).

Reviving liability.

If at any time after such order has been made the court of quarter sessions (*t*) considers that circumstances have changed, and that the highway has become of public use and ought to be maintained at the public expense, it may direct that the liability of such highway to be maintained at the public expense shall revive from such date as it may fix; but the court can only act upon the application of a person interested in the maintenance of the highway, and after a month's notice in writing to the authority (*u*).

The above provisions apply to all highway authorities.

Procedure in old highway district.

155. There is a somewhat similar provision which applies only to those authorities which have succeeded to the powers and duties of a highway board (*x*). If any such authority considers a highway in their district to be unnecessary, it may direct its surveyor to apply to two justices to view the same, and thereupon an order may be made that the highway be no longer repairable by the parish (*a*) under similar conditions to those relating to applications (*b*) to procure the stopping up of highways (*c*); but the liability of the parish may afterwards be revived by quarter sessions if the circumstances have changed (*d*). It is hardly probable that in the future any authority will have recourse to this provision (*e*), except for the purpose of reviving the public liability in cases where, in the past, an order has been made under it.

SECT. 8.—*Re-apportionment of Divided Liability to Repair.*

Highways lying in two parishes.

156. Where the boundary between two parishes runs along a highway (*f*), so that one longitudinal strip is repairable by one

(*r*) As to these courts generally, see title MAGISTRATES.

(*s*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 24.

(*t*) It is not clear whether this power has been transferred from quarter sessions to the county council by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (viii.), or whether such an application is to be regarded as in the nature of an appeal against the original order. If the power has been transferred to the county council a deadlock might arise, the justices declaring a highway to be unnecessary and the council declaring it to be necessary.

(*u*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 24. For a form of application, see Encyclopædia of Forms and Precedents, Vol. VI., p. 389.

(*x*) As to such authorities, see p. 25, *ante*.

(*a*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 21.

(*b*) Under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 84, 85, 88, 91.

(*c*) As to such proceedings, see pp. 71 *et seq.*, *ante*. The notices and certificates are to be varied as the case may require; and an appeal lies to quarter sessions (*R.* v. *Surrey Justices* (1869), L. R. 5 Q. B. 87). The consent of the parish council or meeting is necessary.

(*d*) The procedure and conditions are similar to those mentioned in the text, *supra*.

(*e*) The procedure is less simple, and there is no provision for hearing objectors until an appeal is reached.

(*f*) Where a highway is a parish boundary, the presumption is that the *medium filum* is the boundary line (*R.* v. *Strand Board of Works* (1863), 4 B. & S.

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parish and the other by another, the justices may divide it transversely into such parts as they think just in the circumstances, and order (*g*) that in the future each parish shall repair the whole width of the highway on one side of the transverse line (*h*). The justices can only act on complaint (*i*) by one authority, and after issuing a summons (*j*) to the other, and provision is made for adjournments. The order (*k*), and a plan showing the division of the highway, must be filed with the clerk of the peace; and boundaries must be set up in the highway to mark the division (*l*). The costs are to be apportioned by the justices and borne by the parishes concerned (*m*).

Procedure.

Effect of order.

From the date of the filing, the order discharges the respective parishes (*n*) from all liability to repair any part of the highway not included in their allotment, and renders them liable to maintain and repair such part of the highway as is included therein as if it had always been included in the area of their parishes (*o*). In other words, the order alters the parish boundaries for all purposes connected with the repair of the particular highway, but has no effect for any other purpose (*p*).

Similar proceedings may be taken where on one or both sides of the existing boundary some person or corporation is liable to repair *ratione tenuræ* or *ratione clausuræ* (*q*).

526). An inclosure award could not alter a parish boundary for highway purposes, and is not conclusive as to the line of the boundary (*R.* v. *St. Mary, Bury St. Edmunds* (*Inhabitants*) (1821), 4 B. & Ald. 462). Justices have no jurisdiction to make an order under this provision unless they find that the road is intersected by a parish boundary (*R.* v. *Perkins* (1849), 14 Q. B. 229).

(*g*) An appeal lies against such an order to quarter sessions; see p. 171, *post*.

(*h*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 58. These provisions are of little practical consequence, now that the highway area is the area of the borough, urban district, or rural district.

(*i*) The complaint must state in writing that there is such a highway, and a plan must be annexed describing the same by bounds and admeasurements. A form (No. 12) is given in the Highway Act, 1835 (5 & 6 Will. 4, c. 50), Schedule; see *ibid.*, s. 118, and p. 170, *post*.

(*j*) A form of summons (No. 13) is given in the Highway Act, 1835 (5 & 6 Will. 4, c. 50), Schedule; see *ibid.*, s. 118, and p. 170, *post*. A copy of the complaint and plan must be annexed to it.

(*k*) See Highway Act, 1835 (5 & 6 Will. 4, c. 50), Schedule, Form No. 14; *ibid.*, s. 118, and p. 170, *post*. This is one of the cases under the Highway Acts in which one parish may be liable to repair a highway lying in another parish; see pp. 82, 97, *ante*.

(*l*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 58.

(*m*) *Ibid.*, s. 60.

(*n*) And, through them, the respective highway authorities. Such a filed order, if good on the face of it, is conclusive (*R.* v. *Hickling* (*Inhabitants*) (1845), 7 Q. B. 880), unless it varies materially from the terms of the order as actually made; see *R.* v. *Washbrook* (*Inhabitants*) (1825), 4 B. & C. 732.

(*o*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 59.

(*p*) *Ibid.*, s. 61.

(*q*) Proviso to *ibid.*, s. 58; and see *R.* v. *Perkins*, *supra*. The existence of an intersecting parish boundary is necessary even in a case under this proviso, *ibid.*, *per* COLERIDGE, J., at p. 238; possibly the proviso might apply where the boundary was not a parish boundary (*ibid.*, *per* ERLE J., at p. 239).

Part VIII.—Powers, Duties, Expenses, and Liabilities of Highway Authorities in respect of Repairs.

SECT. 1—*Powers and Duties.*

SECT. 1. Powers and Duties.

SUB-SECT. 1.—*In General.*

General duty.

157. The duty of highway authorities is to "repair and keep in repair" (*r*), or, in the case of main roads, to "maintain and repair" (*s*), highways repairable by the inhabitants at large (*t*). In addition, an urban authority must cause all streets within its district which are repairable by the inhabitants to be levelled, paved, metalled, flagged, channelled, altered (*u*), and repaired as occasion may require (*a*).

Extent of repairs.

As a general rule (*b*) the duty to repair a highway entails an obligation to keep it in such repair as to be reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year (*c*), unless, as appears to be possible, the road has been dedicated for summer use only, being recognised as being impassable in winter (*d*). Consequently there may be a duty to remake or repair with stone a road which in the past has never had a hard foundation (*e*). If a public footpath or bridle way runs along a private cartroad, the duty is limited to doing such

(*r*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 6; Highway Act, 1862 (25 & 26 Vict. c. 61), s. 11. Therefore an indictment for not "paving" a highway is bad (Com. Dig. tit. "Chimin" (A 4)).

(*s*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (1).

(*t*) Main roads, as well as ordinary highways, may, of course, be repairable by individuals (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 97).

(*u*) This does not give power to "divert" without an order of quarter sessions; see *R.* v. *Platts* (1880), 49 L. J. (Q. B.) 848.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149.

(*b*) There is, however, old authority for saying that there is no obligation to put common footpaths into a better condition than they have been in time out of mind, but only to maintain them as they have been usually at the best (*R.* v. *Cluworth* (*Inhabitants*) (1704), 1 Salk. 359, reported at 6 Mod. Rep. 163, as deciding that such is the limited obligation of a person liable by prescription to repair any highway). As to the duty to repair including footways, see also *R.* v. *Lord* (1855), 4 W. R. 83; and see further, pp. 181, 182, *post.*

(*c*) *R.* v. *High Halden* (*Inhabitants*) (1859), 1 F. & F. 678, *per* BLACKBURN, J.; *R.* v. *Henley* (*Inhabitants*) (1847), 2 Cox, C. C. 334; *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264, *per* LINDLEY, J. An indictment for allowing a road to be "very muddy" instead of "out of repair" is bad (*R.* v. *Stretford* (*Inhabitants*) (1705), 2 Ld. Raym. 1169, rather differently reported, 11 Mod. Rep. 56).

(*d*) *R.* v. *Brailsford* (*Inhabitants*) (1860), 2 L. T. 508.

(*e*) *R.* v. *High Halden* (*Inhabitants*), *supra*; *Mildred* v. *Weaver* (1862), 3 F. & F. 30, 34, *per* ERLE, C.J.; *R.* v. *Claxby* (*Inhabitants*) (1855), 3 C. L. R. 986 *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517, C. A. The mode of repair is for the person liable, and a court will not direct what repairs are to be done or what material used (*R.* v. *Claxby* (*Inhabitants*), *supra*).

SECT. 1. Powers and Duties.

repairs as are necessary for the passage of foot passengers or horsemen (*f*).

The fact that a highway is occasionally rendered impassable by floods does not entail an obligation to raise its level (*g*).

Disrepair a question of fact.

158. Repair or disrepair is a question of fact for a jury, to be determined according to what is reasonable and practicable under the circumstances. Thus, where a road has been destroyed by natural causes, they may consider whether to reinstate it would cost more than it is worth (*h*); and repairs need not be done to a ford in a tidal river where every tide would scour out the material used (*i*).

Where a highway is injured by individuals, the right and duty of the authority as against the wrongdoers is to make a way for the public as commodious as before, but not to restore the way exactly as it was before regardless of cost (*k*).

Where no duty to repair, no right to repair.

159. Where there is no duty to repair, there is, apart from statute, no right as against the owner of the soil to execute repairs (*l*); and at common law an authority may not repair in such a manner as to make the public right more burdensome to the owner of the soil; thus it may not alter a bridle track into a different class of road by making cuttings and bridges (*m*), nor place stones on a footpath dedicated subject to a right of ploughing it out (*n*), or on any highway dedicated subject to the condition that it is not to be metalled (if such a restricted dedication be possible (*o*)); nor may it substitute a bridge for stepping stones (*p*), nor put upon a road more materials than are required to make it safe for traffic, and so raise its level (*q*).

When court will not interfere.

160. As between a highway authority and the ratepayers, the court will not interfere if the proposed repairs are *intra vires* and the authority has *bonâ fide* decided that in the interests of passengers it is desirable to carry them out (*r*). Nor will a court give directions

(*f*) *Reynolds* v. *Barnes*, [1909] 2 Ch. 361; *R.* v. *Cricklade St. Sampson* (*Inhabitants*) (1850), 14 Q. B. 735.

(*g*) *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264, *per* LINDLEY, J.

(*h*) *R.* v. *Greenhow* (*Inhabitants*) (1876), 1 Q. B. D. 703; and see p. 98, *ante*.

(*i*) *R.* v. *Landulph* (*Inhabitants*) (1834), 1 Mood. & R. 393, *per* PATTESON, J.

(*k*) *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corporation*, [1908] A. C. 323. See further, as to this point, p. 61, *ante*.

(*l*) *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517, C. A.; *Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518, C. A. See the latter case for the distinction between abating a nuisance and executing permanent works of repair.

(*m*) *Radcliffe* v. *Marsden Urban District Council* (1908), 72 J. P. 475, following *Sutcliffe* v. *Sowerby* (*Highways Surveyors*) (1859), 1 L. T. 7, and not following *R.* v. *Helaugh* (*Inhabitants*) (1863), *Times*, 18th April. See also *Leek Improvement Commissioners* v. *Stafford Justices* (1888), 20 Q. B. D. 794, C. A.

(*n*) *Arnold* v. *Blaker* (1871), L. R. 6 Q. B. 433, Ex. Ch.

(*o*) As to which, see *Eyre* v. *New Forest Highway Board*, *supra*.

(*p*) *Sutcliffe* v. *Sowerby* (*Highways Surveyors*), *supra*. *R.* v. *Helaugh* (*Inhabitants*), *supra*, cannot apparently be relied on; see *Radcliffe* v. *Marsden Urban District Council*, *supra*. But the slight widening of a bridge is not necessarily an interference with the owner's rights (*R.* v. *Barnes* (1884), 1 T. L. R. 24).

(*q*) *Burgess* v. *Northwich Local Board*, *supra*, *per* LINDLEY, J. As to the right of an urban authority to raise the level of a street, see p. 62, *ante*.

(*r*) *R.* v. *Brighton Corporation*, *Ex parte Shoesmith* (1907), 71 J. P. 265, C. A

as to what repairs are to be done: its function is only to consider results, and not to prescribe methods (*s*).

What the highway includes.

161. What is included in the highway is a question of fact (*t*). Where a highway is supported or flanked (*a*) by retaining walls, such walls may be part of the highway and repairable as such (*b*); and if such a wall has been built by, and belongs to, the adjoining owner, the authority may have acquired a right to have the road supported by it so long as it stands and to prevent its removal; but the owner is under no obligation to repair it (*c*). If a highway runs along the seashore, an embankment, sea wall, and groynes may be necessary for its protection and repairable therewith (*d*).

Retaining walls.

Fences.

162. Although in general neither the authority nor the owner is liable to fence a highway (*e*), a fence protecting passengers from a dangerous precipice or stream may be part of the highway and repairable therewith, and whether it is or is not, is a question of fact (*f*).

Cellar roofs.

In a town, where a flagstone, forming both the footway and the roof to a cellar, is worn out by traffic, the authority must repair the flagstone although this cannot be done without repairing the cellar roof (*g*).

Footbridges and stepping stones.

163. The liability to repair a footpath entails liability to repair bridges (*h*) or stepping-stones by which it crosses a stream (*i*); and if no one is liable to repair the path, no one need repair the bridge or stones when they wear out (*k*). The same rules probably apply

(*s*) *A.-G.* v. *Staffordshire County Council*, [1905] 1 Ch. 336; *R.* v. *Claxby* (*Inhabitants*) (1855), 3 C. L. R. 986.

(*t*) As to the width of land subject to the public right of passage, see p. 69, *ante*.

(*a*) But, *semble*, if the landowner for his own purposes has lowered the road since its dedication, he must keep his soil from falling thereon.

(*b*) *R.* v. *Lordsmere District* (*Inhabitants*) (1886), 54 L. T. 766, C. C. R.; compare *Rotherham Corporation* v. *Fullerton* (1884), 50 L. T. 364.

(*c*) *Stockport and Hyde Division and Hundred of Macclesfield Highway Board* v. *Grant* (1882), 46 L. T. 388. In such a case, *semble*, the authority might enter and repair the wall, but no indictment would lie against the parish until the actual way subsided. In general, an owner of land adjoining a highway, but on a lower level, need not provide a support for the highway (*Short and Wife* v. *Hammersmith Corporation* (1910), 75 J. P. 82).

(*d*) *Sandgate Urban District Council* v. *Kent County Council* (1898), 79 L. T. 425, H. L.

(*e*) As to powers and duties in regard to fencing highways, see p. 114, *post*.

(*f*) *R.* v. *Whitney* (1835), 7 C. & P. 208; *R.* v. *Lordsmere District* (*Inhabitants*), *supra*. If the legislature directs the erection of a fence, but does not provide for its maintenance, *semble* that it forms part of the highway and is repairable as such; see *A.-G.* v. *Oxford Canal Navigation* (1903), 72 L. J. (CH.) 285, C. A.

(*g*) *Hamilton* v. *St. George, Hanover Square* (1873), L. R. 9 Q. B. 42; *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221; but see pp. 250, 251, *post*.

(*h*) *I.e.*, such unsubstantial structures as are not county bridges; see p. 184, *post*.

(*i*) Compare *Sutcliffe* v. *Sowerby* (*Highways Surveyors*) (1859), 1 L. T. 7; *R.* v. *Helaugh* (*Inhabitants*) (1863), *Times*, 18th April; *Radcliffe* v. *Marsden Urban District Council* (1908), 72 J. P. 475; *R.* v. *Barnes* (1884), 1 T. L. R. 24; and see pp. 182, 183, *post*.

(*k*) The occupier or owner of the land is not liable if the decay is not attributable to his acts (*Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221; *Rundle* v. *Hearle*, [1898] 2 Q. B. 83).

SECT. 1. Powers and Duties.

Stiles and gates.

to stiles (*l*). Where a path has been dedicated subject to the existence of a gate, it is doubtful whether any person is liable for the repair of the gate (*m*), but it seems that a parish council may expend its funds in repairing bridges, stepping-stones, stiles and gates in public footpaths (*n*).

SUB-SECT. 2—*Widening and Improvement of Highways.*

(i.) *Widening.*

No power at common law.

164. At common law a parish is not responsible for the narrowness of its highways, and cannot purchase land for widening them (*o*); but powers for this purpose are conferred by the Highway Act, 1835.

Powers under Highway Act, 1835.

If two justices, upon a joint (*p*) view, consider that any highway (*q*) within their division is not sufficiently wide and might be widened, they must order (*r*) it to be widened up to a maximum width of 30 feet (*s*). Such order justifies the highway authority in acquiring the necessary land compulsorily, but it may not pull down any building, nor take away part of any garden, park, plantation, building land, or nursery (*t*). The authority is to pay compensation, including the cost of making any necessary fences and ditches, to the owners and occupiers, and also to any other persons injured by the widening. Subject to the written approval of the justices, the authority may agree to the amount of compensation (*a*); and persons with limited rights in the land may renounce any claim for damages or compensation if certain formalities are complied with (*b*). If no agreement can be arrived at, or if the persons entitled cannot be found, the compensation must be assessed by a jury at quarter sessions (*c*). The sum awarded must be paid

(*l*) See *Rundle* v. *Hearle*, [1898] 2 Q. B. 83. The true view appears to be that a stile (like a bridge) is merely a contrivance for surmounting an obstacle subject to which the path has been dedicated.

(*m*) There appears to be no authority upon this point. See also pp. 182, 183, *post*.

(*n*) See pp. 182, 183, *post*. If, however, the path is one which no one is liable to repair, it is not clear that the council can do any repairs without the permission of the owners of the soil (see note (*i*), p. 183, *post*); and in any case a parish council would have no power to repair a gate on a carriage way.

(*o*) *R.* v. *Stretford* (*Inhabitants*) (1705), 2 Ld. Raym. 1169; *R.* v. *Devon* (*Inhabitants*) (1825), 4 B. & C. 670.

(*p*) *R.* v. *Cambridgeshire Justices* (1835), 4 Ad. & El. 111.

(*q*) Including highways repairable *ratione tenuræ* etc. (see Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 93), or under a local or personal Act by persons other than railway or canal companies etc. (Highway Act, 1862 (25 & 26 Vict. c. 61), s. 44). As to the future repair of such highways, see p. 97, *ante*.

(*r*) See form of order, No. 16, Highway Act, 1835 (5 & 6 Will. 4, c. 50), Schedule; and see *ibid.*, s. 118, and p. 170, *post*.

(*s*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 82. Presumably justices before making the order would hear the highway authority and any person whose land is to be taken (see *R.* v. *Totnes Union Guardians* (1845), 7 Q. B. 690; *Gill* v. *Bright* (1871), 41 L. J. (M. C.) 22; *Hopkins* v. *Smethwick Local Board of Health* (1890), 24 Q. B. D. 712, C. A.).

(*t*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 82.

(*a*) *Ibid.* For forms of agreement, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 381, 385.

(*b*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 49.

(*c*) For the procedure, see *ibid.*, s. 82, Schedule, Form 17; *R.* v. *Norwich and*

or tendered to the persons entitled, or be deposited with the clerk of the peace, and thereupon the land in question is for ever divested (*d*) out of them and becomes a public highway; but all minerals which can be got without breaking the surface, and all timber, remain the property of the original owners (*e*), subject to a power for the authority to clear away the trees (*f*).

Whilst the highway is being widened, the authority may make a temporary road over adjoining land (*g*).

Control of widened highway.

165. Where a highway repairable by individuals is thus widened, the justices at special or petty sessions must place it under the control of the highway authority, and must fix an annual or lump sum to be paid by such persons in redemption of their liability (*h*).

Widening gates.

166. Where a gate lawfully erected and maintained (*i*) across any public horseway or cartway is less than 5 or 10 feet wide respectively, as the case may be, the authority may require the owner to enlarge it; and if he does not enlarge nor remove it within twenty-one days, he is liable to a fine of 10*s.* a day during default (*k*).

(ii.) *Improvements.*

Improvements:— Under Highway Acts.

167. A highway authority which is the successor to a highway board (*l*) may make the following improvements in highways within its jurisdiction (*m*):—

(1) Convert roads not previously stoned into stoned roads;

(2) Widen, straighten, and level roads, make new roads, and build or enlarge bridges;

(3) Do any other work necessary to put existing highways into a proper state of repair.

For the above purposes it may acquire lands or easements, and the non-compulsory clauses of the Lands Clauses Consolidation Acts are to apply (*n*). It may also borrow money with the

Watton Road (*Trustees*) (1836), 5 Ad. & El. 563; *R.* v. *Bagshaw* (1797), 7 Term Rep. 363; *R.* v. *Wilson* (1835), 3 Ad. & El. 817. The sum awarded must not exceed forty years' purchase of the annual value of the land taken. The costs are provided for by the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 83. See on this point, *Walker* v. *Wilsher* (1889), 23 Q. B. D. 335, C. A. For a form of notice, see Encyclopædia of Forms and Precedents, Vol. VI., p. 384.

(*d*) *Quære* whether this means more than that the surface becomes subject to the public right of passage.

(*e*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 65, 66.

(*f*) For the details of this power, see *ibid.*; *Honywood* v. *Honywood* (1874), L. R. 18 Eq. 306; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, C. A.

(*g*) See p. 80, *ante*.

(*h*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 93; and see p. 97, *ante*. Such sum may be recovered as a penalty (*ibid.*). As to courts of special or petty sessions generally, see title MAGISTRATES.

(*i*) *I.e.*, a gate subject to which the highway has been dedicated; see p. 46, *ante*.

(*k*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 81. For a form of notice to enlarge a gate, see Encyclopædia of Forms and Precedents, Vol. VI., p. 414.

(*l*) As to this, see p. 25, *ante*.

(*m*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 48. Abolition of tolls was also an "improvement" (Annual Turnpike Acts Continuance Acts, 1872 (35 & 36 Vict. c. 85), s. 15, and 1873 (36 & 37 Vict. c. 90), s. 16).

(*n*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 53. As to these, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. IV., pp. 56 *et seq.*

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approval of the county council and subject to certain prescribed conditions and formalities (*o*).

Such highway authority may also contribute to similar improvements made in another district, if these are in its opinion for the benefit of its district (*p*).

Under Public Health Acts.

168. A highway authority which is not the successor to a highway board has not these powers; but any urban authority may purchase land for the purpose of widening, opening, or enlarging any "street" (*q*), and may borrow money for the purpose with the sanction of the Local Government Board (*r*); and loans to rural authorities for highway improvements have also been sanctioned under the same borrowing provisions.

A county council and a highway authority (or authorities) may enter into agreements with each other in regard to the construction, reconstruction, alteration or improvement or freeing from tolls of highways and bridges (*s*).

Advances by Road Board.

169. The Road Board, with the approval of the Treasury, may make advances to county councils and other highway authorities in respect of the improvement of existing roads (*t*). In such cases the authority may acquire the necessary land, and may obtain compulsory powers by an Order of the Development Commissioners (*u*).

SUB-SECT. 3.—*Materials for the Repair of Highways.*

(i.) *From Land allotted or acquired for the Purpose.*

Land allotted for repairing materials.

170. In many parishes, under the provisions of Inclosure Acts (*x*) or otherwise, land has been allotted, or acquired, in the past for the purpose of quarrying materials for the repair of highways in the parish, or for that purpose coupled with other purposes, such as the repair of private roads, or of buildings and walls belonging to the inhabitants (*a*). Such allotments were usually

As to the power of a county council to acquire land, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65.

(*o*) For these, see Highway Act, 1864 (27 & 28 Vict. c. 101), ss. 47, 48, and Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 8. Apparently the powers and duties of quarter sessions have been transferred to the county council by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (ii.). As to power to borrow, see *ibid.*, and title LOCAL GOVERNMENT.

(*p*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 49.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 154; and see p. 93, *ante*.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 233 *et seq.*

(*s*) Highways and Bridges Act, 1891 (54 & 55 Vict. c. 63), s. 3.

(*t*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 8 (1). For the purposes of this provision the term "improvement" includes the widening of any road, the cutting off the corners of any road where land is required to be purchased for that purpose, the levelling of roads, the treatment of a road for mitigating the nuisance of dust, and the doing of any other work in respect of roads beyond ordinary repairs essential to placing a road in a proper state of repair; and the term "roads" includes bridges, viaducts, and subways (*ibid.*, s. 8 (5)).

(*u*) *Ibid.*, s. 11 (3), (4), (5); but see *ibid.*, s. 19, as to commons, open spaces, and allotments.

(*x*) See the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 72; and see, generally, title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 441 *et seq.* As to the grazing of such allotments, see p. 130, *post*.

(*a*) An allotment of land for getting materials for repairing highways to be

vested in the parish surveyor, and, if so, are now vested in the highway authority (*b*); some, however, were and are vested in trustees for the parish; and in some cases the surveyor, instead of receiving an actual allotment, was authorised to quarry materials from specified quarries (*c*). Materials can now be taken from such allotments or quarries by the highway authority (*b*) for the repair of highways within the parish (*d*), and also by the county council for the repair of main roads within the parish (*e*). Where such allotments exist for the benefit of a rural parish, the parish is entitled to a reduction of rates in respect of the expense saved to the district as a whole (*f*).

The Real Property Limitation Acts (*g*) apply to such allotments; and, therefore, if for twenty years no materials have been quarried nor rights exercised, an adjoining owner may have acquired a possessory title by acts of ownership, such as fencing, filling up holes, and cultivating the surface (*h*).

Disposal of land allotted under Highway Act, 1835.

171. Where lands have been so allotted to, or acquired by a parish or its surveyor for highway purposes only, and the materials in such lands have been exhausted, the highway authority for the district may sell such lands and purchase other lands with the proceeds (*i*); but such lands must first be offered to the adjoining owners (*k*). If the proceeds of the sale cannot be conveniently appropriated to the purchase of other lands, they may be dealt

set out, and for the use of the inhabitants of the parish, does not authorise the inhabitants to get materials for private purposes (*Rylatt* v. *Marfleet* (1845), 14 M. & W. 233).

(*b*) As successors to the surveyor; see p. 25, *ante*.

(*c*) Authority to dig gravel for all time from a particular pit may justify the grantee in extending the pit laterally to the detriment of the surface owner (*Ellis* v. *Bromley Local Board* (1876), 45 L. J. (CH.) 763, C. A.).

(*d*) *Semble*, they cannot be taken for use in other parishes of the district. At any rate, where the land is allotted for other purposes besides the repair of highways, to do so would be unfair to other persons entitled to get materials.

(*e*) *Re Norfolk County County Council and Bittering* (*Highway Surveyor*) (1894), 58 J. P. 497.

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 29 (d).

(*g*) See title LIMITATION OF ACTIONS.

(*h*) *Smith* v. *Stocks* (1869), 10 B. & S. 701; *Thew* v. *Wingate* (1862), 10 B. & S. 714.

(*i*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 48, as amended by the Highway Act, 1845 (8 & 9 Vict. c. 71), s. 1; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149; Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 25, 52 (3), 73, 89, Sched. II. Note that this provision only applies where the sole purpose contemplated is the getting of materials for highways; as to the power of sale where other purposes coexist, see *infra*. The case of *Re Brumby and Frodingham Urban District Council, Re Trent, Ancholme and Grimsby Rail. Co.* (1904), 3 L. G. R. 258, may also be referred to, but is apparently an unreliable authority (see the reporter's note, *ibid.*).

(*k*) There is no provision as to which of two adjoining owners is to have the first offer, nor as to the price at which such an owner may claim the land. At a date (*i.e.*, before 1894) when a price was required to be fixed by justices, it was held that they ought to fix a fair price, and not ask a fancy price because a third person for personal reasons was willing to pay it (*R.* v. *Drayton Highway Board* (1876), 1 Q. B. D. 608). As to the right of pre-emption, generally, see *Coventry* v. *London, Brighton and South Coast Rail. Co.* (1867), L. R. 5 Eq. 104; *London and South Western Rail. Co.* (*Directors*) v. *Blackmore* (1870), L. R. 4, H. L. 610. As to the effect of not offering land to a person having the right, see *Barrett* v. *Ring* (1854), 2 Sm. & G. 43.

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with as if the sale had taken place under the Sale of Exhausted Parish Lands Act, 1876 (*l*).

Under the Sale of Exhausted Parish Lands Act, 1876.

172. Where land has been allotted to or acquired by a parish for the purpose of the supply of materials for repairing the highways in the parish, and also for other purposes, and the materials in such land are exhausted, or are not suitable or not required, and the land is not available for such other purposes (if any) (*m*), it may be disposed of under the provisions of the Union and Parish Property Acts, 1835 (*n*) and 1837 (*o*), and the Parish Property and Parish Debts Act, 1842 (*p*). In a rural parish the power of disposal is exercised by the parish council (*q*), if there is one, and otherwise by the guardians (*r*), with the consent of the parish meeting in either case (*s*). In an urban parish the guardians exercise the power (*t*), but they must obtain the consent of the owners and ratepayers (*a*). In every case the approval of the Local Government Board (*b*) is necessary (*c*); and the proceeds must be applied as far as practicable in the repair or improvement of the highways in the parish, or in aid of the highway rate (*d*). In a rural parish any relief thus accruing to the district as a whole will entitle the particular parish to a reduction in its rates (*e*).

Under Local Government Act, 1894.

173. Where such allotments are vested in the council of a rural parish (*f*) the council may let, or (with the consent of the parish

(*l*) 39 & 40 Vict. c. 62; see *ibid.*, s. 6. As to this provision, see *infra*.

(*m*) Sale of Exhausted Parish Lands Act, 1876 (39 & 40 Vict. c. 62), s. 1.

(*n*) 5 & 6 Will. 4, c. 69.

(*o*) 7 Will 4 & 1 Vict. c. 50.

(*p*) 5 & 6 Vict. c. 18; and see title LOCAL GOVERNMENT.

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (d).

(*r*) Union and Parish Property Acts, 1835 and 1837 (5 & 6 Will. 4, c. 69; 7 Will. 4 & 1 Vict. c. 50); Parish Property and Parish Debts Act, 1842 (5 & 6 Vict. c. 18); unless the parish meeting has the powers of a parish council under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (10).

(*s*) Instead of the consent (as before 1894) of the owners and ratepayers. See Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 52 (1).

(*t*) Under the Union and Parish Property Acts, 1835 (5 & 6 Will. 4, c. 69), and 1837 (7 Will. 4 & 1 Vict. c. 50), and the Parish Property and Parish Debts Act, 1842 (5 & 6 Vict. c. 18); unless an order of the Local Government Board under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 33, has transferred such power to the council.

(*a*) Unless there is a separate board of guardians for the parish, in which case such consent is dispensed with by the Poor Law Act, 1889 (52 & 53 Vict. c. 56), s. 8. As to boards of guardians generally, see title POOR LAW. As to voters and votes at a meeting of owners and ratepayers, see Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 40; Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), ss. 14—16; Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), ss. 7, 8; Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 39; and Local Government Board Order of 20th November, 1891.

(*b*) As to the descent to the Local Government Board of the powers of the Poor Law Commissioners, see Poor Law Board Act, 1847 (10 & 11 Vict. c. 109), s. 10, and Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 2.

(*c*) For the conditions upon which the approval may be obtained, see Parish Property and Parish Debts Act, 1842 (5 & 6 Vict. c. 18), s. 3, and Sale of Exhausted Parish Lands Act, 1876 (39 & 40 Vict. c. 62), ss. 2—5.

(*d*) *Ibid.*, s. 6.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 29 (d).

(*f*) *E.g.*, under *ibid.*, s. 5 (2) (c) or s. 14 (1).

meeting) sell or exchange them; but the consent of the Local Government Board is required for a letting for more than a year, or for a sale or exchange (*g*). In the case of a sale the proceeds must be dealt with in manner similar to that above stated (*h*).

(ii.) *From other Land.*

Material from lands not allotted.

174. Highway authorities have certain statutory (*i*) powers of getting materials from lands other than those allotted to or acquired by them (*j*). In some cases they require either permission or a licence from justices; in some cases they must pay compensation for the value of the materials; in all cases they must do so in respect of any damage done in carting; and, further, they must in the first instance seek for materials in the parish in which the same are to be used.

Powers to search and carry from waste lands.

175. For the purpose of repairing highways any highway authority (*k*) may search for, dig, get (*l*), and carry away gravel, sand, stone, or other materials in any waste land or common ground (*m*), or river or brook flowing through uninclosed land (*n*), either within the parish where the materials are to be employed, or (if sufficient cannot conveniently be found there) within any other parish, provided that sufficient be left for use on the roads in such other parish. The authority must not, however, thereby divert or interrupt such river or brook, nor damage any building, highway, or ford, nor may it get such materials out of any river or brook within 150 feet above or below any bridge, dam or weir (*o*), nor remove any sea beach so as to cause damage by inundation, or increased danger of encroachment by the sea (*p*). Compensation (*q*) is to be paid,

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (2).

(*h*) See p. 108, *ante*.

(*i*) See the Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 51—54. These powers are purely statutory, and authorities cannot have a customary or prescriptive right to quarry materials in land not belonging to them (*Padwick* v. *Knight* (1852), 7 Exch. 854; *Constable* v. *Nicholson* (1863), 14 C. B. (N. S.) 230). The statutory provisions in question are a confused patchwork of legislation, partly enacted for the first time in 1835, and partly then reproduced from earlier Acts. Their effect is given in the text so far as it is possible to reconcile them. As to obtaining materials by contract, see p. 112, *post*.

(*j*) See p. 106, *ante*.

(*k*) Including a county or county borough council in respect of main roads, and a county surveyor in respect of county bridges and roads repairable therewith.

(*l*) *Semble*, they may blast if necessary (*Whitson* v. *Blairgowrie District Committee* (1897), 24 R. (Ct. of Sess.) 519; *R.* v. *Bradford, Ex parte Chambers* (1907), 72 J. P. 61; *Walker* v. *McGowan*, [1911] 1 I. R. 1); and the power to get materials includes power to stack them for a reasonable time (*Russell* (*Earl*) v. *Midhurst Rural District Council* (1908), 72 J. P. 180).

(*m*) Sheepwalks on a mountain attached to a farm are not "waste land or common ground" (*Scott* v. *Towyn Rural District Council* (1907), 5 L. G. R. 1050).

(*n*) If the river or brook flows through inclosed land the case is to be treated as one of taking stones from inclosed land (*Allinson* v. *Cumberland County Council* (1907) 71 J. P. 398). As to the provisions applicable, see the text, *infra*.

(*o*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 51.

(*p*) *Ibid.*, s. 52; and see *Pitts* v. *Kingsbridge Highway Board* (1871), 25 L. T. 195; *Clowes* v. *Beck* (1851), 13 Beav. 347.

(*q*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 51. It is to be assessed by justices at special or petty sessions.

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not for the value of the materials, but only for damage done by carrying them away. Apparently (*r*) no previous consent or notice is required when materials are thus taken from land which is not inclosed, unless such land forms part of a common regulated under the Commons Act, 1876 (*s*).

Power to gather stones.

176. Any highway authority (*t*) may for the same purpose gather and carry away stones lying upon any lands within the parish in which such highways are situated, even though such lands are inclosed, so long as they are not a garden, avenue, park, paddock, or inclosed plantation, or inclosed wood not exceeding 100 acres in extent (*u*). Compensation is to be paid, not for the value of the stones, but only for damage done by carrying them away; but no such stones may be gathered without the consent of the owner (*v*) of the lands, or without a licence from two justices. If the stones are to be gathered from inclosed land, notice must be given to the owner and occupier (*a*); but if from uninclosed land, it is not clear whether a consent or licence is necessary or not.

Power to search and carry from inclosed lands.

177. If sufficient materials cannot conveniently be got in the waste lands, common grounds, rivers or brooks of the parish, the highway authority may be authorised by written licence (*b*) from the justices to search for and get and carry away (*c*) materials in or through any inclosed (*d*) lands within the parish, except gardens, avenues, parks, or inclosed plantations or inclosed woods not exceeding 100 acres in extent. Such a licence may also be granted as to similar lands in any parish near the highway for which the materials

(*r*) It is, however, open to argument that consent or a licence is necessary if stones are "gathered" (not quarried) from uninclosed land; see the text, *infra*.

(*s*) See the Commons Act, 1876 (39 & 40 Vict. c. 56), s. 20; *Hayes Common Conservators* v. *Bromley District Council*, [1897] 1 Q. B. 321; and title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 604, 614.

(*t*) See note (*k*), p. 109, *ante*.

(*u*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 51; *Alresford Rural Sanitary Authority* v. *Scott* (1881), 7 Q. B. D. 210. As to what is a park, see *R.* v. *Bradford*, [1908] 1 K. B. 365. Justices cannot give themselves jurisdiction to grant a licence by an erroneous finding that the *locus* is not a "park" etc. (*ibid.*; *R.* (*De Vesci*) v. *Queen's County Justices*, [1908] 2 I. R. 285).

(*v*) As to what is sufficient proof of ownership in such a case, see *Scott* v. *Towyn Rural District Council* (1907), 5 L. G. R. 1050.

(*a*) See p. 111, *post*. Apparently such notice is intended to be equivalent to the summons here referred to.

(*b*) Forms of licence are to be found in the Highway Act, 1835 (5 & 6 Will. 4, c. 50), Schedule (Form No. 10); see also *ibid.*, s. 118, cited on p. 170, *post*. Such a licence must specify the particular lands and place of digging (*R.* v. *Manning* (1757), 1 Burr. 377; *Hooper* v. *Hawkins* (1886), 51 J. P. 246), and must be limited to the present requirements (*Manvers* (*Earl*) v. *Bartholomew* (1878), 4 Q. B. D. 5); thus a licence cannot be granted for six years (*R.* v. *Bradford*, *supra*). It should be addressed to the authority and not to its surveyor (except in the case of county bridges); see *R.* v. *Bradford*, *supra*.

(*c*) Though the licence may not authorise digging in an avenue etc., materials obtained in a permitted place may be carted through an avenue etc. (*Ramsden* v. *Yeates* (1881), 6 Q. B. D. 583).

(*d*) The term "inclosed lands" includes all lands and grounds in the exclusive occupation of one or more persons for agricultural purposes, although not separated from any adjoining lands or grounds of other persons, or from the highway, by any fence or other inclosure; see Highway Act, 1841 (4 & 5 Vict. c. 51).

are required, if the justices are satisfied that sufficient materials cannot conveniently be got either within the parish directly concerned, or from the waste lands, common grounds, rivers or brooks of such adjacent parish, and that a sufficient quantity will be left for the use of such last-mentioned parish. Compensation (to be settled by justices at special or petty sessions) must be paid in respect both of the value of the materials and of any damage done to the land by getting and carrying them away (*e*). Before an authority takes materials from any inclosed (*f*) land it must give a month's notice in writing to the owner and the occupier, who may show cause against the proposed licence at special or petty sessions (*g*).

Fencing pits.

178. If any pit or hole is made in the course of searching for or getting materials under the provisions above-mentioned (*h*), it must be fenced off and the fence maintained while it is open. If no materials are found, the pit or hole must be filled up, levelled, and turfed within three days; if materials are found, then within fourteen days after sufficient materials have been dug, the pit or hole must be filled up or sloped down and fenced off, if required by the landowner. The penalty is a fine not exceeding 10*s.*; while a failure to fence or slope down a pit or hole within six days after a written notice from a justice, or the owner or occupier, or a commoner, renders both the authority and any person employed by it liable to a fine not exceeding £10, to be laid out in fencing, filling up, or sloping down the pit or hole, and towards the repair of the roads in the parish as the justices may direct (*i*).

Penalties.

Penalties for damage.

179. If an authority or its servants, in digging materials, cause any damage or danger to any bridge, mill, building, dam, highway, occupation road, ford, mine, or tin works or other work, the authority is liable to a penalty not exceeding £5 for each offence, in addition to any civil liability (*j*).

Materials for disturnpiked roads.

180. In the case of such roads disturnpiked after 9th August, 1863, as lie within a district formerly controlled by a highway board under the Highway Acts, 1862 (*k*) and 1864 (*l*), a rural district council may raise, within the district, stone or other material

(*e*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 54. The compensation to the owner and occupier should be assessed when the operations are ended and according to the injury sustained by them respectively (*R.* v. *Manning* (1757), 1 Burr. 377; *Boyfield* v. *Porter* (1811), 13 East, 200). Possibly if an authority wantonly used a circuitous road and did unnecessary damage an action might lie (*Boyfield* v. *Porter*, *supra*), but not otherwise (*Russell* (*Earl*) v. *Midhurst Rural District Council* (1908), 72 J. P. 180).

(*f*) See note (*d*), p. 110, *ante*.

(*g*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 53. For a form of notice, see Encyclopædia of Forms and Precedents, Vol. VI., p. 392.

(*h*) See the text, *supra*.

(*i*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 55. The duty of the authority under this section must be enforced in accordance with its terms and not by an action; see *Russell* (*Earl*) v. *Midhurst Rural District Council*, *supra*. As to procedure for enforcing orders of justices, see title MAGISTRATES.

(*j*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 57.

(*k*) 25 & 26 Vict. c. 61.

(*l*) 27 & 28 Vict. c. 101.

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for repairs in the same way and under the same conditions as the turnpike trustees were, in 1870, empowered to do (*m*). If such road is a main road the county council has similar powers (*n*).

Materials from Crown lands.

181. In the case of Crown forests, woods, and woodlands, a highway authority can take no materials without written permission from the Commissioners of Woods (*o*).

SUB-SECT. 4.—*Contracts for Repair, Materials, and Haulage.*

General powers.

182. Local authorities have a general statutory power to enter into any contracts necessary for the execution of the Public Health Acts (*p*).

Contract for repairs.

183. A highway authority which has succeeded to the powers and duties of a highway board (*q*) may enter into contracts (*r*) with any person or persons, respecting the repair of highways, or roads over bridges, either that the authority shall do repairs for which such other persons are liable, or *vice versâ*; but a contract by the authority to do repairs must not be for more than three years (*s*).

Contract for purchase of materials.

184. A highway authority, as successor to a surveyor of highways, may contract for purchasing, getting, or carrying materials for the repair of highways (*t*); and an authority which has succeeded to the powers and duties of a highway board (*u*) may so contract for any period not exceeding three years, and may also contract for the maintenance and repair of all or part of the highways within its district (*a*).

Stamp duty on contracts.

185. An agreement or contract pursuant to the Highway Acts (even under seal) relating to the making, maintaining, or repairing of highways requires only a 6*d.* stamp (*b*); but this provision does not extend to agreements between a county and a district council under the Local Government Act, 1888 (*c*), with reference to the upkeep of main roads (*d*).

(*m*) Annual Turnpike Acts Continuance Act, 1870 (33 & 34 Vict. c. 73), ss. 10, 11. For the powers of turnpike trustees, see Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), ss. 97—103; stat. (1823) 4 Geo. 4, c. 95, ss. 56, 71; and stat. (1827) 7 & 8 Geo. 4, c. 24, s. 15. They are very similar to those of highway authorities under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), as set out in the text, pp. 109 *et seq.*

(*n*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (1).

(*o*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 106; see title CONSTITUTIONAL LAW, Vol. VII., pp. 125 *et seq.*

(*p*) As to these powers, see Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 173, 174; and title LOCAL GOVERNMENT.

(*q*) *I.e.*, county councils and some rural district councils; see pp. 25, 26, *ante.*

(*r*) As to the stamp on such a contract, see the text, *infra.*

(*s*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 22.

(*t*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 46. For a form, see Encyclopædia of Forms and Precedents, Vol. VI., p. 390.

(*u*) See note (*q*), *supra.*

(*a*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 52.

(*b*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule. The stamp may be an adhesive one (*ibid.*, s. 22). As to stamp duty generally, see title REVENUE.

(*c*) 51 & 52 Vict. c. 41, s. 11 (2), (4).

(*d*) *Cumberland County Council* v. *Inland Revenue Commissioners* (1898), 78

186. A district councillor is not disqualified by being interested in a contract with the council for the supply from land owned or occupied by him of materials for making or repairing highways or bridges, or for the transport of materials for such repairs in his own immediate neighbourhood (*e*). Interest of district councillor in contract.

SUB-SECT. 5.—*Ditches and Drains.*

187. The common law imposes a duty upon occupiers of lands adjoining a highway to clean and scour their ditches so as to prevent any nuisance to the highway (*f*). Highway authorities have statutory powers to make, clean, and keep open all ditches, gutters, drains, and watercourses necessary for the maintenance of the highway (*g*). Ditches and drains.

SUB-SECT. 6.—*Cutting Hedges and Lopping Trees.*

188. No person can be compelled by a highway authority to fell a timber tree growing in a hedge (*h*), except when such tree obstructs a carriage way or cartway (*i*), or has been planted in contravention of the Highway Act, 1835 (*j*), or when a highway is ordered to be widened (*k*): but trees may be ordered to be pruned or lopped in certain cases. Felling trees.

189. If a highway authority considers that any carriage way or cartway (*l*) is prejudiced by the shade of hedges, or by trees (except trees planted for ornament, or for shelter to hop-grounds, houses, buildings, or courtyards), and that the sun and wind are excluded from such highway to the damage thereof, it may apply for a summons (*m*) against the occupier (*a*) of the land (*b*) to appear at a special or petty (*c*) sessions to show cause why such hedges or trees are not cut, plashed, pruned or lopped (*d*); and the justices Cutting hedges and lopping trees.

L. T. 679; *Southampton (County) County Council* v. *Inland Revenue Commissioners* (1905), 92 L. T. 364.

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46 (2). Thus he may hire a team to the council (*Buckley* v. *Hanson* (1898), 62 J. P. 119).

(*f*) Bac. Abr. tit. Highway, D; opinion of law officers cited at 29 J. P. 319; *A.-G.* v. *Waring* (1899), 63 J. P. 789.

(*g*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 67, 68, as to which see title SEWERS AND DRAINS.

(*h*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 66.

(*i*) See p. 165, *post*. For a form of notice to cut down such a tree, see Encyclopædia of Forms and Precedents, Vol. VI., p. 412.

(*j*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 64; see p. 165, *post*.

(*k*) See p. 105, *ante*.

(*l*) Note that this power does not extend to footpaths.

(*m*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 65. As to similar proceedings for removal of obstructions, see p. 165, *post*.

(*a*) The Act says "owner," but "owner" includes "occupier" (*ibid.*, s. 5), and it has been held that in *ibid.*, s. 65, the person in occupation, though not the full owner, is the person to be summoned (*Woodard* v. *Billericay Highway Board* (1879), 11 Ch. D. 214).

(*b*) By the wording of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 65, a summons can only be issued if the hedge or tree is growing on land "next adjoining" the way. Should another strip of land intervene, the section will not apply; see *Jenney* v. *Brook* (1844), 6 Q. B. 323, Ex. Ch.

(*c*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 46.

(*d*) "Topping" is a distinct operation from "pruning" or "lopping," and cannot be justified under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 65 (*Unwin* v. *Hanson*, [1891] 2 Q. B. 115, C. A.). The summons must state

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may order (*e*) the necessary work to be done (*f*) within ten days, under a penalty not exceeding 40*s*. If the occupier makes default, the authority must do the work, and may recover the cost from the occupier (*g*).

There are also special provisions as to lopping hedges and trees applicable in the counties of Wilts, Dorset, Somerset, Devon, and Cornwall to such highway authorities as are successors to a highway board (*h*).

SUB-SECT. 7.—*Removal of Snow and other Obstructions.*

Removal of snow and other obstructions.

190. It is the duty of a highway authority (*i*) from time to time (and at all times within twenty-four hours after notice (*k*) from a justice) to remove impediments or obstructions arising from accumulation of snow (*l*), the falling down of roadside banks, or any other cause (*m*).

SUB-SECT. 8.—*Fencing Highways.*

Fencing highways.

191. At common law there is no obligation on the inhabitants at large to fence a highway, or to maintain an existing fence which is not in fact part of the highway (*n*); but if an authority removes

explicitly what the defendant is called upon to do (*Brook* v. *Jenney* (1841), 2 Q. B. 265, 274; *Jenney* v. *Brook* (1844) 6 Q. B. 323, Ex. Ch.; *Woodard* v. *Billericay Highway Board* (1879), 11 Ch. D. 214).

(*e*) The order must be clear and explicit in its terms, or it will not justify the authority in purporting to act under it (*Brook* v. *Jenney*, *supra*; *Jenney* v. *Brook*, *supra*; *Woodard* v. *Billericay Highway Board*, *supra*). An appeal lies against the order to quarter sessions (Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 105), and an injunction may be granted to restrain the pruning or lopping until an appeal can be heard (*Frompton* v. *Tiffin* (1838), 2 Jur. 986).

(*f*) An order may be made at any time of the year; but no person can be compelled, nor is an authority permitted, to cut or prune any hedge between the end of March and the end of September in any year. There is also a provision as regards the season for felling and grubbing up trees; the order, therefore, should be drawn up and served in accordance with this proviso (Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 66). On this point, however, see note (*h*), *infra*. As to the procedure for the enforcement of orders of justices, see generally, title MAGISTRATES.

(*g*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 65. As to the necessity for a demand, see *Ex parte Whitmarsh* (1840), 8 Dowl. 431.

(*h*) Highway Act Amendment Act, 1885 (48 & 49 Vict. c. 13); see also p. 165, *post*. This Act enables the authority to cut, prune, pare and lop hedges and trees at any time of the year with the consent of the owner and occupier.

(*i*) Including a county, or county borough council in respect of main roads repaired by it; see p. 26, *ante*.

(*k*) A form of notice is scheduled to the Highway Act, 1835 (5 & 6 Will. 4, c. 50), Schedule (No. 8); see also *ibid.*, s. 118, referred to on p. 170, *post*. The justice must be one having jurisdiction in the county.

(*l*) As to snow, see also pp. 129, 154, *post*.

(*m*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 26. As to a nuisance caused in the removal of snow, see *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A. C. 111; *Montreal City* v. *Montreal Street Railway*, [1903] A. C. 482, P. C. As to snow on tram lines, see also *Acton District Council* v. *London United Tramways* (1901), *Ltd.*, (1909), 73 J. P. 6.

(*n*) *R.* v. *Llandilo Roads Commissioners* (1788), 2 Term Rep. 232; *Morgan* v. *Leach* (1842), 10 M. & W. 558. As to a fence or wall being in some cases a part

and fails to replace a fence erected by it or its predecessors to guard a dangerous place, it may be liable as for misfeasance in respect of any accident resulting therefrom (*o*).

Power to fence for protection of travellers.

192. A highway authority may fence a highway where such fencing is required for the protection of persons travelling thereon (*p*); and an urban authority may place and keep in repair fences and posts for the safety of foot passengers in streets which are highways repairable by the inhabitants at large (*q*).

Liability of owner of land adjoining highway.

193. There is, in general (*r*), no obligation upon the owner or occupier of land adjoining a highway to fence such land from the road or to maintain existing fences (*s*); if, however, he allows his fence to become dangerous and a nuisance to persons using the highway, he will be liable to them in respect of an injury naturally resulting from the existence of the nuisance (*t*).

SUB-SECT. 9.—*Protection of Horse and Foot Causeways.*

Protection of horse and foot causeways.

194. It is the duty of a highway authority (*a*) to protect horse causeways and foot causeways which run by the side of carriage ways (*b*) by means of posts, blocks, or stones fixed in the ground, or banks of earth or otherwise, in order to prevent them from being used and spoiled by wheeled traffic (*c*).

of the highway and repairable therewith, see p. 103, *ante*. As to fences on canal bridges and the approaches thereto, see pp. 193, 194, *post*.

(*o*) *Whyler* v. *Bingham Rural Council*, [1901] 1 K. B. 45, C. A.; and see title NEGLIGENCE.

(*p*) Highway Rate Assessment and Expenditure Act, 1882 (45 & 46 Vict. c. 27), s. 6; see also p. 253, *post*.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149. This provision merely gives a discretionary power and imposes no obligation (*Wilson* v. *Halifax Corporation* (1868), L. R. 3 Exch. 114). If, however, an authority erects posts, it may be liable for an accident due to its failure to light them (*Lamley* v. *East Retford Corporation* (1891), 55 J. P. 133, C. A., and see title NEGLIGENCE). As to posts for the protection of footpaths, see the text, *infra*.

(*r*) As to the duty of such owners in general, see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 128 *et seq*. An allottee of land under an inclosure award may be liable to fence such allotment from an adjoining highway; see Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), s. 9; Inclosure Acts, 1845 (8 & 9 Vict. c. 118), s. 65, and 1854 (17 & 18 Vict. c. 97), s. 9.

(*s*) *Potter* v. *Perry* (1859), 23 J. P. 644. As to the construction of a local Act imposing such an obligation, see *Rotherham Corporation* v. *Fullerton* (1884), 50 L. T. 364. An individual who adds land to an unfenced highway need not erect a fence to guard a declivity at the edge of such added strip if it is dangerous only to persons who choose to use the added strip in preference to the old road (*Owen* v. *De Winton* (1894), 58 J. P. 833).

(*t*) *Harrold* v. *Watney*, [1898] 2 Q. B. 320, C. A. (child climbing on rotten fence). And see titles NEGLIGENCE; NUISANCE.

(*a*) Including a county or county borough council in the case of main roads; see p. 26, *ante*.

(*b*) See *Ellis* v. *Woodbridge* (1860), 8 C. B. (N. S.) 290. This provision applies only to the erection of posts etc. between the path and the carriage road, not to posts erected at the end of a path to divert cattle or wheeled traffic. As to posts, see also p. 254, *post*. It does not justify an authority in erecting a line of stones by the side of a path to guide travellers (*Radcliffe* v. *Marsden Urban District Council* (1908), 72 J. P. 475).

(*c*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 24.

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SUB-SECT. 10.—*Erection of Sign Posts.*

Sign posts.

195. A highway authority (*d*) may, and, if so directed by justices in special or petty sessions, must, erect direction posts or stones where two or more ways meet, giving in large legible letters the name of the next market town, village or place, on each of such ways (*e*).

Local authorities have also certain powers and duties as to the erection of notice boards and sign posts under the Motor Car Act, 1903 (*f*).

SUB-SECT. 11.—*Erection of Milestones.*

Milestones.

196. A highway authority may set up, maintain and replace milestones on any highway (*g*).

SUB-SECT. 12.—*Erection of Flood Posts.*

Flood posts.

197. If any part of a highway is subject to deep or dangerous floods, the highway authority must erect such graduated stones or posts as it considers necessary to guide passengers through the floods (*h*).

SUB-SECT. 13.—*Construction of Footways.*

Footways.

198. The making of a regular path for foot passengers is a matter for the discretion of a highway authority (*i*).

SUB-SECT. 14.—*Erection of Boundary Posts.*

Boundary posts.

199. A highway authority may, and, if so directed by justices in special or petty sessions, must, erect stones or posts to mark the boundaries of a highway, such posts or stones bearing the name of the parish wherein they are situate (*j*).

SUB-SECT. 15.—*Provision of Highway Depôt.*

Provision of highway depôt.

200. An urban authority or county council (*k*) may purchase or rent land for use as a depôt for highway materials and tools (*l*); but a rural authority has no such power, unless urban powers are conferred upon it for the purpose (*m*).

(*d*) Including a county or county borough council in respect of main roads repaired by it; see p. 26, *ante*.

(*e*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 24.

(*f*) 3 Edw. 7, c. 36. See title STREET TRAFFIC.

(*g*) Highway Rate Assessment and Expenditure Act, 1882 (45 & 46 Vict. c. 27), s. 6.

(*h*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 24.

(*i*) The consent of the vestry (see Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 80) is no longer required (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149; Local Government Act, 1894 (56 & 57 Vict. c 73), s. 25; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (12)).

(*j*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 24.

(*k*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65 (1).

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 149, 175, 176. The Local Government Board regards a depôt as a consequential necessity of the powers of s. 149. The "parish highway board" of a populous parish had power to provide a depôt under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 19.

(*m*) *I.e.*, by an order under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276, putting s. 149, *ibid.*, in force in their district.

SUB-SECT. 16.—*Property in, Theft of, or Injury to Materials, Tools etc.*

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Property in tools, materials etc.

201. All materials, tools and implements provided for repairing highways, and all scrapings from the highways, are vested in the highway authority (*n*). In an urban (*o*) district all streets, being highways repairable by the inhabitants at large (and not being "unretained" main roads), and the pavements, stones and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, vest in and are under the control of the urban authority (*p*).

Penalty for displacing or injuring property of local authority.

202. In an urban district (*q*) any person who, without the consent of the authority, wilfully displaces, or takes up, or injures the pavement, stones, materials, fences, posts, or trees in any such street as is mentioned above, is liable to a fine not exceeding £5, and a further fine not exceeding 5*s.* for every square foot of materials so displaced, taken up, or injured (*r*). In the case of injury to trees (*s*) he must also pay the authority such compensation as the court may award.

Every person who destroys, injures, or defaces notice-boards, or wilfully damages any works or property of a local authority in circumstances not specially provided for, is liable to a fine not exceeding £5 (*t*).

Penalty for taking away materials.

203. Every person is liable to a fine not exceeding £10 who, without the consent of the highway authority, either takes away materials intended for use on any highway, or (not being the owner of private grounds, nor a person authorised by him to get materials for his own private use) takes any materials out of any quarry for getting highway materials, until the authority and its men have ceased working therein for six weeks (*u*).

SUB-SECT. 17.—*Bye-laws as to Highways.*

Bye-laws as to vehicles and gates.

204. A county council (*a*) or county borough council (*b*) may make bye-laws for all or any of the following purposes with respect to any highways within any highway area in its district (*c*), and may alter or repeal the same (*d*):—

(1) For regulating the width of the tyres on vehicles drawn by animal power;

(*n*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 41. As to laying the property in such articles in criminal proceedings, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 647, 648.

(*o*) The provisions in question may also be applied (except as to main roads) in rural places; see p. 57, *ante*.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149. As to "unretained" main roads, see p. 57, *ante*.

(*q*) See note (*o*), *supra*.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149.

(*s*) *Ibid.* As to planting trees in streets, see p. 258, *post*; as to the property in trees on a highway, see pp. 56, 58, *ante*.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 306, 307 (extended by the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 48); and see title LOCAL GOVERNMENT.

(*u*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 47.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (viii.).

(*b*) *Ibid.*, s. 34.

(*c*) Including quarter sessions boroughs (*ibid.*, ss. 35, 38).

(*d*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 26.

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(2) For prohibiting or regulating the use of projections on such tyres;

(3) For prohibiting or regulating the locking of the wheel of any such vehicle when descending a hill without the use of a skidpan;

(4) For prohibiting or regulating the erection of gates across highways, and prohibiting gates opening outwards on highways.

The bye-laws may impose fines, recoverable summarily, not exceeding £2 for any one offence.

Confirmation by Local Government Board.

A bye-law, and a repeal or alteration of a bye-law, is inoperative unless confirmed by the Local Government Board, and cannot be so confirmed until a month's previous notice of the intention to apply for confirmation has been given in a local newspaper (*e*).

SUB-SECT. 18.—*Regulation of Traffic.*

Traffic.

205. An urban highway authority has power to regulate traffic on highways which are "streets" (*f*).

SUB-SECT. 19.—*Lighting Highways and Streets.*

No general power or duty to light streets.

206. Neither at common law nor under the Highway Acts (*g*) have highway authorities any duty or power to light highways (*h*); but by statute such powers have been conferred upon certain authorities, and every authority which has any power or duty to light the roads in its district has the same power and duty to light any main road within it (*i*).

Under Public Health Act, 1875.

207. An urban authority (*k*), or a rural authority with the necessary urban powers, may contract (*a*) with any person for the supply of gas, or other means (*b*) of lighting streets, and may provide and fix, or authorise the contractor to provide and fix (*c*), such lamps, lamp-posts, and other materials and apparatus as it may think

(*e*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 35; and see title STREET TRAFFIC. As to bye-laws generally, see titles LOCAL GOVERNMENT; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) See title STREET TRAFFIC.

(*g*) For the meaning of "Highway Acts," see p. 24, *ante*.

(*h*) The duty to maintain and repair does not include lighting (*Richardson* v. *Tubbs* (1847), 4 C. B. 304; *Lanarkshire* (*Lower Ward*) *Road* (*Trustees*) v. *Kelvinside Estate* (*Trustees*) (1886), 14 Rettie (House of Lords), 18, *per* Lord HALSBURY, L.C.).

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (11) (*Middlesex County Council* v. *Willesden and Hendon Urban District Councils* (1896), 60 J. P. 630; *Re Warminster Local Board and Wilts County Council* (1890), 25 Q. B. D. 450. Therefore a county council is never liable for the lighting of main roads.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161. The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 119, 120, where in force, confer practically identical powers.

(*a*) As to such contracts with gas companies, and as to the duty of such companies to supply gas to public lamps, see title GAS, Vol. XV., pp. 309, 343.

(*b*) *E.g.*, electricity (*Fareham Local Board and Fareham Electric Light Co.* v. *Smith* (1891), 7 T. L. R. 443). As to lighting streets by electricity, see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 642 *et seq.*

(*c*) *Fareham Local Board and Fareham Electric Light Co.* v. *Smith*, *supra*. As to the authority's discretion in choosing sites for lamp-posts, see note (*e*), p. 60, *ante*. It cannot claim to fix lamps to private houses (*Meek* v. *Langdon* (1862), 37 L. T. Jo. 181).

necessary; and in the case of a "private street" (*d*) the initial cost of providing means of lighting may be charged to the frontagers. For this purpose an authority may, under certain circumstances, generate its own electricity (*e*) or gas (*f*).

The expenses of a rural authority in lighting streets in a portion of its district are as a rule declared to be "special" expenses by the order of the Local Government Board conferring the urban lighting powers (*g*).

Under Lighting and Watching Act, 1833.

208. In certain areas the lighting of streets and roads may be carried out under the Lighting and Watching Act, 1833 (*h*). This Act does not apply to urban districts or to rural districts in which urban lighting powers under the Public Health Act, 1875 (*i*), are in force (*k*); and in places where it once applied and does so no longer, all lamps and other property previously vested in the "lighting inspectors" (*l*) are now the property of the authority (*m*). The Lighting and Watching Act, 1833 (*n*), may, however, still be adopted in rural parishes, or parts of parishes, in which such urban lighting powers have not been put in force.

Adoption of Act.

209. The Lighting and Watching Act, 1833 (*n*), must be adopted for a whole parish by a parish meeting (*o*), and for a part of a parish by a meeting of the parochial electors registered in respect of qualifications in that part (*p*), and the adoption requires a two-thirds majority, both on a show of hands and on a poll (if any) (*q*). Notice of the adoption, and of the limit of expenditure decided upon, should be published in the way in which parochial notices are generally published (*r*).

(*d*) As to "private street works," see p. 215, *post*.

(*e*) See title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 556.

(*f*) See title GAS, Vol. XV., pp. 309, 321. There are practical difficulties in the way of a rural authority manufacturing gas, because it cannot obtain a provisional order under the Gas and Waterworks Facilities Acts, and therefore is never in practice invested by the Local Government Board with urban powers under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 161 (latter part), 162.

(*g*) If not declared special expenses they must be raised as general expenses, *i.e.*, by a poor rate, and not by a rate similar in incidence to a general district rate (*Lancashire and Yorkshire Rail. Co.* v. *Bolton Union Assessment Committee* (1889), 23 Q. B. D. 555, C. A., affirmed *sub nom. Lancashire and Yorkshire Rail. Co.* v. *Bolton Union Assessment Committee and Great Lever (Township) Overseers* (1890), 15 App. Cas. 323). As to special expenses, see title LOCAL GOVERNMENT.

(*h*) 3 & 4 Will. 4, c. 90.

(*i*) 38 & 39 Vict. c. 55, s. 161. As to such powers, see the text, *supra*.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 163, re-enacting Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 46.

(*l*) The title given to the body of officials entrusted with the execution of the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), where adopted.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 163.

(*n*) 3 & 4 Will. 4, c. 90.

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (1).

(*p*) *Ibid.*, ss. 7 (4), 49; Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 73. The general law as to parish meetings (for which see title LOCAL GOVERNMENT) applies, with the exceptions noted in the text.

(*q*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 8, 12.

(*r*) *Ibid.*, s. 15; *R.* v. *Deverell* (1854), 3 E. & B. 372.

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If the proposal is negatived, a year must elapse from the date of the meeting before another meeting can be called to reconsider the question (*s*).

There is no power to adopt the Lighting and Watching Act, 1833 (*t*), for an area extending into two or more parishes; but two or more parishes (or parts thereof) may adopt it separately and then carry it into execution through a joint committee (*u*); and lighting inspectors for one parish may join with those of an adjoining parish to carry it out (*x*).

Execution of Lighting and Watching Act, 1833.

210. Where the Lighting and Watching Act, 1833 (*t*), is adopted after the "appointed day" under the Local Government Act, 1894 (*a*), the parish council (if any) will be the executing authority (*b*). If the parish has no parish council, and the parish meeting has not been vested with the necessary powers (*c*), "lighting inspectors" must be elected (*d*).

Where the Lighting and Watching Act, 1833 (*e*), is adopted before the "appointed day" for an entire parish, the parish council (if any) is the executing authority (*f*); if there is no parish council, the "lighting inspectors" continue to execute the Act (*g*). Where it was so adopted for part of a parish "lighting inspectors" continue to execute it, unless and until it, or a parish meeting for that part of the parish, decides that its powers, duties, and liabilities shall be transferred to the parish council (*h*). Should the parish have no parish council, the "lighting inspectors" continue to execute the Act, unless the parish meeting is vested with special power to accept such a transfer (*i*).

Where the Lighting and Watching Act, 1833 (*j*), was adopted before the "appointed day" for an area which was not after that day comprised in one rural parish, it is executed by a joint committee appointed by the councils (or meetings) concerned (*k*).

(*s*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 16; *Wilkinson* v. *Gray* (1844), 9 J. P. 71; *R.* v. *Dunn* (1857), 7 E. & B. 220. But the refusal of an entire parish to adopt the Act will not prevent one ward thereof from at once adopting it (*ibid.*).

(*t*) 3 & 4 Will. 4. c. 90.

(*u*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 57; Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 61. As to joint committees, see title LOCAL GOVERNMENT.

(*x*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 61.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 84 (4); and see title LOCAL GOVERNMENT.

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (7).

(*c*) See *ibid.*, s. 19 (10).

(*d*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 8, 17.

(*e*) 3 & 4 Will. 4, c. 90.

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (5).

(*g*) *Semble*, an order under the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (10), could not transfer the duty to the parish meeting.

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 53 (1). As to the conditions under which a transfer may be made, see *ibid.*

(*i*) As apparently may be done under *ibid.*, s. 19 (10).

(*j*) 3 & 4 Will. 4, c. 90.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 53 (2). As to such joint committees, see title LOCAL GOVERNMENT.

211. A parish council (or, it is submitted, a parish meeting) may execute the Lighting and Watching Act, 1833 (*l*), through a committee (*m*).

Execution of Act by committee.

212. A "lighting area" may be extended or diminished by an order of the county council on the application of the parish council or meeting (*n*); and the same object may be attained by abandoning the Lighting and Watching Act, 1833 (*l*), and re-adopting it for an altered area.

Alteration of area.

At any time after three years from the adoption of the Act, a meeting for the whole or part of the parish (as the case may be) may by resolution abandon it as from a specified date (*o*). Such abandonment will not prevent the levy of any rate previously made, and any balance left in the hands of the executing authority is to be paid to the overseers of the parish in aid of the poor rates (*p*).

Abandonment of Act.

213. Lighting inspectors are appointed by a parish meeting, held for the whole or part of the parish, as the case may be (*q*); and their number, which is to be not more than twelve nor less than three, should be determined by the meeting which adopts the Lighting and Watching Act, 1833 (*r*).

Lighting inspectors.

An inspector must be resident within the parish, and must have been assessed to the last poor rate in respect of premises of the annual value of £15 or more (*s*).

Qualification.

One-third of the inspectors go out of office at the annual meeting every year, but are eligible for re-election (*t*), and if by any casual vacancy their number is reduced below three, the remaining inspectors must forthwith cause a meeting to be summoned to fill it (*u*).

Retirement and casual vacancies.

214. In the thirteenth month after the adoption of the Lighting and Watching Act, 1833, and subsequently on the same day in

Annual meetings.

(*l*) 3 & 4 Will. 4, c. 90.

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 56. As to the appointment and powers of such committees, see title LOCAL GOVERNMENT.

(*n*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 53 (4).

(*o*) *Ibid.*, s. 15. As to the power of abandonment being now vested in the parish meeting, see note (*q*), *infra*.

(*p*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 15.

(*q*) *Ibid.*, s. 17; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7. Although it is clear that the power of adopting the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), has been transferred from the old meeting of ratepayers to the modern parish meeting of registered parochial electors, it is uncertain whether, when it has been adopted in part only of the parish, the powers of abandoning it and appointing inspectors have been so transferred or not. See the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 5, 9, 15, 16, 17, 21, 73, and the Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 6, 7, 19, 75, which are very difficult to construe together. But it is submitted that the practical inconvenience of the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), being adopted by one class of electors and administered or abandoned by another class would lead the court to hold, if possible, that the ratepayers' meeting is now superseded for all purposes.

(*r*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 8.

(*s*) *Ibid.*, s. 17.

(*t*) *Ibid.*, s. 19.

(*u*) *Ibid.*, s. 21.

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every year, the inspectors must summon a parish meeting (*a*), at which the accounts and vouchers for the past year must be produced, new inspectors elected, and the limit of expenditure for the current year fixed (*b*). A copy of the accounts verified on oath before two justices by any two of the inspectors is to be kept open for inspection at all reasonable times by persons interested (*c*), and an annual return of accounts must be made to the Local Government Board (*d*).

Meetings of inspectors.

215. In addition to such other meetings as may be necessary, lighting inspectors are, in strictness, required to meet on the first Monday in every month at noon at some convenient place previously publicly notified in order to receive complaints (*e*); and at all meetings the quorum is one-third of the whole number appointed, with a minimum of two (*f*). Inspectors may appoint a treasurer (from whom security is to be taken) (*g*) and such other officers as they think necessary, paying suitable salaries and wages, and may rent an office (*h*). The treasurer and officers may be punished summarily for refusing to account or to deliver up books and papers when required (*i*), and are forbidden to accept any fee or reward other than the salary or fees appointed (*k*); an inspector is not to hold any office or place of trust created by virtue of the Lighting and Watching Act, 1833 (*k*), nor to be concerned directly or indirectly in any contract with the parish.

Their duties and liabilities.

Power to sue etc.

Inspectors may sue and be sued in the name of any one of them, and provision is made for their expenses and costs (*l*), as well as for the keeping of minute books and accounts (*m*), the recovery and application of fines and penalties (*n*), appeals to quarter sessions (*o*), actions (*p*), and for the protection of commissioners of sewers (*q*).

Powers of a lighting authority.

216. The authority executing the Lighting and Watching Act, 1833 (*r*), may erect lamps, lamp-irons, or lamp-posts, and may fix them on the walls or palisadoes of any houses, buildings, or inclosures (doing as little damage as possible), and may light them with gas, oil,

(*a*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 18. Doubtless these provisions as to the exact date of the annual meeting may be regarded as directory only.

(*b*) *Ibid.*, ss. 18, 19. As to the limit of expenditure, see p. 123, *post*.

(*c*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 19.

(*d*) Local Taxation Returns Acts, 1860 (23 & 24 Vict. c. 51) and 1877 (40 & 41 Vict. c. 66); and see title LOCAL GOVERNMENT.

(*e*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 22, 23.

(*f*) *Ibid.*, s. 23.

(*g*) *Ibid.*, ss. 25, 27. If he fails to give the required security his appointment is void (*ibid.*, s. 25).

(*h*) *Ibid.*, s. 24. No employee is to hold two offices (*ibid.*).

(*i*) *Ibid*, ss. 26, 27.

(*k*) *Ibid.*, s. 28. The penalty in each case is £50, and permanent disqualification for office under the Act (*ibid.*).

(*l*) *Ibid.*, ss. 29, 64.

(*m*) *Ibid.*, ss. 30, 31.

(*n*) *Ibid.*, ss. 63, 70.

(*o*) *Ibid.*, ss. 66, 67.

(*p*) *Ibid.*, ss. 29, 64. See also Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*q*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 74, 75.

(*r*) 3 & 4 Will. 4, c. 90.

or otherwise (*s*), for such number of hours in every twenty-four as it thinks necessary (*t*). It may contract with any person or company for lighting all or part of its district, or for furnishing lamps, lamp-posts, and other necessary things (*u*), and may purchase or rent ground or buildings (*a*). All lamps, lamp-posts, and other specified property and materials vest in the authority (unless otherwise provided by contract), and the authority may sell them and apply the purchase-money for the purposes of the Act (*b*).

Property in lamps etc.

217. Every person who wilfully breaks, throws down, or damages any lamp, lamp-iron, lamp-post, pale, rail, chain, or other furniture thereof, or wilfully extinguishes any lamp, is liable to a fine not exceeding 40*s.* for every article so broken, thrown down, or damaged, and not exceeding £5 for any other such offence; and in either case he must be ordered to make full satisfaction for any damage done (*c*). He may be arrested without warrant by any eye-witness, but must be handed over to a constable (*d*).

Penalty for damage to lamps etc.

If any person carelessly or accidentally does any of the acts of damage above mentioned, and does not on demand make satisfaction to the authority therefor, the amount of the damage may be recovered from him in a summary manner (*e*).

218. The meeting which resolves to adopt the Lighting and Watching Act, 1833 (*f*), should determine the total amount of money which may be raised for the purposes of the Act in any one year (*g*); and, apparently, when the maximum has been fixed, the electors

Limit on expenditure.

(*s*) This will cover the use of electricity.

(*t*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 45. For provisions contained in the Act relating to laying pipes in private property, altering position of pipes, stopping escapes, disposal of washings, protection of water pipes, and actions against the authority, see title GAS, Vol. XV., pp. 329, 330, 362.

(*u*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 57. As to the formalities to be observed in making such contracts and the enforcement thereof, see *ibid.*, ss. 57, 58. In making contracts, the possible abandonment of the Act should be borne in mind.

(*a*) *Ibid.*, s. 59.

(*b*) *Ibid.*, s. 60. As to actions by and against inspectors, see *ibid.*, s. 29.

(*c*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 55. As to the recovery and application of the money, see *ibid.*, ss. 55, 63.

(*d*) *Ibid.*, s. 55.

(*e*) *Ibid.*, s. 56. As to procedure for recovery, see title MAGISTRATES. This provision applies where the damage is purely accidental, *e.g.*, where a lamp-post is leaning over a street and is struck by a passing cart without any fault of the driver, or where there is some slight carelessness not amounting to negligence (*Burgess* v. *Morris* (1897), 61 J. P. 553; *Ashton* v. *Eccles Corporation* (1906), 71 J. P. 55). If the damage be due to negligence, the master of the person doing it may be liable at common law (*Crystal Palace Gas Co.* v. *Idris & Co.* (1900), 82 L. T. 200; see also titles MASTER AND SERVANT; NEGLIGENCE); but the summary remedy under the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 56, is limited to the person actually doing the damage (*Harding* v. *Barker* (1888), 53 J. P. 308).

(*f*) 3 & 4 Will. 4, c. 90.

(*g*) *Ibid.*, s. 9; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (3). As to the question whether the meeting is to be one of ratepayers or of registered parochial electors, see note (*q*) on p. 121, *ante*.

SECT. 1. Powers and Duties.

are bound by it and cannot increase it, at any rate for three years (*h*). At each successive annual meeting the electors must fix a sum (either the maximum or some less sum) to be raised during the current year (*i*).

Raising of money for lighting expenses.

The executing authority obtains the funds required by a precept addressed to the overseers (*k*), who, in their turn, obtain them by levying a "lighting rate" (*l*).

Liability for failure to light streets.

219. An authority is not in general liable in respect of accidents occurring through its failure to light the streets (*m*); but it may be held liable if it has neglected to light posts or other objects erected by it in such a way as to be a dangerous obstruction unless lighted (*n*).

SUB-SECT. 20.—*Combination of Authorities.*

Power to combine.

220. Two or more local authorities may combine to execute and maintain works for the benefit of their respective districts (*o*); and, in particular, to carry out improvements in highways under the Highways and Bridges Act, 1891 (*p*).

SUB-SECT. 21.—*Officers of Authorities.*

Officers.

221. Urban and rural authorities have power to appoint such officers as may be required for the purposes of highway administration (*q*); and in some cases such authorities have still in their service highway officials transferred to them from dissolved highway boards (*a*); or other superseded authorities (*b*). County councils appoint the county surveyors and other officials required for the purposes of their highway duties (*c*).

Order to enter upon land.

222. A local authority and its officers may obtain from a court of summary jurisdiction an order authorising them to enter, lay

(*h*) *Beechey* v. *Quentery* (1842), 10 M. & W. 65.

(*i*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 9. As to the maximum rate permissible in parishes which have no parish council, see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (9); and title LOCAL GOVERNMENT.

(*k*) Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 32, 35, 38.

(*l*) *Ibid.*, ss. 33, 34. As to such rates, see title RATES AND RATING.

(*m*) For no duty is imposed upon them (*Harris* v. *Baker* (1815), 4 M. & S. 27; *Cowley* v. *Newmarket Local Board* (1890), 55 J. P. 54, affirmed [1892] A. C. 345); and see title NEGLIGENCE.

(*n*) *Lamley* v. *East Retford Corporation* (1891), 55 J. P. 133, C. A. *Mellor* v. *Heywood Corporation* (1884), 48 J. P. 148, and *Young* v. *St. Mary's, Islington, Vestry* (1896), 60 J. P. 821, are perhaps distinguishable on the grounds that in the former case the lamp-post, with which the carriage collided, was not in the roadway, and that in the latter the vestry had by statute a discretion as to the hour for extinguishing lamps.

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 285; and see title LOCAL GOVERNMENT.

(*p*) 54 & 55 Vict. c. 63; and see p. 106, *ante*.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 189, 190; and see title LOCAL GOVERNMENT.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 81; and see title LOCAL GOVERNMENT.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 326; and see title LOCAL GOVERNMENT.

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (x).

open, and examine any lands or premises for the purpose of making plans, surveying, measuring, taking levels, making, keeping in repair, or examining works, ascertaining the course of sewers or drains, or ascertaining or fixing boundaries (*d*); and any person who wilfully obstructs them is liable to a penalty (*e*).

SECT. 2.—*Expenses.*

SUB-SECT. 1.—*County Councils.*

County councils.

223. The expenses incurred by a county council in maintaining and repairing main roads, whether directly or through borough or district councils, are a general county purpose, and are to be charged to the general county account (*f*). In Lancashire, however, main roads are repairable by the hundred, and one half of the cost is repayable to the county account out of a separate rate levied on each hundred (*g*).

Where a county council repairs a highway upon default by the highway authority, the cost of so doing is recoverable from the authority in default (*h*).

SUB-SECT. 2.—*County Borough Councils.*

County borough councils.

224. In county boroughs the expenses of repairing main roads are payable out of the borough fund (*i*). Ordinary highway expenses are defrayed as in other boroughs.

SUB-SECT. 3—*Borough and other Urban Councils.*

Borough and other urban councils.

225. In boroughs and other urban districts the highway expenses of the council, excluding main road expenses in county boroughs (*k*), are in general defrayable out of the district fund and general district rates, so far as they are not met by contributions from the county council or Road Board or by miscellaneous receipts (*l*).

In any borough or urban district where the expenses of the authority under the Public Health Act, 1875 (*m*), are charged on and defrayed out of the district fund and general district rates, and no other mode of providing for repair of highways is directed by any local Act (*n*), the cost of repairing highways is similarly defrayed if

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 305.

(*e*) *Ibid.*, s. 306.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 11 (1), 35 (3). As to this account and the general finance of county councils, see titles LOCAL GOVERNMENT; RATES AND RATING. The council may, of course, receive some contributions from the Road Board; see p. 129, *post*.

(*g*) By an order made under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (13) (see *R.* v. *Dolby*, [1892] 2 Q. B. 736), it is believed that the operation of this sub-section is confined to Lancashire.

(*h*) See pp. 150, 151, *post*.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34 (2). Notwithstanding this provision, it is not unusual to charge highway expenses to the district fund in a county borough where there are only a few short lengths of main road.

(*k*) As to which see *supra*.

(*l*) *E.g.*, trusts, or penalties (see p. 130, *post*).

(*m*) See title LOCAL GOVERNMENT.

(*n*) *I.e.*, one applicable to the whole district (*Hill* v. *Crediton Urban District Council* (1898), 62 J. P. 340).

SECT. 2. Expenses.

the whole of the borough or district is rated for paving, water supply, or sewerage. If, however, parts of the borough or district are not so rated, the cost of repairing highways in those parts is to be defrayed out of a separate highway rate, and in the remaining parts out of the general district rate; and if no public works of paving, water supply, or sewerage are established in the borough or district, the cost of repairing the highways is to be defrayed out of a highway rate to be levied throughout (*o*) the borough or district (*p*).

Where the expenses of an urban authority under the Public Health Act, 1875 (*q*), are payable otherwise than out of a general district rate levied under that Act, the highway expenses of the authority are payable out of the rate (whether borough rate or improvement rate) out of which they were payable before 1875.

At the present date, therefore, a separate highway rate is seldom levied (*r*).

SUB-SECT. 4.—*Rural District Councils.*

Rural district councils.

226. In a rural district, highway expenses, so far as they are not met by contributions from the county council or Road Board, or by miscellaneous receipts, are defrayable as general expenses (*s*), subject to the following qualifications:—

(1) Any contributory place within the district may be charged with the whole expense of maintaining its own highways, and be relieved from the highway expenses of the other parts of the district, if exceptional circumstances render it just to do so, and if the county council approves (*t*).

(2) Where the Public Health Acts Amendment Act, 1890 (*u*), is adopted (*x*), the Local Government Board can, it is submitted (*a*), on

(*o*) *I.e.*, throughout the whole of it (*Re Broughton Local Board* (1865), 29 J. P. 324).

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 216. It is a question of fact whether public works of paving etc. are established. There must be public works "to a reasonable extent," and the laying of 200 yards of kerbing is not sufficient (*Oxenhope Local Board* v. *Bradford Corporation* (1882), 47 J. P. 21); but the existence of some old stone drains or culverts was held sufficient in *R.* v. *Belper Local Board* (1881), 46 J. P. 166. Compare *Birmingham Canal Co.* v. *Docker* (1860), 24 J. P. 691.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 207, 208.

(*r*) As to the levying and incidence of such a rate, see *ibid.*, s. 217; and title RATES AND RATING. A form of highway rate is given (No. 4) in the Schedule to the Highway Act, 1835 (5 & 6 Will. 4, c. 50), and see *ibid.*, s. 29.

(*s*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 29 (a). As to the "general" and "special" expenses of local authorities, see title LOCAL GOVERNMENT.

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 29 (c); Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 7.

(*u*) 53 & 54 Vict. c. 59, s. 40.

(*x*) *I.e.*, where a rural authority has adopted so much of Part III. of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), as is applicable to such an authority, or where *ibid.*, s. 49, has been put in force by an order of the Local Government Board under *ibid.*, s. 5.

(*a*) Notwithstanding that the provision in the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 29, making highway expenses "general expenses," is later in date, it does not appear to qualify the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 49; at any rate, the Local Government Board takes this view. The Board never makes the "repair" of highways a special

the application of the authority, declare any highway expenses to be special expenses chargeable to some contributory place.

(3) Expenses of improvements under the Highways and Bridges Act, 1891 (*b*), may with the consent of the county council be charged on one or more parish or parishes.

(4) Where highway expenses would, if the Local Government Act, 1894 (*c*), had not been passed, have been wholly or partly defrayed out of any property or funds (*d*) other than rates, the district council must give to the parish or other area the benefit of such property or funds by way of reduction of its rates (*e*).

SUB-SECT. 5.—*County Council Contributions.*

(i.) *In respect of Main Roads.*

County council contributions.

227. Where an urban authority has claimed to retain a main road (*f*), the county council must make an annual payment (*g*) towards the costs of the maintenance and repair, and of reasonable improvement connected with such maintenance and repair (*h*).

Where a highway authority (urban or rural) has undertaken the maintenance of, or other dealing with, a main road (*i*), the county council must make an annual payment (*g*) for the costs of the undertaking (*k*).

In either of the above cases the payment is to be such annual sum as may be agreed (*l*), or, in the absence of agreement, may be determined by the Local Government Board (*m*), either as arbitrators or otherwise, at the option of the Board.

expense, and only in very exceptional cases treats "improvement" charges in this way.

(*b*) 54 & 55 Vict. c. 63, s. 3; as to which, see p. 106, *ante*.

(*c*) 56 & 57 Vict. c. 73.

(*d*) *E.g.*, trust funds (see p. 130, *post*); or parochial property such as public quarries (see p. 109, *ante*). The right to compel an individual to repair a road *ratione tenuræ* has been held by quarter sessions not to be "property or funds" (*Lonsdale* v. *Lowther Overseers* (1896), 60 J. P. 297).

(*e*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 29 (d).

(*f*) Under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (2); and see p. 26, *ante*.

(*g*) *I.e.*, a payment to be made annually in respect of the year's expenses, and not a fixed sum arrived at by taking the average expenditure over several years (*Sandgate Urban District Council* v. *Kent County Council* (1898), 79 L. T. 425, H. L.); but, *semble*, costly improvements ought to be paid for by a loan, so as to spread the expense over several years; see *Marlborough Town Council* v. *Wilts County Council* (1894), 58 J. P. 213.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (2).

(*i*) *Ibid.*, s. 11 (4).

(*k*) *Ibid.*

(*l*) Such an agreement requires a 10*s.* stamp; see *Cumberland County Council* v. *Inland Revenue Commissioners* (1898), 78 L. T. 679; *Southampton (County) Council* v. *Inland Revenue Commissioners* (1905), 69 J. P. 105. As to stamp duty generally, see title REVENUE.

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 11 (2), (3), (4), 63; Local Government (Determination of Differences) Act, 1896 (59 & 60 Vict. c. 9), s. 1. The court will not decide a dispute as to the amount payable upon a case stated by the councils concerned (*Re Bedfordshire County Council and Bedford Urban Sanitary Authority*, [1894] 2 Q. B. 786), but will send them to the Local Government Board. If the Board decides "otherwise than as arbitrators," *semble*, its decision cannot be questioned (*R.* v. *Local Government Board*,

SECT. 2. Expenses.

But a county council must not make any such payment until it is satisfied that the road has been properly maintained and repaired, or that the improvement or other dealing with the road, as the case may be, has been properly executed (*n*).

Compelling district council to repair.

If any portion of a main road, the maintenance and repair of which are undertaken by any district council, is not in proper repair and condition, the county council may require the district council to put it in proper repair and condition, and, if such requirement is not complied with within a reasonable time, may do the necessary work themselves and recover the costs from the district council (*o*).

Settlement of differences.

228. If any difference arises under the above provisions between a county council and a district council, either as to the refusal of a county council to make payments, or as to a road having been put in proper repair before becoming a main road (*p*), or as to any notice to put a road in proper repair, such difference shall, should either council so require, be determined by the Local Government Board, either as arbitrators, or otherwise at the option of the Board (*q*).

Allowance in respect of footpath.

A footpath by the side of a main road is for the purposes of repair and maintenance part of the main road, even though it was formerly repaired, not by the turnpike trustees, but by the urban authority, and the authority which retains such a main road is now entitled to an allowance in respect of the footpath although before 1888 it bore the whole cost of it (*r*).

Extent of duty to repair.

The cost of lighting a main road is not thrown upon the county council (*s*); nor is the cost of watering, scraping, or scavenging, except so far as such work is necessary for the maintenance of the road as distinct from sanitary purposes (*t*); but the duty to maintain and

Ex parte Hackney Borough Council (1908), 72 J. P. 211). If it decides "as arbitrators," it proceeds in accordance with the provisions of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), ss. 30—32, as to which see title RAILWAYS AND CANALS; and in such case its award may be questioned like any other award; see *Re Kent County Council and Sandgate Local Board*, [1895] 2 Q. B. 43; *Re Burslem Corporation and Staffordshire County Council*, [1896] 1 Q. B. 24, C. A.

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (5).

(*o*) *Ibid.*, s. 11 (8).

(*p*) As to "maining" of roads, see p. 14, *ante*.

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (9); Local Government (Determination of Differences) Act, 1896 (59 & 60 Vict. c. 9), s. 1, as to which see note (*m*), p. 128, *ante*.

(*r*) *Re Warminster Local Board and Wilts County Council* (1890) 25 Q. B. D. 450; *Re Burslem Corporation and Staffordshire County Council, supra; Derby County Council* v. *Matlock Bath and Scarthin Nick Urban District*, [1896] A. C. 315. But, it may be (see last case) that if a new footpath was dedicated alongside a main road, such path would not be repairable as a part of the road. Paved crossings over a main road are similarly repairable as part of it (*Re Warminster Local Board and Wilts County Council, supra*).

(*s*) *Re Warminster Local Board and Wilts County Council, supra; Middlesex County Council* v. *Willesden and Hendon Urban District Councils* (1896), 60 J. P. 630; *Lanarkshire (Lower Ward) Road Trustees* v. *Kelvinside Estate (Trustees)* (1886), 14 Rettie (House of Lords), 18.

(*t*) *R.* v. *Essex Justices* (1888), 4 T. L. R. 676; *Burnley Corporation* v. *Lancaster (County Palatine) County Council* (1889), 54 J. P. 279; *Re Warminster Local Board and Wilts County Council, supra*.

repair extends to the removal of snow so as to make the road passable (*u*), and to the maintenance of retaining walls and other work necessary for the preservation of the road (*a*).

Reasonable improvement.

Should the urban authority execute any improvements to a main road, the liability of the county council to make a payment in respect thereof depends upon whether the improvement is a reasonable improvement connected with maintenance and repair (*b*).

Payment by tramway authority.

Any payment made by a tramway authority to an urban authority which retains a main road should be taken into account in considering the amount to be paid by the county council (*c*). In the case of a main road in a rural district such a payment will be made to the county council (*d*).

(ii.) *In respect of other Highways.*

Other highways.

229. A county council may contribute towards the cost of the maintenance and improvement of any highway or public footpath in the county, although it is not a main road (*e*); and such contributions may be made subject to such conditions as to maintenance and repair as may be agreed on between the county council and the highway authority (*f*).

SUB-SECT. 6.—*Road Board Contributions.*

Advances by Road Board.

230. Advances may be made by the Road Board with the approval of the Treasury to a county council or other highway authority in respect of the construction of a new road or an improvement of an existing one, and in the former case the Road Board may also contribute towards the cost of maintaining the road. Such an advance may be made either by way of grant or by way of loan (or partly in one way and partly in the other), and upon such terms and conditions as the Road Board thinks fit (*g*). The expenses of a highway authority in constructing a new road under the Development and Road Improvement Funds Act, 1909 (*h*), so far as they are not defrayed out of an advance from the Road Board, are to be defrayed as part of its highway expenses; and enactments as to such expenses, including borrowing powers, apply accordingly.

(*u*) *Amesbury Guardians* v. *Wilts Justices* (1883), 10 Q. B. D. 480; and see p. 114, *ante*.

(*a*) *Sandgate Urban District Council* v. *Kent County Council* (1898), 79 L. T. 425, H. L.; and see p. 103, *ante*.

(*b*) *Re Warminster Local Board and Wilts County Council* (1890), 25 Q. B. D. 450. The provision with regard to "improvements" renders obsolete the decision in *Leek Improvement Commissioners* v. *Stafford Justices* (1888), 20 Q. B. D. 794, C. A.

(*c*) *Over Darwen Corporation* v. *Lancaster County Justices* (1887), 58 L. T. 51.

(*d*) *Stockport and Hyde Division of Macclesfield Hundred Highway Board* v. *Cheshire County Council* (1891), 65 L. T. 85.

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (10).

(*f*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25 (3).

(*g*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 8 (1), (2), (4).

(*h*) *Ibid.*, s. 8 (1).

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SUB-SECT. 7.—*Penalties payable to Highway Authority.*

Penalties.

231. Except in the case of a quarter sessions borough, penalties under the Highway Act, 1835 (*i*), are payable, unless otherwise provided, half to the informer and half to the highway authority, to be applied towards the repair of highways. If the authority lays the information, the whole is applicable to the repair of highways (*j*).

In a quarter sessions borough half is payable to the informer and half to the borough fund (*k*). If the highway authority lays the information, it is doubtful whether the whole is payable to it or to the borough fund (*l*).

SUB-SECT. 8.—*Trusts for Repair of Highways.*

Trust gifts for repair of highways.

232. Where there is a trust (*m*) for the repair of a particular highway, or of the highways in a particular district, the authority responsible for their repair is entitled to the income of the trust (*n*).

Letting of trust lands.

Where lands or tenements have been given for the maintenance of highways, and for no other object, the trustees must let them for not more than ninety-nine years, at the best rent obtainable, without fine. The amount of the rent, and the length of the term, must before any lease is granted be approved in writing by two disinterested justices at petty (*o*) or special sessions (*p*). The proceeds must be paid to the highway authority of the district (*q*), and the parish originally entitled will (if a rural one) receive a reduction in its rates in respect thereof (*r*). There is a somewhat similar provision with respect to lands given in trust for the maintenance of bridges (*s*).

Letting of pasturage on stone allotments.

233. Where land has been allotted to surveyors of highways for quarrying road-repairing materials under the Inclosure Act, 1845 (*t*), the herbage on such allotment (if not specifically allotted to other persons) is now vested in the highway authority of the district (*a*), who must let the same (reserving the right to get

(*i*) 5 & 6 Will. 4, c. 50. For the meaning of "Highway Acts," see p. 24, *ante*. As to penalties under the Public Health Acts, see, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*j*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 103. The Act appears to contain no direction to the contrary in the case of any penalties recoverable summarily.

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 221 (1), (2) (a).

(*l*) It will not be payable to the authority under *ibid.*, s. 221 (2) (b), for the Highway Act, 1835 (5 & 6 Will. 4, c. 50), was passed before the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76); it may, however, be so payable under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 221 (2) (a), if the authority can be regarded as an "informer" or a "person aggrieved."

(*m*) As to the repair of highways being a charitable purpose, see Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 13 (2); and title CHARITIES, Vol. IV., p. 115.

(*n*) *A.-G.* v. *Day*, [1900] 1 Ch. 31; *Middlesex County Council* v. *Willesden and Hendon Urban District Councils* (1896), 60 J. P. 630. See the latter case as to a fund to the benefit of which two authorities were entitled.

(*o*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 46.

(*p*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 50.

(*q*) *A.-G.* v. *Day*, *supra*.

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 29 (d).

(*s*) Stat. (1670) 22 Car. 2, c. 12, s. 2.

(*t*) 8 & 9 Vict. c. 118, s. 72.

(*a*) As successor to the surveyors; see pp. 106, 107, *ante*

materials) at the best rent obtainable. In this case also the parish (if a rural one) must be allowed a reduction in its rates (*b*).

SUB-SECT. 9.—*Accounts.*

Accounts.

234. The provisions of the Highway Act, 1835 (*c*), as to keeping highway accounts appear to be obsolete ; and the accounts of highway authorities must now be kept in the manner prescribed for the accounts of local authorities (*d*).

Annual returns.

A highway authority, other than a municipal corporation (*e*), must, if required by the Local Government Board, make a return of its highway accounts to the Board annually; but such returns are seldom, if ever, called for (*f*).

SUB-SECT. 10.—*Illegal Expenditure.*

When court will interfere.

235. Where a highway authority proposes to carry out work which is within its statutory powers, the court will not interfere, unless it is satisfied that the real object of the work is an ulterior one not contemplated by the statute (*g*).

If an authority wrongfully expends, or proposes to expend, money on objects not within its statutory powers (*h*), or for ulterior purposes on objects *primâ facie* within its powers (*i*), any ratepayer may object at the audit, or an injunction may be obtained against the authority at the suit of the Attorney-General (*k*). In the case of a borough council there is also a remedy by *certiorari* (*l*), and in the case of a highway authority which has succeeded to the powers and duties of a highway board (*m*) a ratepayer may perhaps (*n*) appeal

(*b*) See note (*r*), p. 130, *ante*.

(*c*) 5 & 6 Will. 4, c. 50, ss. 39—41, and Sched., Form 5.

(*d*) See title LOCAL GOVERNMENT.

(*e*) The statutory provisions upon the point were repealed as to municipal corporations by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. I., Part II.

(*f*) The duty to make such returns was imposed by the Local Taxation Returns Acts, 1860 (23 & 24 Vict. c. 51) and 1877 (40 & 41 Vict. c. 66), and the Highway Accounts Returns Act, 1879 (42 & 43 Vict. c. 39), s. 2; but a return need not now be made unless called for, since the accounts are now audited by the Local Government Board auditor, and therefore the District Auditors Act, 1879 (42 & 43 Vict. c. 6), s. 3, applies to them.

(*g*) *R.* v. *Brighton Corporation, Ex parte Shoosmith* (1907), 96 L. T. 762, C. A., where the corporation, on the occasion of some impending motor-car trials, treated a road with tarmac, and it was held that it was entitled to do so, as it honestly considered that it would improve the road, *qua* highway, and therefore it was immaterial that it had some other purpose also in view.

(*h*) *E.g.*, in repairing a road not repairable by the inhabitants at large.

(*i*) See *R.* v. *Brighton Corporation, Ex parte Shoosmith, supra*.

(*k*) See *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516, C. A.

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 141; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 246; *R.* v. *Brighton Corporation, Ex parte Shoosmith, supra*. As to *certiorari* see title CROWN PRACTICE, Vol. X., pp. 160, 173.

(*m*) *I.e.*, county councils and some rural district councils; see pp. 25, 26, *ante*.

(*n*) See Highway Act, 1864 (27 & 28 Vict. c. 101), ss. 38—43. These sections are not expressly repealed, but it is certainly arguable that they should be regarded as repealed by implication, and it is unlikely that recourse will be had to them in the future. For the special procedure on such appeals, see *ibid.*, ss. 39—42.

SECT. 2. Expenses.

to quarter sessions if he feels aggrieved (1) in respect of any order of the authority for the repair of a highway on the ground that it is not repairable by the inhabitants at large, or in respect of any other order on the ground that it was made without jurisdiction; or (2) in respect of any item of expenditure charged as highway expenses, on the ground that it has not in fact been incurred, or has been incurred *ultra vires*.

SUB-SECT. 11.—*Borrowing Powers.*

Borrowing with consent of Local Government Board:

by county council;

by urban authority;

by rural authority.

236. A county council has extensive powers of borrowing money, with the consent of the Local Government Board, for the purposes of its various powers and duties (*o*). Where the duties of a defaulting district council have been transferred to a county council, the latter has special power to borrow as the defaulting council might have done (*p*).

An urban authority may borrow money, with the sanction of the Local Government Board, to defray any expenses incurred by it in the execution of the Public Health Act, 1875, in respect of permanent works (*q*), and may re-borrow in order to discharge certain outstanding loans. A rural authority has similar powers of borrowing to meet expenses incurred by it in the execution of its various duties in respect of permanent works (*r*). It is submitted that a rural authority can only borrow for highway purposes under this provision, and cannot (even though it be the successor to a highway board) make use of the borrowing provisions of the Highway Act, 1864 (*s*), under which a highway board could raise loans for improvements (*t*).

Raising loans for joint scheme.

The Highways and Bridges Act, 1891 (*a*), contains provisions as to the raising of loans by councils who unite to carry out an improvement under it.

SECT. 3.—*Liabilities.*

SUB-SECT. 1.—*Actions.*

General rule.

237. In general, no action for damages will lie against a highway authority at the suit of a person who has suffered injury

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 69. As to such powers, see title LOCAL GOVERNMENT. They extend (*inter alia*) to loans for authorised purchases of land and for permanent works.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 63.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 233, 234. It is submitted that expenses incurred under s. 144 (*ibid.*) in the execution of duties of surveyors of highways are incurred in the execution of the Public Health Acts. As to loans of urban authorities, see title LOCAL GOVERNMENT.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 233, 234; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 29.

(*s*) 27 & 28 Vict. c. 101, s. 47. Under this section a highway board could borrow, with the approval of quarter sessions, in order to defray the expenses of certain specified improvements.

(*t*) It is, at any rate, the view of the Local Government Board that any loan required by a rural district council for highway purposes must be raised under the Public Health Act, 1875 (38 & 39 Vict. c. 55), with the sanction of the Board.

(*a*) 54 & 55 Vict. c. 63.

through its neglect to repair a highway under its charge (*b*); and in order to establish liability it is necessary to show some act amounting to misfeasance as opposed to mere non-feasance (*c*). The predecessors of modern highway authorities were not liable in respect of mere non-feasance (*d*), and a transfer to a public authority of the obligation to repair does not of itself create the liability (*e*).

Although, however, the general rule is as stated above (*f*), there may be exceptional cases in which the statute transferring the obligation has created a liability even in respect of mere non-feasance (*g*).

Application of general rule.

On the other hand, a highway authority will be liable, in the absence of contributory negligence (*h*), to a passenger for injuries

(*b*) Including failure to clean out the ditches thereof (*Irving* v. *Carlisle Rural District Council* (1907), 71 J. P. 212).

(*c*) This rule applies to metropolitan borough councils as successors to the metropolitan vestries and district boards acting as surveyors of highways under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 96 (*Parsons* v. *St. Matthew, Bethnal Green* (1867), L. R. 3 C. P. 56; *Holborn Union Guardians* v. *St. Leonard, Shoreditch, Vestry* (1876), 2 Q. B. D. 145, *per* LUSH, J.; *Taylor* v. *St. Mary Abbotts, Kensington, Vestry* (1886), 2 T. L. R. 668, *per* MANISTY, J.); to the Common Council as successors to the City of London Sewers Commissioners (*Lampard* v. *Sewers Commissioners* (1884), 1 T. L. R. 114); to urban authorities acting as surveyors of highways under the Public Health Act, 1875 (38 & 39 Vict. c. 55) (*Cowley* v. *Newmarket Local Board*, [1892] A. C. 345); and therefore to rural district councils acting under the same statute and the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25. It has apparently never been expressly decided in England that it applies to county councils entrusted with the repair of main roads under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (1), but there seems to be no room for doubt upon the point; and see *Harbinson* v. *Armagh County Council*, [1902] 2 I. R. 538.

(*d*) The inhabitants at large were not so liable (*Russell* v. *Men of Devon* (1788), 2 Term Rep. 667); nor was the county surveyor in respect of a county bridge (*M'Kinnon* v. *Penson* (1854), 9 Exch. 609, Ex. Ch.); nor a parish surveyor of highways (*Young* v. *Davis* (1862), 7 H. & N. 760, affirmed (1863), 2 H. & C. 197, Ex. Ch.).

(*e*) *Pictou Municipality* v. *Geldert*, [1893] A. C. 524, P. C., *per* Lord HOBHOUSE, at p. 527.

(*f*) For illustrations of the rule, see *Wilson* v. *Halifax Corporation* (1868), L. R. 3 Exch. 114; *Gibson* v. *Preston Corporation* (1870), L. R. 5 Q. B. 218; and *Cowley* v. *Newmarket Local Board*, *supra* (cases of local boards); *Parsons* v. *St. Matthew, Bethnal Green*, *supra*; *Taylor* v. *St. Mary Abbotts, Kensington, Vestry*, *supra* (cases of metropolitan vestries); *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64; *Pictou Municipality* v. *Geldert*, *supra*; *Sydney Municipal Council* v. *Bourke*, [1895] A. C. 433, P. C.; *Gibraltar Sanitary Commissioners* v. *Orfila* (1890), 15 App. Cas. 400, P. C.

(*g*) It was held that the liability was created by a local Act incorporating the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 49 (*Hartnall* v. *Ryde Commissioners* (1863), 4 B. & S. 361; followed in *Ohrby* v. *Ryde Commissioners* (1864), 5 B. & S. 743). These cases have been doubted and distinguished; see *Pictou Municipality* v. *Geldert*, *supra*, *per* Lord HALSBURY; *Parsons* v. *St. Matthew, Bethnal Green*, *supra*; *Wilson* v. *Halifax Corporation*, *supra*; *Maguire* v. *Liverpool Corporation*, [1905] 1 K. B. 767, C. A., where a local Act transferring highway duties to the corporation, and rendering it liable to indictment, was held not to create a civil liability for non-feasance; but they have not been expressly overruled. See also *Lampard* v. *Sewers Commissioners*, *supra*.

(*h*) For instances of contributory negligence, see *Butterly* v. *Drogheda Corporation*, [1907] 2 I. R. 134, C. A., where in daylight a plaintiff drove into

SECT. 3. Liabilities.

caused by its misfeasance; and this is so whether the misfeasance be attributable to it in its capacity of highway authority, or in some other capacity, *e.g.*, as sanitary authority. Any person who interferes (however lawfully) with the ordinary structure and normal condition of a highway is responsible as for a misfeasance until it is restored to its proper and normal condition, so that it can properly and without undue risk be traversed by the public (*i*).

Non-feasance and misfeasance.

Thus, an authority has been held liable where it has pulled down and failed to replace a fence protecting passengers from a dangerous ditch (*j*); where it has erected a fountain on the highway and not repaired it so as to prevent stones falling therefrom (*k*); where it has erected a post in the middle of a footpath to prevent cattle straying on it, and has allowed an adjacent street lamp to be unlighted (*l*); where its servants, or other person for whose acts it is responsible (*m*), have left heaps of stones or materials upon a highway without guarding or lighting them (*n*), or have broken up a highway for repairs and have not guarded or lighted it during the work (*o*), or have not properly restored the highway afterwards (*p*), or have caused an accident by negligence in executing the work (*q*); and in the case

a heap of stones; *Torrance* v. *Ilford Urban District Council* (1909), 73 J. P 225, C. A.; and title NEGLIGENCE.

(*i*) *Shoreditch Borough Council* v. *Bull* (1904), 68 J. P. 415, H. L.

(*j*) *Whyler* v. *Bingham Rural Council*, [1901] 1 K. B. 45, C. A.

(*k*) *McLoughlin* v. *Warrington Corporation* (1910), 75 J. P. 57, C. A. As to water from such a fountain freezing on the road, see *O'Keefe* v. *Edinburgh Corporation*, [1911] S. C. 18.

(*l*) *Lamley* v. *East Retford Corporation* (1891), 55 J. P. 133, C. A.; and see *Thurrold* v. *St. George's, Hanover Square* (1898), *Times*, 7th December.

(*m*) As to its liability for contractors, see p. 136, *post;* as to liability for acts of licensees, see *Gilbert* v. *Trinity House Corporation* (1886), 17 Q. B. D. 795. But the road authority is not responsible when work is done by other persons under independent statutory powers, and not as agents or licensees of the authority (*Barham* v. *Ipswich Dock Commissioners* (1885), 54 L. T. 23), unless the authority is bound to supervise the work, as in *Burrows* v. *City of London Sewers Commissioners* (1888), 4 T. L. R. 262.

(*n*) *Foreman* v. *Canterbury Corporation* (1871), L. R. 6 Q. B. 214; *Nelson* v. *Lanarkshire* (*Lower Ward*) *County Council* (1891), 19 R. (Ct. of Sess.) 311; *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72, C. A.; *Tucker* v. *Axbridge Highway Board* (1888), 53 J. P. 87; *Gould* v. *Birkenhead Corporation* (1909), 74 J. P. 105; *Donaldson* v. *Woolwich Corporation* (1911), 75 J. P. (Journal) 27, where the lights were misleading; *Thurrold* v. *St. George's, Hanover Square, supra,* where the adjacent street lamp was not lighted by the gas company, which had contracted with the defendants to light the streets. *Holliday* v. *St. Leonard, Shoreditch, Vestry* (1861), 11 C. B. (N. S.) 192, in which a vestry was held not liable for its servants' negligence, is no longer law; see *Foreman* v. *Canterbury Corporation, supra.*

(*o*) *Pendlebury* v. *Greenhalgh* (1875), 1 Q. B. D. 36, C. A.

(*p*) *Hill* v. *Tottenham Urban District Council* (1898), 79 L. T. 495, where a ridge left by a contractor jolted a driver against a bridge; *Cox* v. *Paddington Vestry* (1891), 64 L. T. 566, where the defendants filled in a trench knowing that they had exposed an unsound water pipe, which by leaking caused a subsidence (contrast *Hyams* v. *Webster* (1868), L. R. 4 Q. B. 138); *Shoreditch Borough Council* v. *Bull, supra,* where in avoiding an ill-rammed trench the plaintiff drove into a heap of rubbish wrongfully placed on the highway by a stranger; *Smith & Co.* v. *West Derby Local Board* (1878), 3 C. P. D. 423.

(*q*) *E.g.*, have broken a gas main and caused an explosion which injured the plaintiff (*Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, C. A.); or have

of a servant, as opposed to a contractor, an authority will be liable for acts of "casual" or "collateral" negligence (*r*).

But such an authority is not responsible where a house-owner, in response to a notice from it, lays a drain in a highway and fills in the trench carelessly (*s*), nor where an accident, though perhaps aggravated by work done by it, is really due to a cause beyond its control, and which it was not negligent in failing to foresee (*t*). It may be misfeasance to lay a great depth of broken stone over the whole width of the road at once and not to roll it in as soon as a short length has been so stoned (*u*); or to fill in a hole with soft material (*x*). Failure to prevent the surface of a path slipping down into adjoining premises (*a*), or to clean out a road drain into which roadside "grips" discharge is mere non-feasance (*b*), and the presence of slippery tar on wood paving is not in itself evidence of misfeasance (*c*). Failure to lop trees in a public park owned by the authority, which overhang a highway, has been held to be non-feasance only (*d*).

As sanitary authority.

There are also certain cases in which a highway authority has been held liable in its capacity of sanitary authority for negligence in failing to maintain in a proper state some appliance properly placed by it or its predecessors in the street, or to remedy some defective appliance placed there by its predecessors: thus it may be held liable for accidents due to defective sewer gratings (*e*), or manholes (*f*), or to defective sewers caving in and forming a hole (*g*); so, too, where it has placed an iron flap in a street to cover a water meter and allows it to become dangerously slippery (*h*). But an authority which, in a proper manner, places a water plug or manhole cover in the street, is not liable merely because as highway authority it subsequently fails to keep the surface of the

injured a passenger by a splinter of metal (*Scott* v. *Manchester Corporation* (1857), 2 H. & N. 204). In *Torrance* v. *Ilford Urban District Council* (1908), 72 J. P. 526, (1909) 73 J. P. 225, C. A., the negligence complained of was stoning a road and not rolling in the stones.

(*r*) See p. 136, *post*, and titles MASTER AND SERVANT; NEGLIGENCE.

(*s*) *Steel* v. *Dartford Local Board* (1891), 60 L. J. (Q. B.) 256, C. A. The house-owner not being the agent of the authority, there was no misfeasance on its part: compare *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345.

(*t*) *Ely Brewery Co.* v. *Pontypridd Urban District Council* (1903), 68 J. P. 3, where a flood caused by the wrongful act of strangers was diverted on to the plaintiffs' premises by a retaining wall built by the defendants which did not interfere with the ordinary flow of surface water.

(*u*) *Torrance* v. *Ilford Urban District Council* (1909), 73 J. P. 225, C. A.

(*x*) *Meeling* v. *St. Mary, Newington, Vestry* (1893), 10 T. L. R. 54.

(*a*) *Short* v. *Hammersmith Corporation* (1910), 75 J. P. 82.

(*b*) *Irving* v. *Carlisle Rural District Council* (1907), 71 J. P. 212.

(*c*) *Holloway* v. *Birmingham Corporation* (1905), 69 J. P. 358.

(*d*) *Tregellas* v. *London County Council* (1897), 14 T. L. R. 55.

(*e*) *White* v. *Hindley Local Board* (1875), L. R. 10 Q. B. 219. As to a carriage plate across a road channel, see *Jones* v. *Rew* (1910), 74 J. P. 321, C. A.

(*f*) *Winslow* v. *Bushey Urban District Council* (1908), 72 J. P. 64, 259, C. A.

(*g*) *Bathurst Borough* v. *Macpherson* (1879), 4 App. Cas. 256, P. C.; see *Pictou Municipality* v. *Geldert*, [1893] A. C. 524, 531, P. C. Apparently the existence of the hole was known to the authority before the accident happened.

(*h*) *Blackmore* v. *Mile End Old Town Vestry* (1882), 9 Q. B. D. 451, C. A. The authority would, of course, be liable also if originally the flap was so placed, or was of such a pattern as to be dangerous; see *Strute* v. *Southwark and Vauxhall Water Co.* (1889), 53 J. P. 424.

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surrounding roadway level with the plug or cover (*i*); and, apart from negligence, an authority is not liable where a sewer, though properly constructed by its predecessors, has subsequently given way (*j*). Where an authority agrees with a tramway company to repair a road primarily repairable by the company, the liability in respect of accidents is transferred to the authority (*k*).

Employment of contractor.

238. An authority which employs a contractor (*l*) to carry out work involving interference with a highway does not thereby absolve itself of its duty towards other persons. Although not responsible for his negligence or that of his servants, so long as such negligence is merely "casual" or "collateral," the authority is responsible if the contractor fails to do or to get done what it is its duty to do or to get done, *i.e.*, to take the necessary precautions to protect the public from the danger which its operations entail (*m*). Thus, where a contractor (*n*) is employed to repair a road, or to lay a sewer therein, the highway authority will not be liable if one of his men negligently leaves a tool lying on the highway (*o*), but it will be if the road is improperly made up (*p*), or the trench is improperly filled in (*q*), or a gas main is broken by negligent

(*i*) *Thompson* v. *Brighton Corporation, Oliver* v. *Horsham Local Board*, [1894] 1 Q. B. 332, C. A., overruling *Kent* v. *Worthing Local Board* (1882), 10 Q. B. D. 118. Nor under such circumstances is a water company liable as owner of the plug (*Moore* v. *Lambeth Waterworks Co.* (1886), 17 Q. B. D. 462, C. A.), provided that the plug was properly fixed and safe in itself; see *Strute* v. *Southwark and Vauxhall Water Co.* (1889), 53 J. P. 424. As to an unsafe plug, see *Bayley* v. *Wolverhampton Waterworks Co.* (1860), 6 H. & N. 241. As to failure to keep stop-cock boxes properly plugged, see note (*h*), p. 153, *post*. As to the duty to "indicate" fire plugs, see *Dawson* v. *Bingley District Council* (1911), 27 T. L. R. 308.

(*j*) *Lambert* v. *Lowestoft Corporation*, [1901] 1 K. B. 590.

(*k*) *Barnett* v. *Poplar Corporation*, [1901] 2 K. B. 319; *Alldred* v. *West Metropolitan Trams Co.*, [1891] 2 Q. B. 398, C. A.

(*l*) It must depend upon the facts and terms of employment in any particular case whether the relation is that of principal and contractor, or master and servant (*Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392, C. A.). See, also, *Steel* v. *South-Eastern Rail. Co.* (1855), 16 C. B. 550; *Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *Same* (1849), 4 Exch. 244; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, C. A. As to a contractor employed by an individual, see *Ellis* v. *Sheffield Gas Co.* (1853), 2 E. & B. 767; *The Snark*, [1900] P. 105. See further, titles AGENCY, Vol. I., pp. 147, 148; MASTER AND SERVANT; NEGLIGENCE.

(*m*) *Hardaker* v. *Idle District Council, supra*; *Penny* v. *Wimbledon Urban Council*, [1898] 2 Q. B. 212, affirmed, [1899] 2 Q. B. 72, C. A.; *Hill* v. *Tottenham Urban District Council* (1898), 79 L. T. 495; *Clements* v. *Tyrone County Council*, [1905] 2 I. R. 542, C. A.; *Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *Same, supra*; *Hole* v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; *Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470; *Gray* v. *Pullen* (1864), 5 B. & S. 970, Ex. Ch.; *Taylor* v. *Greenhalgh* (1876), 24 W. R. 311, C. A.; *Pendlebury* v. *Greenhalgh* (1875), 1 Q. B. D. 36, C. A.; *Holliday* v. *National Telephone Co., supra*; *Hughes* v. *Percival* (1883), 8 App. Cas. 443; *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48, P. C.; *Robinson* v. *Beaconsfield District Council* (1911), 27 T. L. R. 319.

(*n*) Or a sub-contractor; see *Maxwell* v. *British Thomson Houston Co.* (1902), 18 T. L. R. 278, C. A.

(*o*) *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72, 76, C. A., *per* A. L. SMITH, L.J.

(*p*) *Hill* v. *Tottenham Urban District Council, supra*.

(*q*) See *Gray* v. *Pullen, supra*, distinguished in *Hyams* v. *Webster* (1868), L. R. 4 Q. B. 138.

excavation (*r*), or heaps of excavated soil are left unguarded on the highway, for the excavation and safe handling of such soil is an essential part of the work to be done (*s*).

Duty not only to passengers.

239. An authority in carrying out its duties must pay due regard not only to the safety of passengers, but also to the rights of other persons. Thus, in repairing a highway under which gas or water pipes have been lawfully laid, it is not entitled to use steam rollers of such a weight as to damage pipes in a good condition and laid at a proper depth (*t*); and if it does so it will be liable to the owners of the pipes, and to other persons injured by the wrongful acts (*u*); similarly it must not pave a road with materials which will cause injury to plants on adjoining land (*x*).

SUB-SECT. 2.—*Summary Proceedings.*

Liability of surveyor.

240. The surveyor to a highway authority is not a "surveyor of highways" within the meaning of the Highway Act, 1835 (*a*), and is not, it would seem, liable to the various penalties thereby imposed upon surveyors, district surveyors, or assistant surveyors (*b*).

The highway authority is itself the surveyor of highways (*c*); therefore, except where it has succeeded to a highway board (*d*), it may be liable to a fine not exceeding £5 for any neglect of duty in anything required of it by the Highway Act, 1835 (*e*), if no particular penalty is imposed for the particular neglect (*f*). It is

(*r*) The authority will be liable not only to the owner of the pipe, but to persons injured by a resulting explosion (*Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, C. A.).

(*s*) *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72, C. A.; *Clements* v. *Tyrone County Council*, [1905] 2 I. R. 542, C. A.; *Lancaster* v. *West Ham Local Board* (1886), 2 T. L. R. 820.

(*t*) *Gas Light and Coke Co.* v. *St. Mary Abbotts, Kensington, Vestry* (1885), 15 Q. B. D. 1, C. A.; *Gas Light and Coke Co.* v. *St. George's, Hanover Square, Vestry* (1887), 3 T. L. R. 581; *Alliance and Dublin Consumers Gas Co.* v. *Dublin County Council*, [1901] 1 I. R. 492, C. A. In the last-named case the injunction ran, "regard being had to what at the time of the laying of such pipes was the then ordinary traffic, and the then reasonable means of repairing and maintaining the road." See also, as to damage to pipes by traction engines, *Armagh Union Guardians* v. *Bell*, [1900] 2 I. R. 371, C. A.; *Chichester Corporation* v. *Foster*, [1906] 1 K. B. 167.

(*u*) *E.g.*, by a resulting explosion of gas, *Driscoll* v. *Poplar District Board* (1897), *Times*, 8th December); compare *Stacey* v. *Gas Light and Coke Co.* (1911), 9 L. G. R. 174.

(*x*) *West* v. *Bristol Tramways Co.*, [1908] 2 K. B. 14, C. A. (creosoted wood blocks).

(*a*) 5 & 6 Will. 4, c. 50.

(*b*) *E.g.*, Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 20, for "neglect of duty," and *ibid.*, s. 56, for laying obstructions on a highway. In *Hardcastle* v. *Bielby*, [1892] 1 Q. B. 709, proceedings were taken under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 20, against the surveyor to a local board, but failed on other grounds, and this point was not raised; compare *R.* v. *Bradford*, [1908] 1 K. B. 365.

(*c*) *Buckley* v. *Hanson* (1898), 62 J. P. 119.

(*d*) The Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 20, never applied to highway boards (Highway Act, 1862 (25 & 26 Vict. c. 61), s. 42 (5)).

(*e*) 5 & 6 Will. 4, c. 50.

(*f*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 20. A surveyor could not be fined under this provision for failing to repair (*Robinson* v. *Stevenitt* (1878), 38 L. T. 611), nor, of course, for not fencing an excavation or removing a nuisance which he was not bound to fence or remove (*Morgan* v. *Leach* (1842), 10 M. & W. 558). For certain penalties specifically enacted, see p. 111, *ante*.

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not, it is submitted, liable to the penalty imposed by that Act upon a surveyor who lays an obstruction upon a highway (*g*).

SUB-SECT. 3.—*Liability to Workmen.*

Workmen's compensation.

241. A highway authority, like other employers, is liable to pay compensation to workmen employed by it who suffer personal injury by accident arising out of and in the course of their employment (*h*).

Notice of accidents.

242. Where any person employed in (*inter alia*) the construction, use, working, or repair of any bridge or other work authorised by any local or personal Act of Parliament, or in using or working a traction engine, or other engine or machine worked by steam in the open air, meets in such employment with an accident which causes his death, or such bodily injury as to prevent him on any one of the three working days next after the occurrence from being employed for five hours on his ordinary work, his employer must give to the Board of Trade the notice required by the Notice of Accidents Act, 1894 (*i*).

Part IX.—Enforcement of Duty to Repair.

SECT. 1.—*In General.*

Modes of compelling repair.

243. If persons who are under a legal duty to repair a highway allow it to be so much out of repair as to be a nuisance to passengers, they commit an indictable misdemeanour (*k*); and at common law an indictment is the recognised mode of compelling repair (*l*). Leave may also be granted to file a criminal information; but only in exceptional circumstances (*m*), *e.g.*, if a bill of indictment has

(*g*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 56. Under this provision personal knowledge of the obstruction on the part of the surveyor was a necessary ingredient of the offence (*Hardcastle* v. *Bielby*, [1892] 1 Q. B. 709).

(*h*) See title "MASTER AND SERVANT."

(*i*) 57 & 58 Vict. c. 28, s. 1, Schedule, as amended by Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 6. As to these Acts, see further titles FACTORIES AND SHOPS, Vol. XIV., pp. 472 *et seq.*; MINES, MINERALS AND QUARRIES.

(*k*) But no indictment lies in the case of a private way, even though set out for the use of, and to be repaired by, the parishioners of several parishes (*R.* v. *Richards* (1800), 8 Term Rep. 634). In *R.* v. *Warwick Corporation* (1682), 2 Show. 201, it was suggested that an indictment might lie in the case of a "churchway" (see *Hebborne's Case* (1626), Poph. 206; *sed quære*, see *Thrower's Case* (1672), 1 Vent. 208). In general, inclosure commissioners have no power to direct a parish to repair "private" ways so as to render the parishioners liable to an indictment for non-repair (*R.* v. *Cottingham* (*Inhabitants*) (1798), 6 Term Rep. 20), though a road originally set out as private way may have become a highway repairable by the inhabitants; see note (*e*), p. 86, *ante*.

(*l*) The Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 99, abolished proceedings by presentment in the case of highways. In *R.* v. *Dorset Justices* (1812), 15 East, 594, a writ of prohibition to restrain the demolition of a county bridge was applied for, but refused. If a fatal accident happens through mere neglect to repair, the persons who ought to have done the repair cannot be indicted for manslaughter (*R.* v. *Pocock* (1851), 17 Q. B. 34).

(*m*) Bac. Abr. tit. "Highways" (G), the reason given being that a fine inflicted upon an information could not (before 1835) be expended in repairing the highway in question as it could in the case of an indictment. As to procedure on criminal informations, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 329 *et seq.*

SECT. 1. In General.

been ignored by a grand jury who were guilty of partiality or included interested persons (*n*). Where there is a statutory obligation to do works specially prescribed, a mandamus may be granted (*o*); but where the liability is general, *i.e.*, to repair and maintain, a *mandamus* or mandatory order is not an appropriate remedy (*p*); nor will it issue to command the execution of particular repairs (*q*). Where liability to repair is in dispute a declaration may be obtained in an action by the Attorney-General (*r*). At the present date, however, it may be said that the ordinary remedies for failure to repair a highway are two in number, namely, an indictment preferred by a prosecutor *ex proprio motu*, or proceedings, under one or other of certain Acts of Parliament relating to highways, which may ultimately lead to an indictment (*s*). In the case of a county bridge proceedings may still be taken by presentment of one justice (*t*), but an indictment is the ordinary remedy.

SECT. 2.—*Indictment.*

SUB-SECT. 1.—*By and against whom preferred.*

By and against whom preferred.

244. An indictment for non-repair of a highway or public bridge may be preferred by anyone (*a*). In the case of a highway repairable by the inhabitants at large it should in general be preferred

(*n*) *R.* v. *Upton St. Leonard's* (*Inhabitants*) (1847), 10 Q. B. 827.

(*o*) *E.g.*, to railway companies to reinstate an abandoned line (*R.* v. *Severn and Wye Rail. Co.* (1819), 2 B. & Ald. 646), to build bridges to carry a highway over or under their line, or to reinstate the approaches to a bridge (*R.* v. *South-Eastern Rail. Co.* (*Directors etc.*) (1853), 4 H. L. Cas. 471; *R.* v. *Manchester and Leeds Rail. Co.* (1838), 8 Ad. & El. 413; *R.* v. *Dundalk and Enniskillen Rail. Co.* (1861), 5 L. T. 25; *R.* v. *Birmingham and Gloucester Rail. Co.* (1841), 2 Q. B. 47); to inclosure commissioners to set out a public road (*R.* v. *Dean Inclosure Commissioners* (1813), 2 M. & S. 80); and to a dock company (*R.* v. *Bristol Dock Co.* (1841), 2 Q. B. 64). See also the following cases, in which writs were refused:—*R.* v. *Luton Roads Trustees* (1841), 1 Q. B. 860; *Ex parte Exeter Road Trustees* (1852), 16 Jur. 669; *R.* v. *Llandilo Roads Commissioners* (1788), 2 Term Rep. 232; *York and North Midland Rail. Co.* v. *R.* (1853), 1 E. & B. 858, Ex. Ch.; *R.* v. *Gamble* (1839), 11 Ad. & El. 69. As to the writ of mandamus, see title CROWN PRACTICE, Vol. X., pp. 77 *et seq.*

(*p*) *R.* v. *Oxford and Witney Turnpike Roads* (*Trustees*) (1840), 12 Ad. & El. 427.

(*q*) *A.-G.* v. *Staffordshire County Council*, [1905] 1 Ch. 336. For an early decree in the nature of a mandatory injunction to a canal proprietor, see *Lane* v. *Newdigate* (1804), 10 Ves. 192.

(*r*) *A.-G. and Settle Rural District Council* v. *Lunesdale Rural District Council* (1902), 86 L. T. 822; *A.-G. and Doncaster Rural District Council* v. *West Riding of Yorkshire County Council* (1903), 67 J. P. 173; *A.-G.* v. *Staffordshire County Council*, *supra*. But, *semble*, in such an action the court will only decide the liability to repair generally, and will not say what particular works must be done in order to fulfil the obligation (*ibid.*).

(*s*) An indictment directed by justices under those provisions is still a proceeding at common law (*R.* v. *Sandon* (*Inhabitants*) (1854), 3 E. & B. 547).

(*t*) Bridges Act, 1803 (43 Geo. 3, c. 59), s. 1, adopting a previous unrepealed statute; *R.* v. *Breconshire* (*Inhabitants*) (1849), 15 Q. B. 813. A grand jury can now only present by way of indictment (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 78 (3)).

(*a*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 331. But the prosecutor has, as such, no right of audience in court.

SECT. 2. Indictment.

against the inhabitants (*b*) of the parish (*c*) or township (*d*) in which the highway lies, and not against the highway authority (*e*) or the parish council (*f*). An indictment may, however, be preferred against a highway authority by order of the county council under statutory provisions (*g*), and such an authority is also liable to indictment where there is in force a local Act incorporating the Towns Improvement Clauses Act, 1847 (*h*).

In the case of a main road it is not clear whether the county council or the inhabitants of the county should be indicted (*i*). If the highway is repairable by a body corporate or individuals, the indictment should be against it or them by name (*k*). In the case of bridges repairable by a county, or a county borough, the indictment lies against the county council, or the corporation of the borough (*l*), as the case may be; in the case of other bridges, against the inhabitants of the district or the persons liable to repair.

SUB-SECT. 2.—*Pleadings of Prosecution.*

Pleading a "highway."

245. It is not necessary in an indictment or pleading to state either the termini of a highway (*m*), or whether it is a carriage way, bridle path, or footway (*n*), or how it became a highway; nor is it necessary to allege that it has been a highway from time immemorial, an averment of "highway" *simpliciter* being sufficient (*o*). It is, however, usual (*p*) in an indictment to identify the highway

(*b*) Individuals need not be named (*Walker* v. *Measure* (1610), 2 Roll. Abr. 79; *R.* v. *Dixon and Hollis* (1698), 12 Mod. Rep. 198).

(*c*) Where a parish lies in two counties, an indictment should be preferred against the inhabitants of the whole, the venue being laid in the county in which the unrepaired part of the highway lies (*R.* v. *Clifton* (*Inhabitants*) (1794), 5 Term Rep. 498, overruling *R.* v. *Weston-under-Penyard* (*Inhabitants*) (1770), 4 Burr. 2507).

(*d*) Or of several townships jointly liable; see *R.* v. *Bishop Auckland* (*Inhabitants*) (1834), 1 Ad. & El. 744.

(*e*) *R.* v. *Poole Corporation* (1887), 19 Q. B. D. 602, 683.

(*f*) *R.* v. *Shipley Parish Council* (1897), 61 J. P. 488.

(*g*) See p. 150, *post*.

(*h*) 10 & 11 Vict. c. 34, ss. 48, 49.

(*i*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (1), and *A.-G.* v. *Staffordshire County Council*, [1905] 1 Ch. 336; *R.* (*Westropp*) v. *Clare County Council*, [1904] 2 I. R. 569, C. A.

(*k*) *I.e.*, in its corporate name, or naming them individually. Individuals cannot be indicted merely by the description of "owners" or "occupiers" of specified lands (*R.* v. *Burn in Easingwold* (*Owners and Occupiers*) (1778), cited in *R.* v. *Birmingham and Gloucester Rail. Co.* (1842), 3 Q. B. 223, 226).

(*l*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34 (1), (2), 79 (2); see, further, p. 192, *post*.

(*m*) "For the highway is infinite and leads from sea to sea" (*R.* v. *Hamond* (1717), 1 Stra. 44; *Rouse* v. *Bardin* (1790), 1 Hy. Bl. 351). But the termini of a private way must be pleaded (*ibid.*).

(*n*) For "highway" is the "*genus* of all public ways" (*R.* v. *Saintiff* (1704), 6 Mod. Rep. 255, *per* HOLT, C.J.; *R.* v. *Hatfield* (*Inhabitants*) (1736), Lee *temp.* Hard. 315; *Madox's Case* (1587), Cro. Eliz. 63; *Allen* v. *Ormond* (1806), 8 East, 4).

(*o*) *Aspindall* v. *Brown* (1789), 3 Term Rep. 265; *R.* v. *Turweston* (*Inhabitants*) (1850), 16 Q. B. 109; *R.* v. *Stoughton* (1670), 2 Saund. 157.

(*p*) In view of the wide powers of amending indictments where a misdescription is immaterial (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 344), early decisions as to misdescription are of little, if any, value; the following, however, may be referred to if necessary:—as to amending, *R.* v. *Sturge* (1854), 3 E. & B. 734; *R.* v. *Gamlingay* (*Inhabitants*) (1790), 3 Term Rep.

SECT. 2. Indictment.

by naming termini outside the limits of the portion alleged to be out of repair, and also to allege (if such be the fact) that it is an immemorial highway, and whether it be a way for all purposes or for horses or foot passengers only. A prosecutor may be directed to give particulars if necessary (*q*). In a civil action, upon a question of highway or no highway, particulars may be ordered of any specific acts of dedication, or declarations of intention to dedicate, relied on either alone, or jointly with evidence of user, as establishing the public right (*r*).

It is usual (*s*) to state approximately in an indictment the length and width of the portion of the way alleged to be out of repair; and, though this is not necessary (*t*), a defendant is entitled to a reasonably accurate identification of the portion in question. If a parish boundary runs along the *medium filum* such fact should be stated (*u*). The way must be alleged to be out of repair, and not merely to be muddy (*a*) or unpaved (*b*).

Necessary facts to be alleged and proved.

246. The following facts must be alleged and proved by the prosecution: (1) in the case of an indictment against the inhabitants of a parish, that the road is a highway, that a portion of it is out of repair, and that such portion is within the parish (*c*); (2) in the case of an indictment against the inhabitants of a township, that the road is a highway, that a portion of it is out of repair, that such portion lies within the township, and that on some ground to be stated the inhabitants of the township are liable to repair it (*d*); such ground may be that they are by immemorial custom

513; *R.* v. *Knight* (1827), 7 B. & C. 413; *R.* v. *Upton-on-Severn* (*Inhabitants*) (1833), 6 C. & P. 133; *R.* v. *St. Weonard's* (*Inhabitants*) (1833), 5 C. & P. 579; *R.* v. *St. Weonard's* (*Inhabitants*), (1834), 6 C. & P. 582; *R.* v. *Steventon* (*Inhabitants*) (1843), 1 Car. & Kir. 55; *R.* v. *Turweston* (*Inhabitants*) (1850), 16 Q. B. 109; *R.* v. *Waverton* (*Inhabitants*) (1851), 17 Q. B. 562; *R.* v. *Great Canfield* (*Parish*) (1810), 6 Esp. 136; and as to surplusage, see *R.* v. *Turweston*, (*Inhabitants*), *supra*.

(*q*) For cases in which particulars were ordered in indictments concerning highways, see *R.* v. *Curwood* (1835), 3 Ad. & El. 815; *R.* v. *Downshire* (*Marquis*) (1836), 4 Ad. & El. 698.

(*r*) *Spedding* v. *Fitzpatrick* (1888), 38 Ch. D. 410, C. A.

(*s*) See note (*p*), p. 140, *ante*.

(*t*) See 1 Hawk. P. C., 7th ed., c. 76, s. 234; *R.* v. *All Saints and St. Mary's, Derby* (*Inhabitants*) (1735), Lee *temp.* Hard. 105; *R.* v. *Hatfield* (*Inhabitants*) (1736), Lee *temp.* Hard. 315; *R.* v. *Waverton* (*Inhabitants*), *supra*, at p. 564, n.; *R.* v. *Smith* (1753), Say. 98; *R.* v. *East Lidford* (*Inhabitants*) (1756), Say. 301. A highway, duly substituted for an older way repairable by the inhabitants at large, was ordered to be laid out 12 yards wide; but it was, in fact, laid out 15 yards wide. Upon an indictment, not specifying the width of the highway alleged to be repairable by the inhabitants at large, a general verdict of guilty was found. It was held that there was no ground for setting it aside; and, *semble*, the authority was only bound to repair a strip 12 yards wide (*R.* v. *Crompton Urban District Council* (1902), 86 L. T. 762).

(*u*) *R.* v. *St. Pancras* (*Inhabitants*) (1794), Peake, 286 [219].

(*a*) *R.* v. *Stratford* (*Inhabitants*) (1705), 11 Mod. Rep. 56.

(*b*) Com. Dig. tit. "Chimin" (A 4).

(*c*) 1 Hawk. P. C., 7th ed., c. 76, ss. 229—252; *R.* v. *Hartford* (*Inhabitants*) (1779), 1 Cowp. 111; *R.* v. *Upton-on-Severn* (*Inhabitants*), *supra*.

(*d*) *R.* v. *Penderryn* (*Inhabitants*) (1788), 2 Term Rep. 513; *R.* v. *Kingsmoor* (*Inhabitants*) (1823), 2 B. & C. 190. The liability may be alleged differently in different counts; as to the framing thereof, see *R.* v. *Waverton* (*Inhabitants*), *supra*.

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liable to repair all highways lying within the township which would but for the custom be repairable by the whole parish (*e*); and if the indictment alleges liability to repair all highways within the township with certain exceptions, it should also allege that the highway in question is not among those excepted ones (*f*), but, *semble*, it need not state who is liable to repair them (*g*); (3) in the case of an indictment against an individual, or body corporate, that the way in question is a highway and out of repair, and that he or it is liable to repair it on some ground to be stated, *e.g.*, by reason of his or its tenure of certain lands (*h*).

SUB-SECT. 3.—*Appearance.*

Appearance.

247. If the defendants are a body corporate not authorised (*i*) to appear in court by a solicitor or one of its officers, the indictment must be removed by writ of *certiorari* into the King's Bench Division to enable them to appear and plead (*k*). In the case of an indictment against "inhabitants," some of them must appear and plead in person like an ordinary defendant (*l*). Their attendance may be secured by means of a writ of *venire facias* served on any two of them (*m*).

SUB-SECT. 4.—*Pleas of Defendants.*

Pleas of defendants.

248. In the case of an indictment against the inhabitants of a parish, a plea of not guilty puts in issue all the three facts necessary

(*e*) The omission of the last twelve words does not vitiate the indictment, but would enable the defendants (apart from amendment) to escape by proving any one highway in the township to be repairable by individuals (*R.* v. *Heage* (*Inhabitants*) (1841), 2 Q. B. 128; but see *R.* v. *Colling* (1847), 2 Cox, C. C. 184).

(*f*) *R.* v. *Liverpool Corporation* (1862), 3 East, 86.

(*g*) *R.* v. *Ecclesfield* (*Inhabitants*) (1816), 1 Stark. 393.

(*h*) *R.* v. *Stoughton* (1670), 2 Wms. Saund. 157, 158 e, note (9). A mere allegation that he is lord of the manor is not sufficient (*R.* v. *Bucknall* (1702), 2 Ld. Raym. 792, 804; *R.* v. *Kerrison* (1813), 1 M. & S. 435). As to liability *ratione tenuræ*, see p. 88, *ante*.

(*i*) Urban and rural district councils, municipal corporations acting as highway authorities, and parish councils apparently are authorised to do so (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 259; Local Government Act, 1894 (56 & 57 Vict. c. 73), Sched. I., Part II. (16)); compare *R.* v. *Shipley Parish Council* (1897), 61 J. P. 488.

(*k*) *R.* v. *Birmingham and Gloucester Rail. Co.* (1840), 9 C. & P. 469, (1842), 3 Q. B. 223; *R.* v. *Manchester Corporation* (1857), 7 E. & B. 453; *R.* v. *Bury Improvement Commissioners* (1870), 11 Cox, C. C. 641; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 351. For a recent instance of a writ of *certiorari* for this purpose, see *R.* v. *Norfolk County Council* (1909), 73 J. P. (Journal), 528. For the practice, see title CROWN PRACTICE, Vol. X., pp. 203 *et seq.* In the King's Bench Division they can appear by solicitor; see title CROWN PRACTICE, Vol. X., p. 205.

(*l*) Except where it is removed by writ of *certiorari* into the King's Bench Division, where a defendant in misdemeanour may appear by solicitor; see title CROWN PRACTICE, Vol. X., p. 205. Strictly speaking, a defendant cannot appear by solicitor at sessions or in the Crown Court at assizes (see *R.* v. *Stainhall* (*Inhabitants*) (1858), 1 F. & F. 363), but in highway indictments it is sometimes the practice to accept such appearance and not to insist on personal attendance.

(*m*) *R.* v. *Clifton* (*Inhabitants*) (1794), 5 Term Rep. 498, 503; followed if necessary by a writ of *distringas*. See Archbold's Criminal Pleading, 24th ed., pp. 104, 105; Short and Mellor, Practice of the Crown Office, 2nd ed., pp. 525, 527. At quarter sessions attendance may also be enforced by summons.

to support a conviction; and also enables the defendants to rely on the fact that the *primâ facie* liability of the parish has been transferred by statute to some one else (*n*). With this exception, however, if they desire to show that some other body or individual is liable for the repair, they must enter a special plea to that effect (*o*), to which the prosecutor may plead a replication. A plea throwing the liability upon more than one township or person should specify what part of the highway in question is repairable by each (*p*). A plea alleging the liability of a township to repair all highways within it with certain exceptions must show that the highway in question is not one of them (*q*), but need not state by whom they are repairable (*r*). Where an indictment alleges a customary liability in a township to repair all highways within it which but for the custom would be repairable by the whole parish, a special plea is necessary if the defendants desire to prove that some individual is bound to repair the particular road; for a plea of "not guilty" merely puts in issue the facts which the prosecutor must allege and prove (*s*). If, however, the indictment alleges a liability to repair only the particular road, or to repair all highways (without any qualifying words), a special plea is not necessary (*t*).

An individual, or body corporate, may apparently upon a general plea of not guilty adduce evidence of liability in any other person or body of persons (*a*).

SUB-SECT. 5.—*Certiorari.*

249. A writ of *certiorari* may be granted to remove any indictment found, or likely to be found, at assizes or quarter sessions, into the King's Bench Division, and will be granted as of right if the defendants are a body corporate not authorised to appear by solicitor or officer in the court below (*b*). Removal of indictment into King's Bench Division.

SUB-SECT. 6.—*Place of Trial.*

250. The trial will take place at sessions or in the Crown Court at assizes unless the indictment be removed into the King's Bench Place of trial.

(*n*) *R.* v. *St. George, Hanover Square* (*Inhabitants*) (1812), 3 Camp. 222.

(*o*) 3 Salk. 183; *R.* v. *Lordsmere* (*Inhabitants*) (1886), 51 J. P. 86, C. C. R.; *R.* v. *Stoughton* (1670), 2 Wms. Saund. 157, 159 a, n. (10); *R.* v. *St. Andrews, Holborn* (1674), 1 Mod. Rep. 112; *R.* v. *Terrel* (1695), Comb. 312; *R.* v. *Hornsey* (*Inhabitants*) (1692), Carth. 212; *R.* v. *Ireton* (*Inhabitants*) (1696), Comb. 396; *R.* v. *Ecclesfield* (*Inhabitants*) (1818), 1 B. & Ald. 348; *R.* v. *Taunton St. Mary* (*Inhabitants*) (1815), 3 M. & S. 465. So, too, in the case of a "county" bridge (*R.* v. *Norfolk County Council* (1910), 26 T. L. R. 269; *West Riding of Yorkshire* (*Inhabitants*) v. *R.* (1813), 2 Dow, 1, H. L.).

(*p*) *R.* v. *Bridekirk* (*Inhabitants*) (1809), 11 East, 304; subject, of course, to the existing wide power of amendment.

(*q*) *R.* v. *Liverpool Corporation* (1802), 3 East, 86.

(*r*) *R.* v. *Ecclesfield* (*Inhabitants*) (1816), 1 Stark. 393.

(*s*) *R.* v. *Heage* (*Inhabitants*) (1841), 2 Q. B. 128; *R.* v. *Lordsmere* (*Inhabitants*), *supra*.

(*t*) *R.* v. *Stoughton, supra*.

(*a*) 3 Salk. 183; *R.* v. *Norwich* (*Inhabitants*) (1719), 1 Stra. 177; *R.* v. *Hornsey* (*Inhabitants*) (1692), Carth. 212; *R.* v. *Stoughton, supra*; *R.* v. *Yarton* (*Inhabitants*) (1663), 1 Sid. 140.

(*b*) See p. 142, *ante*. For the procedure, and the other grounds on which a writ of *certiorari* may be granted, see title CROWN PRACTICE, Vol. X., pp. 180—184, 203.

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Division by *certiorari*, in which case it will be tried in the Civil Court at assizes, or, if in London or Middlesex, in the High Court of Justice (*c*).

View.

It would appear that a "view" or special jury can only be had if the indictment be so removed (*d*).

SUB-SECT. 7.—*Evidence* (*e*).

Evidence.

251. To establish the liability of a parish it is only necessary to prove that the road is a highway, that part of it is out of repair, and that such part lies within the parish (*f*).

The customary liability of a township (or other subdivision of a parish) may be proved by showing that the township never contributed towards the repair of other highways in the parish outside the township, and actually repaired highways lying within the township, while the parish as a whole never contributed towards the repair of highways in the township (*g*). The liability of individuals may be proved by showing long-continued usage to repair (*h*).

Reputation.

252. On a question of highway or no highway, or of the liability to repair a highway or bridge, evidence of reputation is admissible (*i*); so, too, are reports and estimates prepared by a deceased surveyor to road or bridge trustees (*k*).

(*c*) See title CROWN PRACTICE, Vol. X., pp. 204, 205. But the venue may be changed for good reason (*R.* v. *Holden* (1833), 5 B. & Ad. 347, 354; *R.* v. *Patent Eurika and Sanitary Manure Co.* (1865), 13 L. T. 365).

(*d*) *Anon.* (1732), 2 Barn. (K. B.) 214; *R.* v. *Hatchley Tradgely* (1732), 1 Sess. Cas. (K. B.) 180; *R.* v. *Gate Fulford* (*Inhabitants*) (1855), 24 L. T. (o. s.) 263.

(*e*) In cases of non-repair of highways witnesses cannot be, or at least in practice never are, examined on commission (*R.* v. *Upton St. Leonard's* (*Inhabitants*) (1847), 10 Q. B. 827). See also title EVIDENCE, Vol. XIII., p. 611.

(*f*) See note (*c*), p. 141, *ante*.

(*g*) *R.* v. *Kings Newton* (*Inhabitants*) (1831), 1 B. & Ad. 826; *Freeman* v. *Read* (1863), 4 B. & S. 174; *R.* v. *Barnoldswick* (*Inhabitants*) (1843), 4 Q. B. 499. See also *R.* v. *Rollett* (1875), L. R. 10 Q. B. 469; *R.* v. *Ardsley* (1878), 3 Q. B. D. 255, C. C. R.

(*h*) See pp. 88 *et seq.*, *ante*.

(*i*) *Crease* v. *Barrett* (1835), 1 Cr. M. & R. 919; *R.* v. *Bedfordshire* (*Inhabitants*) (1855), 4 E. & B. 535. But such evidence is not admissible if it relates only to particular facts from which inferences might be drawn as to public rights (*R.* v. *Bliss* (1837), 7 Ad. & El. 550 (citing *Ireland* v. *Powell* (1802), Peake, Law of Evidence (5th ed.), p. 16); *R.* v. *Berger*, [1894] 1 Q. B. 823). Thus, in many cases verdicts or judgments *inter alios*, and ancient surveys, maps, and similar documents may be admissible. See, generally, title EVIDENCE, Vol. XIII., pp. 465, 469, and the following cases: as to surveys, *Freeman* v. *Read* (1863), 4 B. & S. 174; *Smith* v. *Brownlow* (*Earl*) (1870), L. R. 9 Eq. 241; as to maps, *Hammond* v. *Bradstreet* (1854), 10 Exch. 390, Ex. Ch.; *Pipe* v. *Fulcher* (1858), 1 E. & E. 111; *A.-G.* v. *Antrobus*, [1905] 2 Ch. 188; *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 8 L. G. R. 375, 380; *Vyner* v. *Wirral Rural District Council* (1909), 73 J. P. 242; *Mercer* v. *Denne*, [1905] 2 Ch. 538, 561, C. A.; *Smith* v. *Lister* (1895), 72 L. T. 20; *R.* v. *Norfolk County Council* (1910), 26 T. L. R. 269; *Trafford* v. *St. Faith's Rural District Council* (1910), 74 J. P. 297; *R.* v. *Berger*, *supra*. As to verdicts or judgments, see *Pim* v. *Curell* (1840), 6 M. & W. 234, 266; *R.* v. *Brightside Bierlow* (*Inhabitants*) (1849), 13 Q. B. 933; *Petrie* v. *Nuttall* (1856), 11 Exch. 569.

(*k*) *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 73 J. P. 477, C. A.; but compare *R.* v. *Norfolk County Council*, *supra*.

SECT. 2. Indictment.

Effect of convictions.

253. A conviction or judgment on plea of guilty upon an indictment or presentment against the inhabitants of a parish for not repairing a highway averred to be within the parish is, in the absence of fraud or collusion (*l*), conclusive evidence, upon a later indictment for non-repair, that that highway is in fact within and repairable by the parish (*m*). A general verdict of not guilty is no evidence upon the point (*n*). A conviction of a township for not repairing a highway within it, is cogent evidence, upon a later indictment for not repairing another highway, that the township ought to repair all highways within it (*o*).

A previous conviction of an adjoining parish for not repairing a continuation of the road in question is admissible in evidence as tending to show that such road is a highway (*p*).

An order of justices apportioning a highway between two parishes is conclusive as to the boundary between them (*q*).

On an indictment for not repairing a highway repairable *ratione tenuræ*, a conviction of a former occupier is cogent, and probably conclusive, evidence of the existence of the liability (*r*). A general verdict of not guilty would be no evidence on the point (*s*). An admission by a former occupier does not bind the owner (*t*).

SUB-SECT. 8.—*Trial and Appeals.*

Compromises and references.

254. A prosecutor cannot legally, even with the consent of the judge, compromise the prosecution and agree to a verdict of not guilty (*a*); and the defendant will not be bound by any covenant to execute repairs entered into by him as a term of such compromise (*b*). But by consent of the judge the jury may be discharged, and the matter referred to a referee, judgment to be entered in accordance with his finding (*c*).

(*l*) *R.* v. *Eardisland* (*Parish*) (1810), 2 Camp. 494, where it was allowed to be proved that pleas by a parish had been entered without the privity of the inhabitants of one township thereof.

(*m*) It is conclusive even against a recital to the contrary in a statute (*R.* v. *Haughton* (*Inhabitants*) (1853), 1 E. & B. 501, following *R.* v. *St. Pancras* (*Inhabitants*) (1794), Peake, 286 [219], and disregarding a *dictum* of Lord DENMAN, C.J., in *R.* v. *Whitney* (*Inhabitants*) (1835), 3 Ad. & El. 69; *R.* v. *Blakemore* (1852), 2 Den. 410, C. C. R.). It is conclusive against a later inclosure award purporting to deal with the road as being in another parish (*R.* v. *Nether Hallam* (*Inhabitants*) (1854), 6 Cox, C. C. 435).

(*n*) For it might mean simply that the road was in repair (*R.* v. *Haughton* (*Inhabitants*), *supra*).

(*o*) *R.* v. *Lordsmere District* (*Inhabitants*) (1886), 54 L. T. 766, C. C. R.

(*p*) *R.* v. *Brightside Bierlow* (*Inhabitants*) (1849), 13 Q. B. 933.

(*q*) *R.* v. *Hickling* (*Inhabitants*) (1845), 7 Q. B. 880.

(*r*) *R.* v. *Blakemore*, *supra*.

(*s*) For it might mean simply that the road was in repair (*R.* v. *Haughton* (*Inhabitants*), *supra*; *R.* v. *Sutton* (*Lady*) (1838), 8 Ad. & El. 516); but if there was a special finding of no liability it might be evidence (*ibid.*).

(*t*) *R.* v. *Cotton* (1813), 3 Camp. 444. But it may be admissible as evidence of reputation (*ibid.*).

(*a*) *Windhill Local Board of Health* v. *Vint* (1890), 45 Ch. D. 351, C. A. (a case of obstruction); compare *Jefferies* v. *Greenman* (1825), 4 L. J. (O. S.) (K. B.) 13. If the road has been repaired before the trial there should be a plea of guilty and a nominal fine (*R.* v. *Lincombe and Widcombe* (1816), 2 Chit. 214).

(*b*) *Windhill Local Board of Health* v. *Vint*, *supra*.

(*c*) *R.* v. *Wadhurst* (1864), *Times*, 24th March; *R.* v. *Waterlow* (1882), 73 L. T. Jo. 278; not following *R.* v. *Blakemore* (1850), 14 Q. B. 544.

SECT. 2. Indictment.

Judgment and fine.

255. Upon a verdict of guilty, judgment may be pronounced in the absence of the defendants (*d*). The amount of any fine imposed may be calculated on the amount proved to be necessary to put the road in repair (*e*); but, as a rule, judgment will be postponed to permit the defendants to repair it (*f*), and, if they do so (*g*), a nominal fine only will be imposed. The court may, if it sees fit, act upon a certificate of justices as to the state of the road (*h*). Any fine or penalty for not repairing a highway, or for not appearing to an indictment therefor, is to be levied (*i*) and paid to such person residing near the parish concerned as the court may order, to be applied towards the repair of such highway (*k*); and the person named must receive, apply, and account for the same under penalty of double the amount. If, upon conviction of the inhabitants of a parish or township, any such fine or penalty is levied upon any inhabitant, he may apply to the justices in petty (*l*) or special sessions, who must order the highway authority to repay him within two months out of the highway rate (*m*). Payment of the fine does not discharge the defendants, against whom writs of *distringas* may issue until the repairs are done (*n*), or a fresh indictment may be preferred (*o*).

Costs.

256. Costs may be allowed as if the prosecutor or defendant were plaintiff or defendant in civil proceedings (*p*). Further, if

(*d*) *R.* v. *Templeman* (1702), 1 Salk. 56; Com. Dig. tit. "Indictment" (N); 2 Hawk. P. C., 7th ed., c. 48, s. 17; 1 Chitty, Criminal Law, c. xvi., p. 696. But their recognisance may require them to be present.

(*e*) See *R.* v. *East Lidford* (*Inhabitants*) (1756), Say. 301; *R.* v. *Claxby* (*Inhabitants*) (1855), 24 L. J. (Q. B.) 223.

(*f*) Or execution may be stayed, with a view to modifying the fine (*R.* v. *Claxby* (*Inhabitants*), *supra*). The court will not prescribe the mode of repair (*ibid.*). It may refuse to discharge the defendants until the repairs have been tested by a winter's traffic (*R.* v. *Witney* (*Inhabitants*) (1837), 5 Dowl. 728).

(*g*) The time may be enlarged for good reason (*R.* v. *Walton* (*Inhabitants*) (1840), 4 Jur. 195).

(*h*) *R.* v. *Mawbey* (*Bart.*) (1796), 6 Term Rep. 619.

(*i*) By writ of *levari facias*, as to the issue of which see *R.* v. *Steventon* (*Parish*) (1885), 1 T. L. R. 395; Short and Mellor, Practice of the Crown Office, 2nd ed., p. 558.

(*k*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 96. Therefore, if the defendants repair the highway, payment of a fine cannot subsequently be enforced to reimburse persons who have executed repairs before the conviction, and proceedings must be stayed (*R.* v. *Barnard Castle* (*Inhabitants*) (1841), 10 L. J. (M. C.) 53).

(*l*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 46.

(*m*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 96. As to mandamus to levy such a rate, see *R.* v. *Townshend* (1780), 2 Doug. (K. B.) 420; *R.* v. *Lancashire Justices* (1810), 12 East, 366. As to the costs of defending an indictment, see Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 111.

(*n*) *R.* v. *Cluworth* (*Inhabitants*) (1704), 1 Salk. 358. For form of writ, see Short and Mellor, Practice of the Crown Office, 2nd ed., p. 559.

(*o*) *R.* v. *Old Malton* (*Inhabitants*) (1794), 4 B. & Ald. 470, n.; *R.* v. *Machynlleth and Penegoes* (*Inhabitants*) (1821), 4 B. & Ald. 469. A second fine cannot be inflicted on the same indictment (*ibid.*).

(*p*) Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 9 (3). This section applies to all offences in relation to the non-repair or obstruction of highways and public bridges; and the special provisions as to costs in the Highway Acts, 1835 (5 & 6 Will. 4, c. 50) and 1862 (25 & 26 Vict. c. 61), are repealed (Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 10, and Schedule).

the indictment has been removed by *certiorari*, there may be a liability to pay costs under a recognisance (*q*).

Appeals.

257. An appeal lies from a conviction on indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river, in whatever court the indictment is tried, in all respects as though the conviction were a verdict in a civil action tried at assizes (*r*). No appeal lies against an acquittal (*s*). In special circumstances the court may direct entry of judgment to be stayed, where such judgment is unsatisfactory and would operate as an estoppel upon a second trial of the matters in issue (*t*).

SECT. 3.—*Statutory Remedies* (*u*).

SUB-SECT. 1.—*Highways in General: Complaint to Justices* (*a*).

Highway Act, 1835.

258. If information on oath is laid before a justice that a highway is out of repair, he must summon the person or body alleged to be liable to repair it, to a petty (*b*) or special sessions for the division (*c*) in which the highway is situate. At such sessions a

(*q*) See title CROWN PRACTICE, Vol. X., pp. 204, 205. An acquittal upon some counts only is not such an acquittal "upon the indictment" as is contemplated by a recognisance binding a prosecutor to pay costs upon such event (*R.* v. *Bayard*, [1892] 2 Q. B. 181).

(*r*) Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20 (3). It is not clear whether indictments preferred by order of justices (see *R.* v. *Sandon* (*Inhabitants* (1854), 3 E. & B. 547, and p. 148, *post*) or of the county council (see *R.* v. *Wakefield Corporation* (1888), 20 Q. B. D. 810, and p. 150, *post*) are "indictments at common law" within the meaning of this provision. As to the procedure on such appeals, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 437 *et seq.*

(*s*) The Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20 (1), abolished writs of error and the power to grant new trials in criminal cases. Before that Act new trials were not usually granted after acquittal in highway cases (see, for instance, *R.* v. *Duncan* (1881), 7 Q. B. D. 198, and *R.* v. *Southampton County* (*Inhabitants*) (1887), 19 Q. B. D. 590), but it was occasionally done (see *R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1787), 2 East, 353, n.; *R.* v. *Chorley* (1848), 12 Q. B. 515; and *R.* v. *Leigh* (1839), 10 Ad. & El. 398).

(*t*) But not where the judgment will not so operate; see *R.* v. *North-Eastern Rail. Co.* (1901), 84 L. T. 502. This course was followed in *R.* v. *Wandsworth* (*Inhabitants*) (1817), 1 B. & Ald. 63 (acquittal against weight of evidence); *R.* v. *Oxfordshire* (*Inhabitants*) (1812), 16 East, 223, and *R.* v. *Middlesex* (*Inhabitants*) (1813), 1 B. & Ald. 64, n. (pleader's errors); *R.* v. *Sutton* (1833), 5 B. & Ad. 52 (misdirection and weight of evidence), but a stay was refused after a rule *nisi* in *R.* v. *Norfolk County Council* (1910), 74 J. P. (Journal) 113. Judgment has been arrested where there has been a conviction under a statute repealed between the finding of the bill and the trial (*R.* v. *Mawgan* (*Inhabitants*) (1838), 8 Ad. & El. 496; *R.* v. *Denton* (*Inhabitants*) (1852), 18 Q. B. 761). As to estoppel by matter of record, see title ESTOPPEL, Vol. XIII., pp. 325 *et seq.*

(*u*) There are a number of summary methods of enforcing the liability to repair highways; see *infra* and pp. 148—151, *post*. Some apply to highways by whomsoever repairable, others only to highways repairable by the inhabitants at large, and others only to highways repairable by private individuals. Some apply to highways in any locality, some only to highways within the district of an authority who have succeeded to a highway board, and one at least only to highways in a rural district.

(*a*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 94. The procedure under ss. 94, 95, *ibid.*, is still available notwithstanding later enactments providing other remedies (*R.* v. *Morse*, [1904] W. N. 114).

(*b*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 46.

(*c*) The order or conviction must show that the justices were acting for the division (*R.* v. *Bolton* (1841), 5 Jur. 1154; *R.* v. *Martin* (1843), 2 Q. B. 1037, n.;

SECT. 3. Statutory Remedies.

day must be fixed for a subsequent hearing, before which the highway must be viewed either by two or more justices (*d*); or by some other competent person who is to report to them. On the second hearing, if it is clear that the road is not a highway (*e*), or if there is a *bonâ fide* dispute as to whether it is one or not (*f*), the justices must stay their hands; otherwise, if they are satisfied by the view or report (*g*) that it is not in proper repair, they must, unless the defendant *bonâ fide* disputes his liability to repair the highway (*h*), fine him a sum not exceeding £5, and order him to repair (*i*) within a specified time. If this order is not obeyed the defendant must be ordered to pay to a person named by the justices in a second order (*k*) the sum necessary for the repairs, which is to be applied to such repairs. If more than one person is liable for the repairs, the sum must be apportioned.

Indictment.

259. If the defendant *bonâ fide* disputes his liability, the justices must direct an indictment to be preferred, and the necessary witnesses served with a *subpœna* to attend, at the next assizes or quarter sessions (*l*). The indictment will charge the inhabitants of the parish, or the private defendant or defendants (as the case may be), with suffering and permitting the highway to be out of repair (*m*). There are statutory provisions as to costs (*n*) and appeal (*o*).

R. v. *Hickling* (*Inhabitants*) (1845), 7 Q. B. 880, 890; *R.* v. *Watford* (*Inhabitants*) (1847), 4 Dow. & L. 593). As to courts of petty and special sessions generally, see title MAGISTRATES.

(*d*) They should view jointly; see note (*s*), p. 74, *ante*.

(*e*) *E.g.*, if there is a jury's verdict to that effect (*Ex parte Bartlett* (1860), 3 E. & E. 253).

(*f*) *Ex parte Bartlett, supra*; *R.* v. *Johnson* (1865), 34 L. J. (M. C.) 85; *R.* v. *Farrer* (1866), L. R. 1 Q. B. 558. In this case the only remedy is an ordinary indictment, as to which see p. 139, *ante*; but on a question whether such a dispute is *bonâ fide* or not the justices' decision may be reviewed on *certiorari* (*R.* v. *Odell* (*Inhabitants*) (1869), 21 L. T. 556).

(*g*) They are not concluded by the report (*R.* v. *Wilts Justices* (1840), 8 Dowl. 717).

(*h*) *R.* v. *Surrey Justices* (1852), 21 L. J. (M. C.) 195. If the question of liability depends upon such a fact as whether the highway lies within or without a town, the justices may be ordered to decide the point upon a view (*Milton Commissioners* v. *Faversham Highway District Board* (1867), 31 J. P. 341).

(*i*) They must not specify what repairs are to be done; see *R.* v. *Claxby* (*Inhabitants*) (1855), 24 L. J. (Q. B.) 223.

(*k*) An appeal lies against either of these orders; but, so long as the first order is unreversed, the defendant may not dispute it on an appeal against the second; see *Illingworth* v. *Bulmer East Highway Board* (1883), 52 L. J. (Q. B.) 680.

(*l*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 95. They have no discretion (*R.* v. *Surrey Justices* (1852), *supra*; *R.* v. *Arnould* (1857), 8 E. & B. 550; *R.* v. *Farrer* (1866), L. R. 1 Q. B. 558). As to *subpœna* generally, see title EVIDENCE, Vol. XIII., pp. 577 *et seq.*

(*m*) Not the highway authority (*R.* v. *Biggleswade Rural District Council* (1900), 64 J. P. 442; *Loughborough Highway Board* v. *Curzon* (1886), 16 Q. B. D. 565, 571). It has been said that the indictment should state that it is preferred by order of the justices (*R.* v. *Biggleswade Rural District Council, supra*), but *quære* whether there is any necessity for this now that costs do not depend upon the order. As to the removal of indictments by *certiorari*, see p. 143, *ante*, and title CROWN PRACTICE, Vol. X., p. 176, note (*l*).

(*n*) See p. 146, *ante*. Formerly the right to costs depended upon the validity of the justices' order, but the decisions to this effect seem to be obsolete since the Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15).

(*o*) See p. 147, *ante*.

SUB-SECT. 2.—*Highways in an Old Highway District: Complaint to Justices.*

SECT. 3. Statutory Remedies.

260. In the case of highways within the district of a highway authority which has succeeded to the powers of a highway board (*p*), proceedings similar to those above mentioned may be taken under the Highway Act, 1862 (*q*). Highway Act, 1862.

SUB-SECT. 3.—*Highways repairable Ratione Tenuræ or otherwise in an Old Highway District* (*r*).

261. If any highway which any body or person is liable to repair, *ratione tenuræ* or otherwise, lying within the district of a highway authority which has succeeded to the powers and duties of a highway board (*s*), is adjudged in manner provided by the Highway Act, 1862 (*t*), to be out of repair, the highway authority may direct its surveyor to repair the same, and may recover the expenses so incurred from the party liable before two justices in a court of summary jurisdiction (*u*). Highways repairable in an old highway district.

SUB-SECT. 4.—*Highways repairable by Inhabitants at Large: Complaint by County Council.*

262. If any highway authority fails to maintain or repair any of the highways within its jurisdiction, the county council (*a*), if satisfied of the default (*b*) by inquiry (*c*) and report by its surveyor, must order (*d*) the authority to perform its duty within a specified time (*e*). If the order is disobeyed without sufficient Powers of county council over highway authority.

(*p*) *I.e.*, county councils and some rural district councils; see pp. 25, 26, *ante*.

(*q*) Highway Act, 1862 (25 & 26 Vict. c. 61), ss. 18, 19. The wording of these sections differs from that of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 94, 95 (see the preceding paragraph), but their effect appears to be substantially the same.

(*r*) Highway Act, 1862 (25 & 26 Vict. c. 61), s. 34; as amended by the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 23.

(*s*) *I.e.*, county councils and some rural district councils; see pp. 25, 26, *ante*.

(*t*) See the text, *supra*.

(*u*) An appeal seems to lie to quarter sessions against a justices' order for payment of such expenses; see Highway Act, 1862 (25 & 26 Vict. c. 61), s. 42 (1); *Illingworth* v. *Bulmer East Highway Board* (1883), 52 L. J. (Q. B.) 680. As to courts of summary jurisdiction generally, see title MAGISTRATES.

(*a*) As successors of the "county authority"; see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (viii.).

(*b*) The jurisdiction of the county council is not ousted by a denial (however *bonâ fide*) of the fact that the road in question is a highway (*R.* v. *Cheshire Justices* (1883), 50 L. T. 483); but a mandamus will not be granted directing it to make an order, if it is satisfied that it is not a highway (*Ex parte Johnson* (1886), 50 J. P. 313), nor if it says that it is not satisfied on the point (*R.* v. *Dorset County Council* (1903), 67 J. P. 19): the rule *nisi* in this case was ultimately discharged (unreported).

(*c*) Although the statute does not expressly require it, it seems desirable that the authority should be given an opportunity of being heard.

(*d*) As the common law lays down the standard of repair, *semble*, such an order should not direct repairs "to the satisfaction of our surveyor"; but such a provision can be treated as surplusage, and is no ground for quashing an indictment preferred in consequence of the order (*R.* v. *Southport Corporation* (1900), 65 J. P. 184).

(*e*) Highways and Locomotives (Amendment), Act, 1878 (41 & 42 Vict. c. 77), s. 10.

SECT. 3. Statutory Remedies.

cause (*f*), the county council may appoint some person to do the work, and order the authority to pay the cost of the repairs and the reasonable remuneration of the person appointed to superintend them; and any such order may be removed into the High Court for enforcement. Any person so appointed to do repairs has all the powers of the defaulting authority, except that of raising money (*g*), and he may be changed by the county council (*h*).

Indictment.

If the authority within ten days after service of the order upon it gives notice to the county council (*i*) that it declines to obey the order until its liability to repair (*j*) the road in question has been determined by a jury, the county council, unless it cancels or modifies its order, must direct an indictment to be preferred against the defaulting authority (*k*) at the next practicable assizes in order to determine the question. The order is suspended until the conclusion of the trial, and a verdict of not guilty *ipso facto* annuls it (*l*). If costs are ordered to be paid by the county council they will come out of the county rate, and if by the authority, out of its funds applicable to the repair of highways.

SUB-SECT. 5.—*Highways repairable by Inhabitants at Large in a Rural District: Complaint by Parish Council.*

Powers of county council over rural district council on complaint of parish council.

263. If a parish council, or, if there be none, the parish meeting, resolves that a rural district council has failed in its duty to repair any highway (*m*), it may complain to the county council, and the latter, if satisfied of the default by due inquiry (*n*), may by resolution transfer to itself the duties and powers of the district council in the matter. If it does so, it must give notice of the resolution to the district council and the Local Government Board; and may recover the cost of the repairs from the defaulting council as a debt, to be defrayed by it as part of its expenses in the execution of the

(*f*) This apparently refers to cause for delay, *e.g.*, floods or frost. A question of non-liability should be raised by a distinct notice within ten days of the service of the order.

(*g*) Thus he may, if necessary, make a temporary road (see p. 80, *ante*), or get materials from private lands (p. 109, *ante*) or highway quarries (p. 106, *ante*).

(*h*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 10.

(*i*) Formerly the clerk of the peace; see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 78 (1).

(*j*) It may contend that the road is not a highway (*R.* v. *Cheshire Justices* (1883), 50 L. T. 483), or that, though a highway, it is not repairable by the inhabitants at large.

(*k*) And not against the inhabitants of the parish in which the road lies (*R.* v. *Wakefield Corporation* (1888), 20 Q. B. D. 810).

(*l*) As to costs and appeals, see pp. 146, 147, *ante*.

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 16 (1), 19 (8). As to complaints if a rural district should extend into two districts, see *ibid.*, s. 63 (2). For forms of resolution and complaint, and subsequent orders by the county council, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 393—401.

(*n*) It must give the district council an opportunity of being heard (*R.* v. *Huntingdonshire County Council* (1902), *County Council Times*, 1902, Supplement, p. 44).

Public Health Acts (*o*). The county council must keep separate accounts of receipts and expenditure in respect of any power thus transferred to it (*p*).

Default of rural district council.

The county council may instead (*q*) order (*r*) the district council to perform its duty within a specified time, and in case of default may appoint a person to perform the duty. Such person has all the powers of the defaulting authority (except that of levying rates), and the county council may order his expenses and reasonable remuneration and the cost of the proceedings to be paid by the district council (*s*).

SUB-SECT. 6.—*Highways repairable Ratione Tenuræ.*

Highways repairable *ratione tenuræ.*

264. Where a highway repairable *ratione tenuræ* appears (*t*), on the report of a competent surveyor, not to be in proper repair, and the person liable to repair the same fails to do so when requested by the district council (*u*), the district council may repair it and recover (*v*) the cost from the defaulter.

Part X.—Nuisances, Obstructions, Offences, and Legal Proceedings.

SECT. 1.—*Common Law Nuisances.*

Public nuisance.

265. It is a nuisance at common law either to neglect any legal duty in respect of a highway, or to hinder or prevent the public from passing freely, safely and conveniently along it (*x*), unless such prevention or hindrance is justifiable as an exercise of rights reserved by the dedicating owner, or as an ordinary and

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 63. Money may be borrowed for the work, if necessary; see title LOCAL GOVERNMENT.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 63 (1) (e).

(*q*) *Ibid.*, s. 16 (2).

(*r*) It should give the district council an opportunity of being heard.

(*s*) As to the recovery of these costs, see further the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 299—302, and title LOCAL GOVERNMENT. Those sections are applied by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 16 (2), to any order made under it.

(*t*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25 (2).

(*u*) *Quære*, whether this provision applies to both urban and rural councils, as the bulk of s. 25 (2), *ibid.*, refers only to rural councils.

(*v*) *I.e.*, by action. It has been contended that a dispute as to liability may raise a question of title ousting the jurisdiction of a county court (see *Barnstaple Rural District Council* v. *Rudd* (1897), 103 L. T. Jo. 11); but it is submitted that this is not so.

(*x*) Bac. Abr. tit. "Highways" (D); Stephen, Digest of Criminal Law, art. 210. "Something which will render the way less commodious than before to the public" (*R.* v. *United Kingdom Electric Telegraph Co.* (1862), 31 L. J. (M. C.) 166, *per* MARTIN, B., at p. 168); compare also 1 Hawk. P. C., 8th ed., c. 32, "Nuisance to Highway," ss. 10, 11; *R.* v. *Mathias* (1861), 2 F. & F. 570, *per* BYLES, J., and other cases in the following notes. As to highways dedicated subject to nuisances, see p. 46, *ante*. As to nuisances generally, see title NUISANCE.

SECT. 1. Common Law Nuisances.

What it means.

reasonable exercise of the rights of a passenger or frontager thereon, or under statutory powers (*y*).

Whether an obstruction, encroachment, or other act or omission amounts to a nuisance is a question of fact for the jury; and, in deciding it, they may apply the maxim *de mininis non curat lex*, and may find that an obstruction or encroachment is so inappreciable, or so temporary, as not to amount to a nuisance (*a*), or perhaps that, though in itself appreciable, passengers seldom, if ever, require to pass over its site (*b*). But it is no defence to show that although the act complained of is a nuisance to the highway, yet in other respects it is beneficial to the public (*c*), or that, though a part of the highway actually used by passengers is obstructed, sufficient available space is left (*d*). No lapse of time (*e*), and no consent from any highway authority (*f*), affords an answer to a charge of committing a nuisance.

(*y*) See *R.* v. *Scott* (1842), 3 Q. B. 543; *R.* v. *Great North of England Rail. Co.* (1846), 9 Q. B. 315.

(*a*) As in *R.* v. *Lepine* (1866), 15 L. T. 158 (explained in *R.* v. *Bartholomew*, [1908] 1 K. B. 554, C. C. R.); *R.* v. *Tindall* (1837), 6 Ad. & El. 143; *R.* v. *Betts* (1850), 16 Q. B. 1022; *R.* v. *Russell* (1854), 3 E. & B. 942; *A.-G.* v. *Mayo County Council*, [1902] 1 I. R. 13. No indictment will lie for a mere "mathematical obstruction such as would be made by a child's building" (*per* CROMPTON, J., in *R.* v. *Train* (1862), 2 B. & S. 640); compare also *Wandsworth Board of Works* v. *London and South-Western Rail. Co.* (1862), 31 L. J. (CH.) 854. To disturb the recognised practice of putting trestles to divert traffic on a newly repaired road would be unreasonable (*R.* v. *Richmond Justices* (1860), 25 J. P. 340).

(*b*) *R.* v. *Bartholomew*, *supra*, *per* DARLING, J., at p. 562. Prior to this decision it was generally accepted that a permanent and appreciable obstruction ought to be found to be a nuisance even if erected on the margin of a road where no one ever required to pass; see *R.* v. *United Kingdom Electric Telegraph Co.* (1862), 31 L. J. (M. C.) 166. In *R.* v. *Bartholomew*, *supra*, the verdict was clearly ambiguous, and the prosecution had no "merits," and it is submitted that the decision has laid down no new law. As to a fountain on a highway, see *McLoughlin* v. *Warrington Corporation* (1910), 75 J. P. 57, C. A. As to trees on a highway, see p. 153, *post*.

(*c*) *R.* v. *Ward* (1836), 4 Ad. & El. 384 (overruling *R.* v. *Russell* (1827), 6 B. & C. 566); *R.* v. *Russell*, *supra*, at p. 949; *R.* v. *Train*, *supra*; *A.-G.* v. *Terry* (1874), 9 Ch. App. 423. Compare *Broadbent* v. *Imperial Gaslight Co.* (1857), 26 L. J. (CH.) 276.

(*d*) 1 Hawk. P. C., 8th ed., c. 32, "Nuisance to Highway," ss. 10, 11; *R.* v. *United Kingdom Electric Telegraph Co.*, *supra*; compare *Cattle* v. *Stockton Waterworks* (1875), L. R. 10 Q. B. 453.

(*e*) *Weld* v. *Hornby* (1806), 7 East, 195; *Vooght* v. *Winch* (1819), 2 B. & Ald. 662; *R.* v. *Edwards* (1847), 11 J. P. 602; *Turner* v. *Ringwood Highway Board* (1870), L. R. 9 Eq. 418; *Mott* v. *Shoolbred* (1875), L. R. 20 Eq. 22. There can be no prescription to cause a public nuisance (*Fowler* v. *Sanders* (1617), Cro. Jac. 446; *R.* v. *Cross* (1812), 3 Camp. 224).

(*f*) *A.-G.* v. *Barker* (1900), 83 L. T. 245; *A.-G.* v. *Mayo County Council*, *supra*; *R.* v. *Longton Gas Co.* (1860), 2 E. & E. 651; *Hawkins* v. *Robinson* (1872), 37 J. P. 662; *Preston Corporation* v. *Fullwood Local Board* (1885), 53 L. T. 718, explaining *Edgeware Highway Board* v. *Harrow Gas Co.* (1874), L. R. 10 Q. B. 92; *Harvey* v. *Truro Rural District Council* (1903), 68 J. P. 51. But an authority may have statutory powers to authorise what would otherwise be a nuisance; in such case an informality in giving its consent will not necessarily prevent the defendant relying thereon as a defence to an indictment (*R.* v. *Burrell* (1867), 10 Cox, C. C. 462, C. C. R.).

Instances of nuisance.

266. The following are instances of acts which may be found to be nuisances:—

To omit to repair a highway (*g*), or some object lawfully placed thereon, such as a grating or metal plate (*h*), which the defendant is legally bound to repair (*i*); to omit to clean ditches adjoining a highway (*j*); to allow trees or bushes to grow over a highway (*k*); to allow a house or building adjoining a highway to be in a dangerous condition, and likely to fall upon it (*l*); to keep on premises near a highway large quantities of explosive or highly inflammable substances (*m*); to erect a fence or building across or so as to encroach upon a highway, or to place logs or heaps of stone or other obstructions thereon (*n*); to erect a gate across a highway where there has been none before (*o*), or, if a footpath has been dedicated subject to the existence of a stile, to substitute a higher or less convenient stile (*p*); to construct unreasonably inconvenient or dangerous steps in a footpath when lawfully altering the level of the road into which it opens (*q*); to lay, without statutory powers, along (*r*) or across (*s*) a highway a permanent tramway, or even temporary rails by the side of an authorised tramway undergoing

(*g*) As to the repair of highways, see pp. 82, *ante*.

(*h*) *Primâ facie* the liability for accidents arising from non-repair rests with the occupier of the premises; the owner may, however, be liable, if he knew or ought to have known of the defect at the date of the demise; at any rate if, as between himself and the tenant, he is bound to repair (*Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401; *Gwinnell* v. *Eamer* (1875), L. R. 10 C. P. 658; *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C. P. D. 311; *Bowen* v. *Anderson*, [1894] 1 Q. B. 164). As to the occupier's liability if a coal shoot is left open, see *Whiteley* v. *Pepper* (1876), 2 Q. B. D. 276; *Braithwaite* v. *Watson* (1889), 5 T. L. R. 331; and compare *Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470. As to stop-cock boxes in highways left unplugged, see *Osborn* v. *Metropolitan Water Board* (1910), 74 J. P. 190; *Rosenbaum* v. *Metropolitan Water Board* (1910), 75 J. P. 12, C. A.; *Batt* v. *Metropolitan Water Board*, [1911] 1 K. B. 845.

(*i*) As to which see p. 103, *ante*.

(*j*) See p. 113, *ante*.

(*k*) 1 Hawk. P. C., 7th ed., c. 76, s. 149; *Walker* v. *Horner* (1875), 1 Q. B. D. 4; *Thorne* v. *Roberts* (1909), 128 L. T. Jo. 155 (county court case); but see, *contra*, *Anon.* (1491), Y. B. 8 Hen. 7, fo. 7; Bro. Abr. tit. "Nuisance," pl. 28.

(*l*) *R.* v. *Watts* (1703), 1 Salk. 357; compare *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314 (fall of overhanging lamp); *Barker* v. *Herbert* (1911), 27 T. L. R. 252; and see *Bowen* v. *Anderson*, *supra*, as to the liability *inter se* of landlord and tenant.

(*m*) *R.* v. *Lister* (1857), Dears. & B. 209, C. C. R.; compare *R.* v. *Taylor* (1742), 2 Stra. 1167; *Hepburn* v. *Lordan* (1865), 2 Hem. & M. 345. For statutory offences in connection with explosives, see title EXPLOSIVES, Vol. XIV., pp. 355 *et seq.*

(*n*) 1 Hawk. P. C., 7th ed., c. 76, ss. 144—145; compare *Lamley* v. *East Retford Corporation* (1891), 55 J. P. 133, C. A. (post in footpath); *Watson* v. *Ellis* (1885), 1 T. L. R. 317 (carpet laid from door across footpath); *Campbell* v. *Paddington Borough Council* (1911), 27 T. L. R. 232 (stand to view a procession). Where an encroachment is made on a highway by the owner of adjoining land, his heir is responsible for continuing it (*Lee* v. *Boothby* (1635), 2 Roll. Abr. 137, "Nuisance" B. 4).

(*o*) 1 Hawk. P. C., 7th ed., c. 76, ss. 144, 145, 149; *James* v. *Hayward* (1630), Cro. Car. 184.

(*p*) *Bateman* v. *Burge* (1834), 6 C. & P. 391. *Semble*, an unlocked gate is more convenient than an ordinary stile.

(*q*) *R.* v. *Burt* (1870), 11 Cox, C. C. 399.

(*r*) *R.* v. *Train* (1862), 2 B. & S. 640; *R.* v. *Morris* (1830), 1 B. & Ad. 441; *R.* v. *Charlesworth* (1851), 16 Q. B. 1012.

(*s*) *A.-G.* v. *Barker* (1900), 83 L. T. 245.

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repairs (*t*); to erect, without statutory powers, telegraph or other posts in the soil of a highway (*a*); to break open, without statutory powers, the soil of a highway for the purpose of laying drains, or wires (*b*), and, possibly, even to cut "grips" across its grass margins (*c*); to fail to reinstate a highway after lawfully breaking it open (*d*), and, *a fortiori*, to make a permanent trench across it (*e*), or plough it up, unless dedicated subject to a right to do so (*f*); to let down the surface of a highway by underground workings (*g*); to sweep fallen snow into heaps and leave it so as to impede traffic, or to dissolve fallen snow by salt or other means causing injury to horses or inconvenience to traffic (*h*); to keep a swing bridge carrying a highway over a river or canal open for an unreasonable time (*i*), or to leave its ends unguarded when it is open (*j*); to stop up a watercourse and thereby cause a highway to be flooded (*k*); to allow a stream of water to spout up in the highway (*l*); and, apparently, to let water drip on to a highway from a bridge across it (*m*); to use a highway, not dedicated conditionally (*n*) for the purpose of trade, *e.g.*, to cut up logs (*o*) or mend carriages (*p*) thereon outside one's yard or smithy; to allow vehicles to stand upon a highway for an unreasonable time whilst waiting for passengers (*q*); to obstruct a highway to a greater extent or for a

(*t*) *Tilling (T.), Ltd.* v. *Dick Kerr & Co., Ltd.*, [1905] 1 K. B. 562.

(*a*) *R.* v. *United Kingdom Electric Telegraph Co.* (1862), 31 L. J. (M. C.) 166.

(*b*) *R.* v. *Longton Gas Co.* (1860), 2 E. & E. 651; *R.* v. *Sheffield Gas Consumers' Co.* (1853), 18 Jur. 146, n.; *Preston Corporation* v. *Fullwood Local Board* (1885), 53 L. T. 718. Compare *Cattle* v. *Stockton Waterworks* (1875), L. R. 10 Q. B. 453.

(*c*) *Nicol* v. *Beaumont* (1883), 50 L. T. 112.

(*d*) *Drew* v. *New River Co.* (1834), 6 C. & P. 754; *Goodson* v. *Sunbury Gas Consumers' Co., Ltd.* (1896), 60 J. P. 585; *Hartley* v. *Rochdale Corporation*, [1908] 2 K. B. 594; *Ellis* v. *Sheffield Gas Consumers Co.* (1853), 2 E. & B. 767; *Peachey* v. *Rowland* (1853), 13 C. B. 182; *quære* whether this last decision can now be relied on; see cases in note (*m*), p. 136, *ante*.

(*e*) *R.* v. *Shelderton* (*Inhabitants*) (1667), 2 Keb. 221; 2 Russell on Crimes and Misdemeanours, 7th ed., p. 1833.

(*f*) *Griesly's Case* (1669), 1 Vent. 4. As to such a right, see p. 46, *ante*.

(*g*) *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corporation*, [1908] A. C. 323. But he is only responsible for a nuisance directly due to the subsidence; and where a colliery company let down a whole neighbourhood, and a railway company whose line formerly crossed a highway on the level thereupon raised the line to its old level, thus blocking the highway by an embankment, it was held that the colliery company was not responsible for the obstruction (*A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301).

(*h*) *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A. C. 111. As to the duty of tramway companies in respect of snow, see, further, *Acton Urban District Council* v. *London United Tramways* (1901), *Ltd.* (1909), 73 J. P. 6.

(*i*) *Wiggins* v. *Boddington* (1828), 3 C. & P. 544.

(*j*) *Manley* v. *St. Helens Canal and Rail. Co.* (1858), 2 H. & N. 840.

(*k*) See precedent in Crown Circuit Companion, 376. As to failure to clean out adjoining ditches, see p. 113, *ante*.

(*l*) *Hill* v. *New River Co.* (1868), 9 B. & S. 303.

(*m*) *Great Western Rail. Co.* v. *Bishop* (1872), L. R. 7 Q. B. 550.

(*n*) As to this, see p. 46, *ante*.

(*o*) *R.* v. *Jones* (1812), 3 Camp. 230. He "is not to eke out the inconvenience of his own premises by taking in the public highway into his timber yard" (*ibid.*, *per* LORD ELLENBOROUGH, C.J., at p. 231).

(*p*) See *Original Hartlepool Collieries Co.* v. *Gibb* (1877), 5 Ch. D. 713, *per* JESSEL, M.R. But if a carriage breaks down in the street, it may well be reasonable to repair it *in situ*.

(*q*) *R.* v. *Cross* (1812), 3 Camp. 224. "The King's highway is not to be used

longer time than is reasonably necessary by loading or unloading vehicles from or into adjoining premises (*r*), or by hoardings in the course of executing building operations (*s*), it being the duty of a frontager to act reasonably and diminish the necessary public inconvenience as much as possible (*t*); to use carriages on a way dedicated to foot passengers alone (*u*); to use on a highway, without statutory powers (*a*), vehicles of an unreasonable size and character (*b*) so as to injure the surface (*c*), or substantially to obstruct other traffic (*d*), or, without statutory powers (*a*), to use on it vehicles or engines calculated to frighten horses (*e*), or otherwise endanger

as a stable yard" (*ibid., per* LORD ELLENBOROUGH, C.J., at p. 227). Compare *Jeffery* v. *St. Pancras Vestry* (1894), 63 L. J. (Q. B.) 618; *Robinson* v. *London General Omnibus Co., Ltd.* (1910), 74 J. P. 161 (nuisance by noise and vibration from motor omnibuses using a street as a "stand"); *Original Hartlepool Collieries Co.* v. *Gibb* (1877), 5 Ch. D. 713. An owner of premises may have his carriage drawn up to his door, though it overlaps his neighbour's premises, but must act reasonably in removing it to meet his neighbour's convenience (*ibid., per* JESSEL, M.R., at p. 721).

(*r*) *R.* v. *Russell* (1805), 6 East, 427; *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400; *A.-G.* v. *Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276, C. A.; *R.* v. *Jones* (1812), 3 Camp. 230; *A.-G.* v. *Smith* (*W. H.*) *& Son* (1910), 74 J. P. 313.

(*s*) *R.* v. *Jones, supra.* As to the propriety of erecting hoardings when necessary to protect passengers, see *R.* v. *Ward* (1836), 4 Ad. & El. 384, 405; *Bradbee* v. *London Corporation* (1842), 5 Scott (N. R.), 79; *Bush* v. *Steinman* (1799), 1 Bos. & P. 404.

(*t*) *E.g.*, by carrying in materials at the least busy hours of the day, or by distributing such carriages between different entrances (*Fritz* v. *Hobson* (1880), 14 Ch. D. 542). Compare *Land Securities Co.* v. *Commercial Gas Co.* (1902), 18 T. L. R. 405.

(*u*) *A.-G.* v. *Blackpool Corporation* (1907), 71 J. P. 478 (motor cars on a "parade"); *Sheringham Urban District Council* v. *Halsey* (1904), 68 J. P. 395; *Abercromby* v. *Fermoy Town Commissioners*, [1900] 1 I. R. 302, C. A. As to perambulators, see *R.* v. *Mathias* (1861), 2 F. & F. 570.

(*a*) As to railway engines, see *R.* v. *Pease* (1832), 4 B. & Ad. 30; *Jones* v. *Festiniog Rail. Co.* (1868), L. R. 3 Q. B. 733. Even where the legislature authorises the use of vehicles which might otherwise be a nuisance, the drivers are under an obligation to take reasonable care for the protection of other users of the road (*Rattee* v. *Norwich Electric Tramway Co.* (1902), 18 T. L. R. 562, C. A.; *Ramsden* v. *Lancashire and Yorkshire Rail. Co.* (1888), 53 J. P. 183; *Simkin* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 453, C. A.).

(*b*) It is a nuisance if it occasions delay and inconvenience to the public substantially greater than would have been caused by horses and carts (*R.* v. *Chittenden* (1885), 15 Cox, C. C. 725, a case of traction engine and trucks). A perambulator is a nuisance on a footpath if of such a size and weight as to injure the soil or inconvenience other passengers (*R.* v. *Mathias, supra*).

(*c*) *R.* v. *Leech* (1704), 6 Mod. Rep. 145, *obiter dictum* (cart on a bridleway); *Egerly's Case* (1641), 3 Salk. 183 (a waggon of excessive weight *et cum inusitato numero equorum*); *A.-G.* v. *Scott*, [1904] 1 K. B. 404, C. A.; *A.-G.* v. *Scott*, [1905] 2 K. B. 160, C. A.; *Cavan County Council and Bailieborough Rural District Council* v. *Kane*, [1910] 2 I. R. 644 (traction engines). In such a case it is no answer to say that no nuisance would have been caused if the road had been properly repaired (*A.-G.* v. *Scott*, [1904] 1 K. B. 404, C. A.). For provisions as to extraordinary traffic or excessive weight, see p. 172, *post.* As to injury to pipes by steam rollers and traction engines, see p. 137, *ante.*

(*d*) *R.* v. *Chittenden* (1885), 49 J. P. 503 (traction engine and trucks on a narrow road).

(*e*) *Watkins* v. *Reddin* (1861), 2 F. & F. 629; *Jeffery* v. *St. Pancras Vestry, supra*; *Galer* v. *Rawson* (1889), 6 T. L. R. 17, C. A.; *Bantwick* v. *Rogers* (1891), 7 T. L. R. 542 (traction engines or steam rollers emitting sparks and steam). The question is whether such an engine is calculated to frighten horses of

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passengers (*f*), or injure property (*g*); *a fortiori*, to leave a vehicle or implement calculated to frighten horses standing upon a highway or on the sides thereof for an unreasonable time (*h*); to place, even on private land, an object calculated to frighten horses, if it be so near a highway as to be likely to cause danger (*i*); to keep a ferocious and noisy dog so near to a highway as to be likely to startle horses (*k*); to turn a vicious animal loose in a field through which an unfenced highway runs (*l*); to blast stone in a quarry in such a manner as to endanger passengers upon a neighbouring highway (*m*); to erect or maintain adjoining a highway a barbed wire fence dangerous or inconvenient to passengers (*n*), a low wall surmounted by spikes (*o*), a rotten railing (*p*), or a wall which is out of the perpendicular and leans over the highway (*q*); to make (*r*) any

ordinary nerve and courage (*Galer* v. *Rawson* (1889), 6 T. L. R. 17, C. A.). If a person "has his carriage constructed and painted in such a manner as to be very conspicuous indeed, it may then become a nuisance" (*per* COLLINS, J., in *Jeffery* v. *St. Pancras Vestry* (1894), 63 L. J. (Q. B.) 618).

(*f*) As to the liability of motor vehicles to "skid," see *Wing* v. *General Omnibus Co., Ltd.* (1909), 73 J. P. 429, C. A.; *Parker* v. *London General Omnibus Co.* (1909), 74 J. P. 20, C. A.; *Gibbons* v. *Vanguard Motor Bus Co., Ltd.* (1908), 72 J. P. 506.

(*g*) *Powell* v. *Fall* (1880), 5 Q. B. D. 597, C. A.; *Gunter* v. *James* (1908), 72 J. P. 448.

(*h*) *Harris* v. *Mobbs* (1878), 3 Ex. D. 268 (steam plough and van); *Wilkins* v. *Day* (1883), 12 Q. B. D. 110 (agricultural roller). Any vehicle, if so left for an unreasonable time, might of course be a nuisance on the ground of mere obstruction.

(*i*) *Brown* v. *Eastern and Midlands Rail. Co.* (1889), 22 Q. B. D. 391, 393, C. A. *Semble*, the occupier may be responsible if he fails to remove such objects placed there by others; see *A.-G.* v. *Tod-Heatly and Brownrigg* (1897), 76 L. T. 174.

(*k*) *Brown* v. *Eastern and Midlands Rail. Co., supra.*

(*l*) *R.* v. *Dant* (1865), 29 J. P. 359, C. C. R. As to the civil liability of an owner who puts a savage animal into a field which the public to his knowledge are in the habit of crossing, see *Lowery* v. *Walker*, [1911] A. C. 10, and title TRESPASS. As to allowing animals to stray on to a highway, see *Higgins* v. *Searle* (1909), 73 J. P. 185, C. A.; compare *Hadwell* v. *Righton*, [1907] 2 K. B. 345 (fowl and bicyclist); *semble*, fowls may properly be allowed to stray upon a highway outside their owner's premises.

(*m*) *R.* v. *Mutters* (1864), Le. & Ca. 491, C. C. R. As to rifle practice, see *Bannister* v. *Bigges* (1865), 29 J. P. 531.

(*n*) *Bird* v. *Frost* (1880), 56 J. P. 164; *Stewart* v. *Wright* (1893), 57 J. P. 137; *Elgin County Road Trustees* v. *Innes* (1886), 14 R. (Ct. of Sess.) 48; *Collen* v. *Ellis* (1893), 32 L. R. Ir. 491. For statutory provisions as to barbed wire fences, see p. 169, *post*.

(*o*) *Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199.

(*p*) *Harrold* v. *Watney*, [1898] 2 Q. B. 320, C. A.

(*q*) *Silverton* v. *Marriott* (1888), 52 J. P. 677. If through the act of strangers property abutting on a highway becomes a nuisance and dangerous to passengers, the occupier is liable to persons injured if he fails to remove the nuisance upon becoming aware of its existence (*ibid.*). See, also, as to absence of negligence, *Barker* v. *Herbert* (1911), 27 T. L. R. 252.

(*r*) Where a highway is dedicated subject to the existence of a dangerous erection or excavation on or near to it, the public must (apart from statutory provisions, *e.g.*, as to mines and quarries, see p. 169, *post*) accept it as they find it with its attendant drawbacks and dangers (*Cornwell* v. *Metropolitan Sewers Commissioners* (1855), 10 Exch. 771; *Wilson* v. *Halifax Corporation* (1868), L. R. 3 Exch. 114, 118; *R.* v. *Dant, supra*; *Wettor* v. *Dunk* (1864), 4 F. & F. 298; *Owen* v. *De Winton* (1894), 58 J. P. 833; *Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371; *Fisher* v. *Prowse* (1862), 2 B. & S. 770).

dangerous excavation or erection on land immediately (*s*) adjoining a highway (*a*), unless the public be protected from danger by a substantial fence (*b*); to organise or take part in a procession or meeting which naturally results in an obstruction and is an unreasonable user of the highway (*c*); to use premises situate near a highway for exhibitions (*d*), entertainments, or other purposes of such a character that crowds of persons (*e*) naturally collect and obstruct the highway, not by the mere act of coming and going (*f*), but by remaining on it awaiting admission to or watching the spectacle, or endeavouring to obtain information as to what is going on out of their sight (*g*).

Nuisances apart from obstruction.

Apart from any question of obstruction, it is a nuisance to expose on, or near to, a highway any object, *e.g.*, a corpse, calculated to disgust passers-by and outrage the public sense of decency (*h*).

(*s*) The site must "substantially" adjoin the highway, and whether it does so is a question for a judge and not for a jury (*Hardcastle* v. *South Yorkshire Railway and River Dun Co.* (1859), 4 H. & N. 67; *Binks* v. *South Yorkshire Railway and River Dun Co.* (1862), 3 B. & S. 244; *Hounsell* v. *Smyth* (1860), 7 C. B. (N. S.) 731); compare *Blithe* v. *Topham* (1607), 1 Roll. Abr. 88. If a person adds 20 feet of land to widen an old road, and such added strip has a dangerous declivity beyond it, persons who choose to diverge on to the new strip do so at their peril (*Owen* v. *De Winton* (1894), 58 J. P. 833; see also *Neill* v. *Byrne* (1878), 2 L. R. Ir. 287). See also *Carshalton Urban District Council* v. *Burrage* (1911), 27 T. L. R. 280, and p. 253, *post*.

(*a*) *Coupland* v. *Hardingham* (1813), 3 Camp. 398; *Jarvis* v. *Dean* (1826), 3 Bing. 447. In both these cases the "areas" must be presumed to have been made after the dedication; see *Cornwell* v. *Metropolitan Sewers Commissioners* (1855), 10 Exch. 771, 775, *per* MARTIN, B., and *Fisher* v. *Prowse*, *Cooper* v. *Walker* (1862), 2 B. & S. 770, *per* BLACKBURN, J.; *Barnes* v. *Ward* (1850), 9 C. B. 392 (an "area"); *Manley* v. *St. Helens Canal and Rail. Co.* (1858), 2 H. & N. 840 (an open swing bridge); *Hadley* v. *Taylor* (1865), L. R. 1 C. P. 53 (a "hoist-hole").

(*b*) As to an insufficient fence or rail, see *Jewson* v. *Gatti* (1886), 2 T. L. R. 381, 441, C. A.; as to a fence broken by a trespasser, see *Barker* v. *Herbert* (1911), 27 T. L. R. 252; as to the liability in the case of children, see *ibid.*; *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229; *Schofield* v. *Bolton Corporation* (1910), 26 T. L. R. 230, C. A.; *Barker* v. *Herbert*, *supra*. See further, as to the duty to fence as between occupier and owner, title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 128.

(*c*) *Lowdens* v. *Keaveney*, [1903] 2 I. R. 82, following *Original Hartlepool Collieries Co.* v. *Gibb* (1877), 5 Ch. D. 713, *per* JESSEL, M.R. As to meetings on a highway, see *Ex parte Lewis* (1888), 21 Q. B. D. 191, 197; *R.* v. *Graham and Burns* (1888), 16 Cox, C. C. 420; *Burden* v. *Rigler*, [1911] 1 K. B. 337.

(*d*) Whether visible from the highway or not (*R.* v. *Carlile* (1834), 6 C. & P. 636).

(*e*) Or vehicles; see *R.* v. *Cross* (1842), 3 Camp. 224.

(*f*) *Jenkins* v. *Jackson* (1888), 40 Ch. D. 71.

(*g*) 1 Hawk. P. C., 7th ed., c. 75, s. 7; *Betterton's Case* (1695), Holt (K. B.), 538; *R.* v. *Cross* (1812), 3 Camp. 224; *R.* v. *Moore* (1832), 3 B. & Ad. 184; *R.* v. *Carlile*, *supra*; *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400; *Original Hartlepool Collieries Co.* v. *Gibb*, *supra*; *Walker v. Brewster* (1867), L. R. 5 Eq. 25; *Inchbald* v. *Robinson*, *Inchbald* v. *Barrington* (1869), 4 Ch. App. 388; *Bellamy* v. *Wells* (1890), 39 W. R. 158; *Jenkins* v. *Jackson*, *supra*; *Wagstaff* v. *Edison Bell Phonograph Corporation* (1893), 10 T. L. R. 80; *Germaine* v. *London Exhibitions, Ltd.* (1896), 75 L. T. 101; *Barber* v. *Penley*, [1893] 2 Ch. 447. In 1881 a shopkeeper was convicted in respect of an exhibition of photographs in a shop window at Manchester (see 46 J. P. 19); but in *R.* v. *Sarmon* (1758), 1 Burr. 516, the court quashed an indictment for getting a person to distribute handbills on a footway whereby it was impeded and obstructed.

(*h*) *R.* v. *Clark* (1883), 15 Cox, C. C. 171; *R.* v. *Richardson* (1896), *Times*, 12th September.

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It is also a nuisance knowingly to expose on a public highway a person or animal liable to transmit infection without taking reasonable precautions (*i*), or to set near a highway a trap baited so as to entice animals from the highway (*k*).

Duty of persons acting under statutory powers.

267. If persons acting under statutory powers interfere with a highway, they must exercise due care to see that their works while in progress are so carried on, and when completed are so maintained, and that the public are not injured thereby (*l*).

SECT. 2.—*Remedies at Common Law.*

Indictment.

268. Every common nuisance is an indictable (*m*) misdemeanour, for which the defendant, if convicted, may be punished by fine or imprisonment, or both (*n*); and if the nuisance is still in existence at the time of the conviction, the court may also order him to abate it (*o*). Further, if the nuisance is continued after conviction, a second indictment may be preferred, and upon the trial thereof the former conviction will be conclusive evidence for the Crown that an obstacle complained of is in fact a nuisance, and that the way is a highway (*p*). If an owner of land adjoining a highway incloses part of the highway, his heir becomes responsible by merely continuing the nuisance (*q*).

Who can take proceedings.

269. The Attorney-General, as custodian of the rights of the public, can maintain an action for an injunction to restrain the commission of a nuisance to a highway, or for a mandatory injunction directing its abatement, and in such an action no actual injury need be proved (*r*); but a member of the public can only

(*i*) *R.* v. *Vantandillo* (1815), 4 M. & S. 73, *per* LE BLANC, J.; *R.* v. *Burnett* (1815), 4 M. & S. 272 (smallpox); *R.* v. *Henson* (1852), Dears. C. C. 24 (glanders); compare *Tunbridge Wells Local Board* v. *Bisshopp* (1877), 2 C. P. D. 187. See also title ANIMALS, Vol. I., pp. 397, 420.

(*k*) *Townsend* v. *Wathen* (1808), 9 East, 277.

(*l*) *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392, C. A. (explosion in laying wires); *Maxwell* v. *British Thomson Houston Co.* (1902), 18 T. L. R. 278, C. A. (contractor held liable for sub-contractor's acts); *Price* v. *South Metropolitan Gas Co.* (1895), 65 L. J. (Q. B.) 126 (gas company held liable for explosion, their main having been cracked by other persons' excavations); *Stacey* v. *Gas Light and Coke Co.* (1911), 9 L. G. R. 174; as to failure to fill in excavations properly, see pp. 134, 136, *ante*.

(*m*) For an indictment against joint offenders, see *R.* v. *Lynn and Debney* (1824), 1 C. & P. 528. The fact that a civil action is pending in respect of the same matters is no ground for postponement (*R.* v. *Bowles* (1861), 2 F. & F. 371).

(*n*) Bac. Abr. tit. "Nuisances" (D); *R.* v. *Gregory* (1833), 5 B. & Ad. 555. A merely nominal fine is of course frequently sufficient to meet the requirements of the case; see *R.* v. *Incledon* (1810), 13 East, 164; *R.* v. *Paget* (1862), 3 F. & F. 29; *R.* v. *Lewes Corporation* (1886), 2 T. L. R. 399; *R.* v. *Dunraven* (*Earl*) (1837), Will. Woll. & Dav. 577. As to appeals and costs, see pp. 146, 147, *ante*.

(*o*) *R.* v. *Incledon, supra; R.* v. *Pappineau* (1726), 2 Stra. 686; *R.* v. *Stead* (1799), 8 Term Rep. 142. A writ *de nocumento amovendo* may issue to the sheriff; see Short and Mellor, Practice of the Crown Office, 2nd ed., p. 560.

(*p*) *R.* v. *Maybury* (1864), 4 F. & F. 90.

(*q*) *Lee* v. *Boothby* (1635), 2 Roll. Abr. 137, tit. "Nuisance" (B 4). As to liability for acts of workmen, see *R.* v. *Stephens* (1866), 35 L. J. (Q. B.) 251; as to a contractor's liability, see *R.* v. *Burt* (1870), 11 Cox, C. C. 399.

(*r*) *A.-G.* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (1882), 21 Ch. D. 752; *A.-G.* v. *Barker* (1900), 83 L. T. 245; *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 242, 270, C. A., *per*

maintain an action for damages or an injunction in respect of such a nuisance, if he has sustained therefrom some substantial injury beyond that suffered by the rest of the public, such injury being direct and not merely consequential (*s*). If he asks for an injunction he should assert his rights promptly, otherwise he may be left to his remedy in damages (*t*). An individual cannot maintain an action for a declaration that a particular *locus in quo* is a highway (*a*).

What is sufficient damage to support an action.

270. An authority which, in accordance with its duty, incurs expense in abating a nuisance on a highway under its management, sustains particular damage sufficient to support an action (*b*); and so does an individual who suffers injury to his person or chattels (*c*), or whose property is rendered difficult of access (*d*) or

KAY, L.J. But if the nuisance is a trivial one the court will not grant an injunction merely because the Attorney-General is suing (*A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304; *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 346). As to lapse of time, see *A.-G.* v. *Grand Junction Canal Co.* (1909), 73 J. P. 421. As to mandatory injunctions, see titles INJUNCTION; SPECIFIC PERFORMANCE.

(*s*) *Winterbottom* v. *Derby* (*Lord*) (1867), L. R. 2 Exch. 316; *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542. To such an action contributory negligence will afford an answer (*Butterfield* v. *Forrester* (1809), 11 East, 60; *Marriott* v. *Stanley* (1840), 4 Jur. 320; *Davies* v. *Mann* (1842), 10 M. & W. 546; *Flower* v. *Adam* (1810), 2 Taunt. 314). As to the necessity for the Attorney-General being a party to a claim for an injunction unless the plaintiff has suffered special injury, see *Wallasey Local Board* v. *Gracey* (1887), 36 Ch. D. 593; *Tottenham Urban District Council* v. *Williamson & Sons*, [1896] 2 Q. B. 353, C. A.; *Exeter Corporation* v. *Devon* (*Earl*) (1870), L. R. 10 Eq. 232, 241. As to liability where the damage is the consequence of a third person's intervening act, see *Clark* v. *Chambers* (1878), 3 Q. B. D. 327; *Hill* v. *New River Co.* (1868), 9 B. & S. 303.

(*t*) *Rogers* v. *Great Northern Rail. Co.* (1889), 53 J. P. 484.

(*a*) *St. Ives Corporation* v. *Wadsworth* (1908), 72 J. P. 73; *Whitehouse* v. *Hugh*, [1906] 1 Ch. 253; compare *Taff Vale Rail. Co.* v. *Pontypridd Urban District Council* (1905), 69 J. P. 351.

(*b*) *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corporation*, [1908] A. C. 323; *Benfieldside Local Board* v. *Consett Iron Co.* (1877), 3 Ex. D. 54; *Acton Urban District Council* v. *London United Tramways* (1901), *Ltd.* (1908), 73 J. P. 6; *Louth Urban District Council* v. *West* (1896), 60 J. P. 600; *Cavan County Council and Bailieborough Rural District Council* v. *Kane*, [1910] 2 I. R. 644. *Semble*, an individual liable to repair a highway *ratione tenuræ* or otherwise could similarly recover in respect of a nuisance causing him extra expense (*Egerly's Case* (1641), 3 Salk. 183).

(*c*) *E.g.*, if he or his horse fall into a ditch dug across the road (4 Vin. Abr. tit. "Chimin," p. 506), or if he collides with some obstruction therein (*Fowler* v. *Sanders* (1617), Cro. Jac. 446; *Clark* v. *Chambers*, *supra*). See *Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199, and *Wakelin* v. *London and South Western Rail. Co.* (1886) 12 App. Cas. 41, as to evidence sufficient in the case of an unexplained fatal accident to connect the injury with the nuisance; and see title DAMAGES, Vol. X., pp. 318 *et seq.*

(*d*) *E.g.*, by the narrowing, diversion, or other alteration of the highway by which it is approached (*Spencer* v. *London and Birmingham Rail. Co.* (1836), 8 Sim. 193; *Cook* v. *Bath Corporation* (1868), L. R. 6 Eq. 177 (back entrance cut off); *Benjamin* v. *Storr*, *supra* (vans blocking access for an unreasonable time); *Barber* v. *Penley*, [1893] 2 Ch. 447 (private nuisance by crowd outside theatre); and the following compensation cases, *Beckett* v. *Midland Rail. Co.* (1867), L. R. 3 C. P. 82 (narrowing); *Chamberlain* v. *West End of London and Crystal Palace Rail. Co.* (1863), 2 B. & S. 617, Ex. Ch. (turning road into a *cul de sac*); *Caledonian Rail. Co.* v. *Walker's Trustees* (1882), 7 App. Cas. 259 (diverting a

SECT. 2. Remedies at Common Law.

otherwise prejudicially affected in value (*e*); if, however, the property is leased, the injury must be of a permanent character to enable the reversioner to sue (*f*). Mere inconvenience and delay suffered by all persons using the obstructed road is not sufficient to enable any one of them to maintain an action (*g*); but substantial pecuniary loss occasioned to an individual by the fact that he or his servants cannot carry on his business, or can only do so by a circuitous or more costly journey, may be sufficient (*h*). It is not clear whether a trader can maintain an action on the ground that persons likely to pass his premises and do business with him are diverted along other streets (*i*). The obstruction by one landowner of a footpath across his land will not entitle his neighbour to sue on the ground that obstructed passengers have trespassed on to his land (*k*).

Where act authorised by statute.

271. Where something which would otherwise be a nuisance is authorised by statute, the remedy (if any) of an aggrieved individual is by proceedings for compensation (*l*), unless the statutory powers have been exceeded, or exercised *malâ fide* or negligently (*m*).

road). As to the right of action when actual access to the highway from adjoining premises is obstructed, see p. 61, *ante*.

(*e*) *E.g.*, *semble*, if his tenants are driven away (*Baker* v. *Moore* (1697), cited in *Iveson* v. *Moore* (1699), 1 Ld. Raym. 486, 491). This decision was doubted in *Ricket* v. *Metropolitan Rail. Co.* (*Directors etc.*) (1867), L. R. 2 H. L. 175; but see *Beckett* v. *Midland Rail. Co.* (1867), L. R. 3 C. P. 82, *per* WILLES, J., at p. 102; *Campbell* v. *Paddington Borough Council* (1911), 27 T. L. R. 232 (loss of tenants through obstruction of view of an expected procession).

(*f*) *Mott* v. *Shoolbred* (1875), L. R. 20 Eq. 22; *Cooper* v. *Crabtree* (1882), 20 Ch. D. 589, C. A.

(*g*) *Winterbottom* v. *Derby* (*Lord*) (1867), L. R. 2 Exch. 316.

(*h*) The plaintiff succeeded in the following cases:—*Iveson* v. *Moore*, *supra*; *Maynell* v. *Saltmarsh* (1665), 1 Keb. 847; *Hart* v. *Basset* (1681), T. Jo. 156; *Rose* v. *Miles* (1815), 4 M. & S. 101; *Greasly* v. *Codling* (1824), 2 Bing. 263; *Wiggins* v. *Boddington* (1828), 3 C. & P. 544; *Blagrave* v. *Bristol Waterworks Co.* (1856), 1 H. & N. 369; *Boyd* v. *Great Northern Rail. Co.*, [1895] 2 I. R. 555; *Smith* v. *Wilson*, [1903] 2 I. R. 45. Compare *Fineux* v. *Hovenden* (1599), Cro. Eliz. 664; *R.* v. *Dewsnap* (1812), 16 East, 194, and *Chichester* v. *Lethbridge* (1738), Willes, 71, where the defendant prevented the plaintiff from removing the obstruction. The defendant succeeded in *Paine* v. *Partrich* (1691), Carth. 191, 194, and *Hubert* v. *Groves* (1794), 1 Esp. 148, as to which see *Rose* v. *Miles*, *supra*, and *Wilkes* v. *Hungerford Market Co.* (1835), 2 Bing. (N. C.) 281.

(*i*) Such an action was held to be maintainable in *Wilkes* v. *Hungerford Market Co.*, *supra* (compare the American decision of *Stetson* v. *Faxon* (1837), 19 Pickering, 147). That case was adversely commented on in *Ricket* v. *Metropolitan Rail. Co.* (*Directors etc.*), *supra*, and WILLES, J., in *Beckett* v. *Midland Rail. Co.*, *supra*, at p. 100, regarded it as overruled; see also *Martin* v. *London County Council* (1899), 80 L. T. 866, C. A.; but the later cases of *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400, and *Fritz* v. *Hobson* (1880), 14 Ch. D. 542, appear to support it.

(*k*) Such trespass not being a natural consequence, the damages are too remote (*Blagrave* v. *Bristol Waterworks Co.*, *supra*). Compare *Sharp* v. *Powell* (1872), L. R. 7 C. P. 253; and see title DAMAGES, Vol. X., pp. 318 *et seq.*

(*l*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 43 *et seq.*

(*m*) See *Martin* v. *London County Council*, *supra*; *Goldberg & Son., Ltd.* v. *Liverpool Corporation* (1900), 82 L. T. 362, C. A.; *Chaplin* (*W. H.*) *& Co., Ltd.* v. *Westminster Corporation*, [1901] 2 Ch. 329; *A.-G.* v. *River Thames Conservators* (1862), 1 Hem. & M. 1.

SECT. 2. Remedies at Common Law.

272. A person who places on a highway an obstruction necessarily dangerous to passengers is not relieved from liability by the intervening act of a third person who moves it from one part of the way to another (*n*). Act of third party.

273. If a passenger acts reasonably and prudently in all the circumstances in trying to surmount an obstruction, and is injured in so doing without any carelessness on his part, he may maintain an action against the person causing the obstruction (*o*). Action by person obstructed.

274. The owner of the soil of a highway may remove therefrom any object the presence of which cannot be justified as incidental to the exercise of the public right of passage, whether such object amount to a nuisance or not (*p*). Other persons have no right to interfere, even with a nuisance, unless it does them special injury (*q*), or unless it is impossible or, perhaps, unreasonably inconvenient, for them to pass without removing the obstruction (*r*). Right to remove obstruction.

275. At common law the duty of repairing a highway includes the duty of preventing and removing obstructions (*s*). Duty to remove obstruction.

SECT. 3.—*Statutory Power to protect Roadside Wastes and Rights of Way.*

276. In the case of main roads, other than those retained by an urban authority, the actual road and materials are vested in the county council (*a*), but not the roadside wastes, at any rate if they are more than mere grass margins, even though the public right of passage extends over the whole of them (*b*). Vesting of roadside wastes.

(*n*) *Clark* v. *Chambers* (1878), 3 Q. B. D. 327.

(*o*) *Lee* v. *Nixey* (1890), 54 J. P. 807.

(*p*) *R.* v. *Mathias* (1861), 2 F. & F. 570.

(*q*) *Dimes* v. *Petley* (1850), 15 Q. B. 276; *Colchester Corporation* v. *Brooke* (1845), 7 Q. B. 339, 377.

(*r*) *Dimes* v. *Petley, supra; Bateman* v. *Bluck* (1852), 18 Q. B. 870; *Roberts* v. *Rose* (1865), L. R. 1 Exch. 82, Ex. Ch.; *Chichester* v. *Lethbridge* (1738), Willes, 71. A man cannot justify an entry upon land adjoining a highway and the removal of an object standing there, on the ground that at night such an obstacle might be a source of danger to persons wandering off the highway (*Arnold* v. *Holbrook* (1873), L. R. 8 Q. B. 96). Nor can anyone not legally liable to repair a broken bridge justify as against the owner of the soil the construction of a new bridge (*Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518, C. A.).

(*s*) *R.* v. *Heath* (1865), 6 B. & S. 578; *Bagshaw* v. *Buxton Local Board of Health* (1875), 1 Ch. D. 220; *Harris* v. *Northamptonshire County Council* (1897), 61 J. P. 599; compare *National Telephone Co.* v. *St. Peter Port (Constables)*, [1900] A. C. 317, P. C. But they interfere at the risk of an action for trespass should the matter complained of be held not to have been an obstruction; see *Mill* v. *Hawker* (1874), L. R. 9 Exch. 309, (1875) L. R. 10 Exch. 92, Ex. Ch. Therefore in cases of any doubt a judicial decision should be obtained; see *Reynolds* v. *Presteign Urban District Council*, [1896] 1 Q. B. 604. As to trespass generally, see title TRESPASS.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (6); and see p. 26, *ante*.

(*b*) *Curtis* v. *Kesteven County Council* (1890), 45 Ch. D. 504.

SECT. 3. Statutory Power to Protect Roadside Wastes etc.

In the case of main roads retained by an urban authority and other highways which are repairable by the inhabitants at large within an urban district, both the road and materials and roadside wastes subject to the public right of passage (*c*) are vested in the urban authority (*d*).

Power of county council.

277. The county council has power, upon its own initiative, to prevent and remove obstructions on main roads, and possibly other highways also, and to assert the right of the public to the use and enjoyment of the roadside wastes (*e*), whether vested in it or not (*f*).

Duty of district council.

278. Without prejudice to the above-mentioned powers, or to any powers exercisable prior to 1894 by an urban sanitary authority (*g*), it is the duty of every district council to protect all public rights of way in its district and prevent them from being stopped up or obstructed, and to prevent any unlawful encroachment on any roadside waste within its district, whether vested in it or not; and this duty extends to rights of way in adjoining districts of the same county, if the district council considers that the stoppage or obstruction thereof would be prejudicial to its district (*h*). For these purposes the district council may institute or defend any legal proceedings, and generally take such steps as it deems expedient (*i*); and no such proceedings or steps are to be deemed unauthorised merely because the alleged right of way is found not to exist (*k*). The council may proceed by indictment or by an action in the name of the Attorney-General, and may remove obstructions and defend proceedings brought against it for so doing; and in such an action it and its servants may rely upon the Public Authorities Protection Act, 1893 (*l*). It may also contribute money towards the defence of actions brought against individuals who have removed obstructions (*m*); and if it removes an obstruction it can recover the cost of so doing from the person who erected it (*n*).

(*c*) *Coverdale* v. *Charlton* (1878), 3 Q. B. D. 376. The joint effect of this case and *Curtis* v. *Kesteven County Council* (1890), 45 Ch. D. 504, appears to be that when there is an "unretained" main road in an urban district, with a roadside waste beside it, the road is vested in the county council and the waste in the urban authority.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (2), (6).

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (1). It is not clear whether these powers are general or are confined to main roads except where the highway authority makes default.

(*f*) *Harris* v. *Northamptonshire County Council* (1897), 61 J. P. 599.

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26 (7).

(*h*) *Ibid.*, s. 26 (1). Possibly this provision will enable them to appeal against an order for diverting or stopping up a highway in an adjoining district.

(*i*) *Ibid.*, s. 26 (3).

(*k*) *Ibid.*, s. 26 (5).

(*l*) *Greenwell* v. *Howell*, [1900] 1 Q. B. 535, C. A.; *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342; compare *Mill* v. *Hawker* (1875), L. R. 10 Exch. 92, Ex. Ch.; and see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*m*) *R.* v. *Norfolk County Council*, [1901] 2 K. B. 268.

(*n*) *Louth District Council* v. *West* (1896), 65 L. J. (Q. B.) 535.

SECT. 3.
Statutory Power to Protect Roadside Wastes etc.

Duty on information received from parish council or parish meeting.

279. In determining whether to interfere in the case of an alleged obstruction, a council does not act judicially, and the presence of an interested member does not invalidate its proceedings (*o*). If the district council is informed by a parish council or parish meeting (*p*) of a rural parish that any public right of way within the district or an adjoining district in the same county has been unlawfully stopped or obstructed, or that any roadside waste within the district has been unlawfully encroached upon, it is its duty to take proceedings, unless satisfied that the information is incorrect; and if it refuses or fails to do so, the county council, on the petition of the parish council or parish meeting, may transfer to itself the powers and duties of the district council in the matter (*q*). No proceedings taken by it are to be deemed unauthorised merely because the alleged right of way is found not to exist (*r*).

Vesting in county boroughs.

280. In county boroughs, roadside wastes forming part of highways repairable by the inhabitants at large and subject to the public right of passage are vested in the borough council (*s*), which, without prejudice to any other powers, may exercise the powers of a district council as to the preservation of rights of way and roadside wastes (*a*).

SECT. 4—*Miscellaneous Statutory Provisions.*

SUB-SECT. 1.—*Encroachments.*

Penalty for encroachments.

281. Any person who encroaches (*b*) upon a carriage way or cartway by making any building, hedge, ditch, or fence thereon and within 15 feet of the centre thereof (*c*), is liable on summary conviction at special or petty sessions (*d*) to a fine not exceeding 40*s*. If, after conviction or notice, he refuses to remove the obstruction (*e*),

(*o*) *Murray* v. *Epsom Local Board*, [1897] 1 Ch. 35.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 19 (8).

(*q*) *Ibid.*, s. 26 (4), as was done in *R.* v. *Norfolk County Council*, [1901] 2 K. B. 268. With regard to resolutions transferring powers to a county council, see *ibid.*, s. 63, and title LOCAL GOVERNMENT. For forms of representation and petition, and the order by the county council, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 401—403.

(*r*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26 (5).

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149; *Coverdale* v. *Charlton* (1878), 3 Q. B. D. 376.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26 (7).

(*b*) Highway Act, 1835 (5 & 6 Will 4, c. 50), s. 69.

(*c*) The provision as to "fifteen feet from the centre" (as to which, see p. 9, *ante*) apparently confines this provision to metalled roads; see *Keane* v. *Reynolds* (1853), 2 E. & B. 748.

(*d*) The encroachment is not a continuing offence (*Coggins* v. *Bennett* (1877), 2 C. P. D. 568; *Ranking* v. *Forbes* (1869), 34 J. P. 486). *Semble*, the time runs from the date when the encroachment became substantial, or when some existing obstruction was substantially increased (*Hyde* v. *Entwistle* (1884), 49 J. P. 517). As to enforcement of orders made by courts of special or petty sessions, see title MAGISTRATES.

(*e*) If a building etc. contravenes this provision, the authority has no discretion as to removing the obstruction or not; but unless the owner has been convicted, he should be given an opportunity of justifying his act (*Keane* v. *Reynolds*, *supra*; *Hopkins* v. *Smethwick Local Board of Health* (1890), 24 Q. B. D. 712, C. A.). A conviction, though erroneous, will, if unreversed, protect the authority against an action for trespass (*Keane* v. *Reynolds*, *supra*).

SECT. 4. Miscellaneous Statutory Provisions.

the authority responsible for the way in question must remove it, and may recover the expense of so doing, and any penalty imposed, by distress and sale of the offender's goods. This provision, which is in force in all districts, applies only to encroachments of the four kinds specifically mentioned, and then only if the encroachment is actually on the *via trita* as well as within 15 feet of its centre (*f*).

Penalty for placing buildings and materials on side of way.

282. In the case of carriage and cartways (*g*) under the control of an authority who are successors of a highway board (*h*), any person who makes any building, pit, ditch, or other fence (*i*), or places any dung or other materials for dressing land or any rubbish, on the side of such way (*k*), either within 15 feet of the centre thereof (*l*), or so as to reduce its width to less than 30 feet if it is fenced on both sides (*m*), is liable on summary conviction to a fine not exceeding 40*s*. and to pay the cost of removing the obstruction, even though the whole space of 15 feet from the centre has not been metalled.

SUB-SECT. 2.—*Obstacles on Highways.*

Penalty for obstacles.

283. If any timber (*n*), stone, hay, straw, dung, manure, lime, soil, ashes, rubbish, or other matter or thing whatsoever is laid upon any highway (*o*) so as to be a nuisance, and is not forthwith removed after notice (*p*) from the highway authority, such authority may, after obtaining a written order (*a*) from a justice, remove and dispose of the same, applying the proceeds towards the repair of the highways in the same parish; provided that if any soil, ashes,

(*f*) *Evans* v. *Oakley* (1843), 1 Car. & Kir. 125; *Chapman* v. *Robinson* (1858), 28 L. J. (M. C.) 30; compare *Lowen* v. *Kaye* (1825), 4 B. & C. 3.

(*g*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 51, as to the object of which see *Easton* v. *Richmond Highway Board* (1871), L. R. 7 Q. B. 69, 74. The offence is not a "continuing" one; see note (*d*), p. 163, *ante*.

(*h*) *I.e.*, county councils and some rural district councils; see pp. 25, 26, *ante*.

(*i*) This includes a temporary "guard" fence, erected to protect a young hedge on private property (*Clarson* v. *Arnold* (1890), 54 J. P. 630).

(*k*) Apparently this provision does not apply to obstructions on the *via trita*; and it does not, of course, apply to erections on land that has never been dedicated to the public, *e.g.*, on the site of a ditch which the adjoining owner has retained (*Thorne* v. *Field* (1869), 33 J. P. 727), or on common land over which the public have walked and driven without any legal right to do so, (*Easton* v. *Richmond Highway Board*, *supra*); but it is for the justices to say whether the site of the obstruction has ever been dedicated or not; see p. 168, *post*.

(*l*) See note (*c*), p. 163, *ante*.

(*m*) See the proviso to the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 51, which thus covers certain cases where the metalled road is not in the middle of the roadside waste.

(*n*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 73. See, as to the omission of the word "timber" in the operative part of s. 73, *ibid.*, being immaterial (*Dixon* v. *Chester* (1906), 70 J. P. 380).

(*o*) The justices must determine, in case of dispute, whether the *locus in quo* is a highway; see p. 168, *post*.

(*p*) For form of notice, see Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 118, Schedule, Form 15, and p. 170, *post*.

(*a*) Such an order is permissive only, and the authority is not bound to act upon it (*Morgan* v. *Leach* (1842), 10 M. & W. 558). *Semble*, the person responsible for the nuisance should be summoned to show cause why an order should not be made; see *R.* v. *Gaisford*, [1892] 1 Q. B. 381; *Mould* v. *Williams* (1844), 5 Q. B. 469. Such an order protects the justices from an action of trespass (*Mould* v. *Williams*, *supra*).

or rubbish laid on any highway are not of sufficient value to defray the expense of removing them, the person who so laid them must repay to the authority the expense of removal, such expense being recoverable as a penalty (*b*).

SUB-SECT. 3.—*Trees, Hedges, or Banks Obstructing Carriage ways or Cartways.*

Penalty for obstructing ways by trees etc.

284. Trees, bushes or shrubs may not be planted on any carriage way or cartway, or within 15 feet from the centre thereof (*c*); and if so planted, must be removed by the owner or occupier of the land within twenty-one days after notice from the highway authority, under a penalty of 10*s.* for every neglect (*d*).

Application for removal by highway authority.

285. If a highway authority considers that a carriage way or cartway (*e*) is obstructed by any hedge or tree, it may apply for a summons (*f*) against the occupier of the land on which it grows for the removal of the obstruction. If the justices consider that there is an obstruction which should be removed, they may order the defendant to remove it within ten days (*g*): if he makes default, he is liable to a fine not exceeding 40*s.*, and the authority must remove the obstruction, and may recover the expense of removal and the fine by distress (*h*).

Special provisions.

286. There are also special provisions applicable in the counties of Wilts, Dorset, Somerset, Devon, and Cornwall to such highway authorities as are successors to a highway board (*i*). If such an authority considers that any highway (*k*) is obstructed by any hedge, tree, or bank, or by anything growing on any bank adjoining such highway, it may at any time of the year (*l*) remove such

(*b*) *I.e.*, under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 103, p. 170, *post*. As to procedure for enforcement of orders of justices, see title MAGISTRATES.

(*c*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 64. As to ascertaining the "centre of a highway," see p. 9, and note (*c*), p. 163, *ante*. This provision prohibits the planting of a tree on private ground, if it will be within 15 feet of the centre of an adjoining carriage way or cartway. It has no application to footpaths. Probably it does not apply to trees planted on the unmetalled part of a highway, but more than 15 feet from the centre; but in such a case an indictment would lie. Apparently any tree planted since 1835, and hitherto overlooked, might be dealt with under this provision if it was originally planted within 15 feet of the centre of a carriage way or cartway. As to trees in streets, see p. 258, *post*.

(*d*) *Semble*, in respect of every notice disregarded by him.

(*e*) This power does not extend to footpaths.

(*f*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 65. As to the issue of the summons and procedure thereon, see similar provisions relating to the cutting of hedges, p. 113, *ante*, and the cases there cited.

(*g*) As to contents of summons and order, see note (*d*) p. 113, and note (*e*), p. 114, *ante*. If a tree, whether a timber tree or not, obstructs a carriage way or cartway, its removal may be ordered at any period of the year, notwithstanding the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 66; see *Bullen* v. *Wakely* (1898), 62 J. P. 166.

(*h*) As to the necessity for a demand, see *Ex parte Whitmarsh* (1840), 8 Dowl. 431.

(*i*) Highway Act Amendment Act, 1885 (48 & 49 Vict. c. 13). See also p. 114, *ante*.

(*k*) Not only a carriage way or cartway.

(*l*) Thus getting rid of the restrictive prohibition in the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 66; see p. 114, *ante*.

SECT. 4. Miscellaneous Statutory Provisions.

obstruction, with the consents of both the owner and the occupier of the premises on which it is situated.

SUB-SECT. 4.—*Cutting Turf on Roadsides and Removing Soil.*

Removing turf or soil.

287. Paring turf or removing soil from the side of a road is an indictable nuisance if it causes a substantial obstruction (*m*), and is an actionable trespass as against the owner or occupier of the surface. In the case of carriage or cartways under the control of an authority who are successors of a highway board (*n*), any person, even the owner of the soil (*o*), who encroaches by removing soil or turf from the side (*p*) of such road, except for the purpose of improving it and by order of the authority, is liable to a fine not exceeding 40*s*. (*q*), and to pay the cost of repairing the injury.

If a highway authority removes turf or soil, except *bonâ fide* for the improvement of the highway, it is liable, it is submitted, to an action at the suit of the owner of the soil, even though the surface is vested in it.

SUB-SECT. 5.—*Obstructions on Old Turnpike Roads.*

Penalty for obstructing old turnpike road.

288. Every person who obstructs or encroaches in any of the following ways (*r*) upon a turnpike road disturnpiked after the 5th July, 1865, is liable to a penalty of 40*s*., to be levied by distress under the authority of a justice and payable to the informer, and the highway authority may abate the nuisance itself and recover the cost from the offender (*a*) :—

By making any building, hedge, or fence on or at the side of the road, so as to reduce its breadth or confine its limits; by filling or obstructing any ditch at the side thereof; by making any building, hedge, or fence on any common or waste land on the side thereof within 30 feet from its centre if within three miles of any market town, or 25 feet if beyond that distance; by making any drain, gutter, sink, or watercourse across it, or otherwise breaking up or injuring its surface; by ploughing or breaking up the soil of any land, or turning a plough or harrow upon any land, or by making any other encroachment, within the above distances from its centre.

SUB-SECT. 6.—*Various Offences on Highways.*

Various offences.

289. It is unlawful to permit cattle to stray on highways, or to commit any of a number of acts of obstruction thereon or of annoyance or danger to passengers or residents (*b*).

(*m*) See pp. 151 *et seq.*, *ante*.
(*n*) *I.e.*, county councils and some rural district councils ; see pp. 25, 26, *ante*.
(*o*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 51.
(*p*) *I.e.*, from land which has been dedicated to the public; see note (*k*), p. 164, *ante*.
(*q*) The offence is not a continuing one; see note (*d*), p. 163, *ante*.
(*r*) Annual Turnpike Acts Continuance Act, 1865 (28 & 29 Vict. c. 107), s. 2; Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), s. 118. S. 124, *ibid.*, prescribes how the "centre" of a road is to be ascertained.
(*a*) For the full provisions upon this point, see *ibid.*, s. 118.
(*b*) See Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 70, 72, 75—79; Town

SECT. 4. Miscellaneous Statutory Provisions.

Various offences.

290. It is an offence for any person (*c*) wilfully (*d*) to obstruct the passage of a highway or footway; wilfully to destroy or injure the surface of a highway (*e*); to cause any injury or damage to a highway, or the hedges, posts, rails, walls, or fences thereof; wilfully or wantonly to remove or damage the posts, blocks, or stones fixed by the highway authority to protect horse causeways and foot causeways from damage by wheeled traffic (*f*); wilfully or wantonly to dig or cut down the banks (*f*) which secure a highway; wilfully or wantonly to break, damage, or throw down the stones, bricks, or wood fixed upon the parapets of bridges, or otherwise to injure or deface the same (*g*); wilfully or wantonly to pull down, destroy, obliterate, or deface any milestone or direction post upon a

Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Highway Act, 1864 (27 & 28 Vict. c. 101), s. 25; and title STREET TRAFFIC.

(*c*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 72. This provision is in force in urban as well as rural districts, and in the metropolis (*Hawkins* v. *Robinson* (1872), 36 J. P. 756; *Back* v. *Holmes* (1887), 56 L. T. 713). It enumerates a number of other offences; see title STREET TRAFFIC.

(*d*) A thing is done "wilfully" if it be done "purposely" (*Fearnley* v. *Ormsby* (1879), 4 C. P. D. 136, 138, *per* Lord COLERIDGE, C.J.). "It amounts to this, that he knows what he is doing, and intends to do what he is doing, and is a free agent" (*Re Young and Harston's Contract* (1885), 31 Ch. D. 168, 175, C. A., *per* BOWEN, L.J.); compare also *Gayford* v. *Chouler*, [1898] 1 Q. B. 316; *R.* v. *Senior*, [1899] 1 Q. B. 283, C. C. R., *per* Lord RUSSELL OF KILLOWEN, C.J., at pp. 290, 291. Therefore a person who deliberately opens a highway, relying on a valueless authority to do so, can be convicted of "wilfully" injuring it (*Hawkins* v. *Robinson* (1872), 36 J. P. 756). It is not clear how far the word "wilful" implies some act of commission; it is not wilful obstruction merely to allow rainwater to flow on to a highway from eaves (*Crosdill* v. *Ratcliff* (1862), 26 J. P. 165), or trees to grow across it (*Walker* v. *Horner* (1875), 1 Q. B. D. 4), but under some circumstances neglect to remove an obstruction after notice to do so may be wilful obstruction (*Gully* v. *Smith* (1883), 12 Q. B. D. 121). A person cannot be convicted of wilfully injuring or obstructing a highway if his acts are only done in the assertion or reasonable exercise of his rights; see *St. Mary, Newington* v. *Jacobs* (1871), L. R. 7 Q. B. 47 (injury to pavement by reasonable exercise of right of access to carriage way); *Pease* v. *Paver* (1875), 39 J. P. 407 (winning underlying minerals); *R.* (*Christie*) v. *Londonderry Justices*, *R.* (*Ballantine*) v. *Same*, [1902] 2 I. R. 266 (deposit of goods on pavement); *Sutcliffe* v. *Sowerby* (*Highways Surveyors*) (1859), 1 L. T. 7 (removal of footbridge wrongfully imposed upon the land); *Mercer* v. *Woodgate* (1869), L. R. 5 Q. B. 26; *Brackenborough* v. *Thorsby* (1869), 33 J. P. 565 (ploughing up field footpaths); *Dunn* v. *Holt* (1904), 68 J. P. 271 (reasonable use of a "vacuum cleaner" outside a house). A meeting on a highway is not necessarily illegal (see cases cited in note (*b*), p. 49, *ante*), but persons have been convicted under this section for obstructing a highway by standing thereon and attracting a crowd to listen to music or speeches (*Back* v. *Holmes* (1887), 56 L. T. 713; *Horner* v. *Cadman* (1886), 55 L. J. (M. C.) 110). Whether persons passing in procession along a highway are responsible for an obstruction caused by it depends upon whether under the circumstances the procession was a reasonable mode of using the highway (*Lowdens* v. *Keaveney*, [1903] 2 I. R. 82). In the case of temporary obstacles it is a question of degree whether the "passage" is obstructed or not (*Dunn* v. *Holt*, *supra*). In the case of a substantial permanent erection, evidence that particular persons were or were not obstructed is apparently immaterial (*Read* v. *Perrett* (1876), 1 Ex. D. 349). See also note (*l*), p. 168, *post*.

(*e*) Including a field footpath (*Brackenborough* v. *Thorsby*, *supra*.

(*f*) *I.e.*, fixed under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 24; see p. 115, *ante*.

(*g*) As to malicious injuries to bridges, see, further, p. 169, *post*; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 785, 791.

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highway (*h*); to suffer any dirt, lime, or similar (*i*) offensive matter to run or flow upon a highway from any building, erection, or premises adjacent thereto; to lay any timber, stone, hay, straw, dung, manure, lime, soil, ashes, rubbish, or other matter or thing whatsoever upon a highway (*k*), to the injury of such highway, or to the injury, interruption or personal danger of any person travelling thereon (*l*).

Penalty on summary conviction.

291. A person committing any of the above offences may be convicted summarily before two or more justices (*m*), subject to an appeal to quarter sessions (*n*), upon an information laid by anyone (*o*), and may for each offence be ordered to pay a fine not exceeding 40*s.* over and above the damages occasioned by his act (*p*). Offenders whose names are unknown may be arrested without a warrant (*q*).

Proof of dedication.

292. Upon the hearing of a charge in respect of such offences, it is for the justices to decide whether the *locus in quo* is a highway or not (*r*); similarly, if the defendant seeks to justify an obstruction on the ground that the highway was dedicated subject to the right so to obstruct it, it is apparently for them to decide whether such restricted or conditional dedication is proved (*s*).

(*h*) As to the erection of milestones and posts, see p. 116, *ante*.

(*i*) Though the Act says "whatsoever," the *ejusdem generis* rule applies, and rainwater dripping from eaves is not within the prohibition (*Crosdill* v. *Ratcliff* (1862), 26 J. P. 165).

(*k*) An authority's surveyor may be convicted under this provision if he places a heap of stones on a highway and leaves it unguarded at night (*Fearnley* v. *Ormsby* (1879), 4 C. P. D. 136; *Smith* v. *Perry* (1905), 70 J. P. 93). As to the removal of such obstructions, see p. 164, *ante*.

(*l*) These words create only two offences, namely, doing an act to the injury of the highway, and doing an act to the injury, interruption, or personal danger of a passenger; and therefore a conviction for doing an act to the injury, interruption, and personal danger of a passenger is not void for duplicity (*Smith* v. *Perry*, *supra*. If an act is necessarily calculated to endanger or interrupt passengers, it is apparently unnecessary to prove that particular persons were endangered or interrupted, see *M'Kee* v. *M'Grath* (1892), 30 L. R. Ir. 41 (bicycle on a footpath); compare *Dunn* v. *Holt* (1904), 68 J. P. 271; *Hinde* v. *Evans* (1906), 70 J. P. 548; *Read* v. *Perrett* (1876), 1 Ex. D. 349.

(*m*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 103; see p. 170, *post*.

(*n*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 105. As to appeals against convictions under the Highway Acts, see p. 171, *post*. As to procedure on appeals to quarter sessions generally, see title MAGISTRATES.

(*o*) *Back* v. *Holmes* (1887), 56 L. T. 713.

(*p*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 72.

(*q*) *Ibid.*, s. 79; and see p. 170, *post*.

(*r*) *Williams* v. *Adams* (1862), 2 B. & S. 312; *R.* v. *Bradley* (1894), 58 J. P. 199.

(*s*) *Leicester Urban Authority* v. *Holland* (1888), 52 J. P. 788. But in *R.* (*Christie*) v. *Londonderry Justices*, *R.* (*Ballantine*) v. *Same*, [1902] 2 I. R. 266, an Irish court held that the justices' jurisdiction was ousted by a *bonâ fide* claim that a highway had been dedicated subject to a right to deposit goods on it; and see *Mercer* v. *Woodgate* (1869), L. R. 5 Q. B. 26; *Brackenborough* v. *Thorsby* (1869), 33 J. P. 565; *Ex parte Whittaker* (1859), 23 J. P. 84; *Pease* v. *Pavel* (1875), 39 J. P. 407.

SUB-SECT. 7.—*Barbed Wire Fences.*

SECT. 4. Miscellaneous Statutory Provisions.

Barbed wire fences.

293. If a barbed wire fence (*a*) adjoining a highway is a nuisance (*b*), the local authority (*c*) may require the occupier of the land on which the fence is placed to abate the nuisance within a time not less than one month, nor more than six months (*d*). Upon his default, a court of summary jurisdiction, if satisfied that the wire is a nuisance to the highway, may order him to abate it; and if he fails to comply with the order within a reasonable time, the authority may execute the order and recover summarily the expenses of so doing (*e*).

Where the local authority is the occupier of the land in question any ratepayer within the district may take proceedings, and do everything which in other cases the authority is empowered to do (*f*).

SUB-SECT. 8.—*Unfenced Quarries and Mines.*

Quarries and shafts.

294. Dangerous quarries and open mine shafts within specified distances of a highway or place of public resort must be securely fenced by their owners (*g*), and pits or shafts within specified distances of a highway must be properly screened from view (*h*).

SUB-SECT. 9.—*Malicious Injuries to Bridges etc.*

Criminal offences.

295. Certain injuries to highways and to bridges over or under them are criminal offences under the Malicious Damage Act, 1861 (*i*).

(*a*) *I.e.*, a fence made with barbed wire, or in or on which barbed wire has been placed. Barbed wire means "any wire with spikes or jagged projections" (Barbed Wire Act, 1893 (56 & 57 Vict. c. 32), s. 2). As to barbed wire fences on or near a highway being a nuisance at common law, see *Elgin County Road Trustees* v. *Innes* (1886), 14 R. (Ct. of Sess.) 48; *Bird* v. *Frost* (1889), 56 J. P. 164; *Stewart* v. *Wright* (1893), 57 J. P. 137, affirmed 9 T. L. R. 480; *Collen* v. *Ellis* (1893), 32 L. R. Ir. 491.

(*b*) *I.e.*, if it "may probably be injurious to persons or animals lawfully using such highway" (Barbed Wire Act, 1893 (56 & 57 Vict. c. 32), s. 2).

(*c*) For the purposes of the Barbed Wire Act, 1893 (56 & 57 Vict. c. 32), "local authority" means any county council, urban sanitary authority, sanitary authority in London, or other highway authority (*ibid.*).

(*d*) *Ibid.*, s. 3 (1). For a form of notice, see Encyclopædia of Forms and Precedents, Vol. VI., p. 414.

(*e*) Barbed Wire Act, 1893 (56 & 57 Vict. c. 32), s. 3 (2). The expenses of executing the Act (so far as they are not thus recovered from occupiers) are to be defrayed as highway expenses (*ibid.*, s. 5).

(*f*) *Ibid.*, s. 4. As to enforcement of orders of courts of summary jurisdiction generally, see title MAGISTRATES.

(*g*) See title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 130; Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19); Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 13; Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), ss. 37, 59; and title MINES, MINERALS, AND QUARRIES. For forms of notice, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 122, 123.

(*h*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 70; and see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 130; MINES, MINERALS, AND QUARRIES.

(*i*) 24 & 25 Vict. c. 97, ss. 33, 34, 51, 52, 53; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 785, 786, 791.

SECT. 5. Legal Proceedings.

SECT. 5.—*Legal Proceedings.*

SUB-SECT. 1.—*Notices and other Documents.*

Notices.

296. Notices and other documents under the Public Health Act, 1875 (*j*), may be authenticated and served in the manner therein provided.

SUB-SECT. 2.—*Forms.*

Forms.

297. The forms of proceedings contained in the schedule to the Highway Act, 1835 (*k*), are to be used upon all occasions, with such additions or variations as may be necessary, and no objection may be made or advantage taken for want of form in any such proceedings.

SUB-SECT. 3.—*Power of Arrest.*

Power of arrest.

298. Duly authorised officers or servants of a highway authority, and persons called by them to their assistance, and any other actual eye-witness of the offence, may seize and detain any unknown person who commits an offence against the Highway Acts (*l*), and take him forthwith before a justice (*m*).

SUB-SECT. 4.—*Recovery of Penalties.*

Penalties recoverable summarily.

299. All penalties, forfeitures, and costs (*n*) (unless otherwise specially provided for) are recoverable summarily before two or more justices, and may be levied by distress (*o*). In default of distress the offender may be imprisoned with hard labour (*p*).

(*j*) 38 & 39 Vict. c. 55, ss. 266, 267; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) 5 & 6 Will. 4, c. 50, s. 118. For conflicting opinions as to how far a similar provision in the earlier Highway Act was imperative or directory only, see *Davison* v. *Gill* (1800), 1 East, 64; and *R.* v. *Casson* (1823), 3 Dow. & Ry. (K. B.) 36, 40. Several of the scheduled forms are obsolete, and several others have been expressly repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43). For summary proceedings generally, see title MAGISTRATES.

The following forms may still be found necessary or useful:—No. 4, form of highway rate; No. 5, form of accounts; No. 6, notice of intention to make highway (see *ibid.*, s. 23, and p. 92, *ante*); No. 7, certificate of justices of highway having been made in substantial manner (see *ibid.*, s. 23, and p. 92, *ante*); No. 8, notice to remove snow etc. (see *ibid.*, s. 26, and p. 114, *ante*); Nos. 10, 11, licences from justices to get road-making materials (see *ibid.*, ss. 53, 54, and pp. 109 *et seq.*, *ante*); No. 12, information to enable justices to fix boundaries of highway lying in two parishes (see *ibid.*, s. 58, and p. 99, *ante*); No. 13, summons on same; No. 14, order of adjudication on same; No. 15, notice from authority (as surveyor) to remove nuisance (see *ibid.*, s. 73, and p. 164, *ante*); No. 16, order of two justices for widening a highway (see *ibid.*, s. 82, and p. 104, *ante*); No. 17, certificate to be indorsed thereon if necessary; No. 18, consent of owner of land to making of new highway (see *ibid.*, s. 85, and p. 73, *ante*); No. 19, notice of intention to divert or stop up highway (see *ibid.*, s. 85, and p. 74, *ante*).

(*l*) As to the meaning of "Highway Acts," see p. 24, *ante*.

(*m*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 79; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 302.

(*n*) The costs referred to are costs incident to proceedings which may be had for imposing penalties and forfeitures (*R.* v. *Eyton* (1854), 3 E. & B. 390); but apparently they include costs of an appeal ordered to be paid by quarter sessions (*Sellwood* v. *Mount* (1841), 1 Q. B. 726).

(*o*) See title DISTRESS, Vol. XI., pp. 221 *et seq.*

(*p*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 103; Highway Act, 1862

If any person rescues or releases, or attempts to rescue or release, any distress or levy made under the authority of the Highway Acts (*q*) before such distress or levy has been discharged by due course of law, he is liable upon summary conviction before two or more justices to a fine not exceeding £20, and in default of payment to imprisonment with hard labour (*r*). Distress.

SUB-SECT. 5.—*Application of Penalties.*

300. The application of penalties recovered under the Highway Act, 1835 (*s*) and the Public Health Act, 1875 (*t*), is provided for by those statutes. Application of penalties.

SUB-SECT. 6.—*Justices.*

301. Justices may exercise at petty sessions any jurisdiction which they were authorised under the Highway Acts (*u*) to exercise at special sessions (*v*). Justices at petty sessions.

302. No justice is disqualified from hearing highway cases merely because he is a ratepayer or one of any other class of persons who may contribute to, or be benefited by, any fund to which any penalty that may be inflicted will be paid (*w*); nor in cases under the Public Health Act, 1875 (*x*), because he is a member of a local authority. Disqualification.

SUB-SECT. 7.—*Fees.*

303. The fees prescribed by the Highway Act, 1835 (*a*), and no others, are to be taken by the clerk of the peace, clerk to the justices, or others, for their services in the execution of the Act. Fees.

SUB-SECT. 8.—*Appeals.*

304. Any person who thinks himself aggrieved by any rate made under or in pursuance of the Highway Act, 1835 (*b*), or by any order, conviction, judgment, or determination made, or by any Appeals.

(25 & 26 Vict. c. 61), s. 47; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 251 etc. For summary proceedings generally, see title MAGISTRATES.

(*q*) As to the meaning of "Highway Acts," see p. 24, *ante*.

(*r*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 75.

(*s*) *Ibid.*, s. 103; and see p. 130, *ante*.

(*t*) 38 & 39 Vict. c. 55, s. 254, as to which see title LOCAL GOVERNMENT.

(*u*) As to the meaning of "Highway Acts," see p. 24, *ante*.

(*v*) Highway Act, 1864 (27 & 28 Vict. c. 101), s. 46.

(*w*) Justices of the Peace Act, 1867 (30 & 31 Vict. c. 115), s. 2; and see title MAGISTRATES. This section appears to have been overlooked in *R.* v. *Gaisford*, [1892] 1 Q. B. 381.

(*x*) 38 & 39 Vict. c. 55, s. 258; and see title LOCAL GOVERNMENT. Though not disqualified merely as a member of the authority, he may be disqualified as having instigated the proceedings.

(*a*) 5 & 6 Will. 4, c. 50, s. 110, which contains a proviso as to fees for recovery of rates under local Acts, now practically, if not entirely, obsolete. The prescribed fees are:—6*d.* for every information; 1*s.* for every summons or warrant, and 6*d.* for the service thereof; 6*d.* for every notice, and 6*d.* for the service thereof; 1*s.* for every order, and 6*d.* for the service thereof; 2*s.* for every warrant of distress; 1*s.* for every appointment; and 2*s.* for every conviction. As to the offices of clerk of the peace and clerk to the justices, see title MAGISTRATES.

(*b*) 5 & 6 Will. 4, c. 50.

SECT. 5. Legal Proceedings.

matter or thing done (*c*), by any justice or other person in pursuance of that Act (for which no particular method of relief is therein appointed) may appeal to quarter sessions (*d*). There is a similar right of appeal against penalties exceeding £5 under the Highway Act, 1862 (*e*); against any summary conviction or order under the Highways and Locomotives (Amendment) Act, 1878 (*f*), and against any matter or thing done by a court of summary jurisdiction under the Public Health Act, 1875 (*g*).

Special cases.

305. Both quarter sessions (*h*) and petty sessions (*i*) may state a special case for the opinion of the High Court.

No *certiorari*.

306. Proceedings under the Highway Acts (*k*) and Public Health Acts are not to be quashed for want of form nor be removed by *certiorari* or other writ into the High Court (*l*).

Part XI.—Excessive Weight and Extraordinary Traffic.

SECT. 1.—*In General.*

Statutory remedy.

307. Where (*m*) by a certificate of its surveyor (*n*) it appears to the authority which is liable, or has undertaken (*o*), to repair any

(*c*) These words are not wide enough to give a right of appeal to a prosecutor when a summons is dismissed (*R.* v. *London County Keepers of the Peace and Justices* (1890), 25 Q. B. D. 357); but they give a right of appeal when justices assess a price for an exhausted gravel pit (*R.* v. *Drayton Highway Board* (1876), 1 Q. B. D. 608), or refuse to approve a new road which an individual proposes to dedicate (*R.* v. *Derbyshire Justices* (1858), E. B. & E. 69).

(*d*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 105. As to appeals to quarter sessions generally, see title MAGISTRATES.

(*e*) 25 & 26 Vict. c. 61, s. 47.

(*f*) 41 & 42 Vict. c. 77, s. 37.

(*g*) 38 & 39 Vict. c. 55, s. 269. All appeals from summary convictions or orders are now regulated by the Summary Jurisdiction Acts, for which see title MAGISTRATES; in other cases by the section conferring the right of appeal. For appeals against highway rates, see title RATES AND RATING.

(*h*) They can do so at common law apart from the express provision on the point in the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 108.

(*i*) See title MAGISTRATES.

(*k*) As to the meaning of "Highway Acts," see p. 24, *ante*.

(*l*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 107; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 262. As to the effect of this provision, see title CROWN PRACTICE, Vol. X., pp. 175—178.

(*m*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23, as amended and extended by the Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12. If the traffic amounts to a public nuisance, the persons who cause it may also be indicted (*Edgerly's Case* (1641), March, 135; and see p. 155, *ante*), or restrained by injunction (*A.-G.* v. *Scott*, [1904] 1 K. B. 404, C. A.; *A.-G.* v. *Scott*, [1905] 2 K. B. 160, C. A.); and, probably, may be sued for damages at common law by the authority or person liable for the repairs. See cases cited in note (*b*), p. 159, *ante*.

(*n*) As to this certificate, see p. 177, *post*. For a form, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 295.

(*o*) *E.g.*, under the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 22 (see

highway, that, having regard to the average expense of repairing highways in the neighbourhood (*p*), extraordinary expenses have been incurred by it in repairing such highway by reason of the damage caused by excessive weight (*q*) passing along the same, or extraordinary traffic (*r*) thereon, it may recover in an action (*s*) from any person by, or in consequence of, whose order (*a*) such weight or traffic has been conducted, the amount (*b*) of such expenses as may be proved to have been incurred by it by reason of the damage arising from such weight or traffic.

Agreement compounding damages.

A person against whom expenses are, or may be (*c*), recoverable under this provision may enter into an agreement with the authority concerned for the payment to it of a composition in respect of such weight or traffic; and if he does so, he ceases to be liable to an action (*d*).

SECT. 2.—*Excessive Weight.*

"Excessive weight."

308. The term "excessive weight" has reference, not to the aggregate weight carried by a number of vehicles or by the same vehicle on different journeys, but to the weight put upon the road by a single vehicle with its load (*e*); and whether the weight of a vehicle is "excessive" or not must be determined by comparing it with the ordinary weights of vehicles upon the particular road in question—not upon roads in the neighbourhood generally (*f*).

Test.

In making such a comparison it is necessary to consider what were the ordinary weights on such road prior to the year in which the damage was done; for to take into account only that year might be an unreliable test (*g*); but weights which are excessive in one decade may not be so in the next (*h*).

p. 112, *ante*); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 148 (see p. 96, *ante*); or Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (4) (see p. 27, *ante*).

(*p*) As to the meaning to be attached to the words "extraordinary" and "average" expenses, see *Billericay Rural Council* v. *Poplar Union and Keeling*, [1911] 1 K. B. 734; and see p. 180, *post*.

(*q*) See the text *infra*.

(*r*) See p. 174, *post*.

(*s*) As to the court, provisions as to limitation, and proceedings generally, see pp. 177 *et seq.*, *post*.

(*a*) As to the person liable, see p. 176, *post*.

(*b*) As to the measure of damages, see p. 180, *post*.

(*c*) He may make such an agreement before he commences the work likely to cause damage.

(*d*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23. For forms of such agreements, see Encyclopædia of Forms and Precedents, Vol. VI., p. 431, and Vol. XVI., p. 296.

(*e*) *Hill* v. *Thomas*, [1893] 2 Q. B. 333, C. A.; *Kent County Council* v. *Vidler*, [1895] 1 Q. B. 448, C. A.

(*f*) *Aveland* (*Lord*) v. *Lucas* (1880), 5 C. P. D. 211, 351, C. A.; *R.* v. *Ellis* (1882), 8 Q. B. D. 466.

(*g*) *Hemsworth Rural District Council* v. *Micklethwaite* (1904), 2 L. G. R. 1084, *per* WILLS, J.

(*h*) At any rate, extraordinary traffic may thus cease to be extraordinary; see *Bromley Rural District Council* v. *Croydon Corporation*, *Same* v. *Chittenden and Simmons*, *Same* v. *Wood & Sons* (1907), 5 L. G. R. 453; *Hemsworth Rural District Council* v. *Micklethwaite*, *supra*.

SECT. 2. Excessive Weight.

On any particular road the weight of a traction engine may be excessive, although such weight and the width of its wheels are within the prescribed limits (*i*); and a comparison between the pressure per square inch of the wheel surface of an engine and trucks and the pressure per square inch of the wheel surface of ordinary traffic is often fallacious (*k*).

Effect of neglect to repair.

The neglect of an authority to repair a road has no direct bearing upon the question whether the weight of a vehicle is excessive, or whether traffic is extraordinary, but may be important in considering the amount of damage (*l*).

SECT. 3.—*Extraordinary Traffic.*

"Extraordinary traffic."

309. "Extraordinary traffic" denotes a carriage of articles over a road at either one or more times, which is so exceptional in the quality or quantity of the articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common (*m*).

Test.

310. As in the case of excessive weight, the test is what is the ordinary traffic on the particular road, not on other roads in the neighbourhood (*n*). Therefore the fact that the traffic in question is the result of an important industry carried on throughout the district is no answer to an action, if such traffic has hitherto been confined to other roads (*o*); so, too, the fact that timber is the natural produce of land does not exempt from liability a man who

(*i*) *Aveland* (*Lord*) v. *Lucas* (1880), 5 C. P. D. 211, 351, C. A. For these limits, see title STREET TRAFFIC.

(*k*) *Ibid.*; and *Hemsworth Rural District Council* v. *Micklethwaite* (1904), 2 L. G. R. 1084. The concentrated weight may break culverts, or depress the whole surface of the road, or squeeze it into the ditches, although the broad wheels may not make ruts. See *R.* v. *Ellis* (1882), 8 Q. B. D. 466.

(*l*) See p. 180, *post*.

(*m*) *Hill* v. *Thomas*, [1893] 2 Q. B. 333, C. A. In this case the Court of Appeal carefully reviewed the earlier decisions, which are, therefore, of little value except as illustrations of the working of the rule as stated in the text. It should be noticed that *Pickering Lythe East Highway Board* v. *Barry* (1881), 8 Q. B. D. 59, was overruled; and *Wallington* v. *Hoskins* (1880), 6 Q. B. D. 206, supported only in view of the actual finding of the justices. The singularity of the product carried, or of the purpose for which it is carried, is not the sole criterion; but exceptional purposes may have a tendency to produce, and may account for, extraordinary traffic (*Hill* v. *Thomas*, *supra*). As to the user of carts "in strings" and not proceeding at intervals, see *Wolverhampton Corporation* v. *Salop County Council* (1895), 64 L. J. (M. C.) 179. As to the weight of each load, see *Geirionydd Rural District Council* v. *Green* (1908), 72 J. P. 321, affirmed, [1909] 2 K. B. 845, C. A.

(*n*) *Ibid.*; *Aveland* (*Lord*) v. *Lucas*, *supra*; and cases in notes (*o*), *infra*, and notes (*p*), (*q*), (*r*), p. 175, *post*. In considering what is ordinary traffic, previous years, and not only the year in question, should be considered (*Hemsworth Rural District Council* v. *Micklethwaite*, *supra*).

(*o*) *Tonbridge Highway Board* v. *Sevenoaks Highway Board* (1884), 49 J. P. 340 (opening of a new quarry); *Whitebread* v. *Sevenoaks Highway Board*, [1892] 1 Q. B. 8 (new quarry); *Etherley Grange Coal Co.* v. *Auckland District Highmay Board*, [1894] 1 Q. B. 37, C. A. (new colliery); *Shepton Mallet Rural District Council* v. *Wainwright & Co.* (1908), 72 J. P. 459; *Kent County Council*

carries over an agricultural road a greater number of loads of timber than has usually passed over it in a similar period (*p*). Where, however, a road is used for the carriage of timber, not at long intervals, but periodically in the ordinary course of forestry, different roads being used in turn in different years, the timber traffic on the road, when its turn recurs, may be ordinary (*q*).

Extra-ordinary user of road.

The traffic put upon a road by any one person is not necessarily extraordinary because he uses the road more than others, and in order to render him liable his traffic must be extraordinary as regards the ordinary user of the road as a whole by all who use it (*r*).

Extra-ordinary traffic a question of fact.

311. Traffic which is extraordinary on a particular road may in the future cease to be so, and become ordinary. At what date it does so is a question of fact (*s*). The change may in some cases take place in a comparatively short time (*t*); but, where the species of traffic in question is virtually confined to one or two individuals, their persistence in conducting such traffic for six or seven years may not be sufficient to make it ordinary traffic of the particular road (*a*).

Effect of character of road.

312. In considering whether traffic is extraordinary or not, it is doubtful how far the character and construction of the road can properly be taken into account, except as giving rise to the presumption that traffic, up to the standard of which a road has been repaired, is traffic expected to be found upon it (*b*).

v. *Kent Coal Concessions, Ltd.* (1908), 72 J. P. 507; *Wallington* v. *Hoskins* (1880), 6 Q. B. D. 206, as explained in *Hill* v. *Thomas*, [1893] 2 Q. B. 333, C. A. *Lower Strafforth Highway Board* v. *Hatfield Chase Co.* (1893), 57 J. P. 567, turned, like *Wallington* v. *Hoskins*, *supra*, on the finding of the justices; it was not reported in time for consideration in *Hill* v. *Thomas*, *supra*.

(*p*) *Williams* v. *Davies* (1880), 44 J. P. 347; *Norfolk County Council* v. *Green* (1904), 68 J. P. 223. See also two county court cases, one as to timber in a district where chair-making from local timber was a common industry, *Wycombe Rural Council* v. *Smith* (1903), 67 J. P. 75; *High Wycombe Rural District Council* v. *Palmer* (1905), 69 J. P. 167.

(*q*) *Raglan Highway Board* v. *Monmouth Steam Co.* (1881), 46 J. P. 598, explained in *Geirionydd Rural District Council* v. *Green* (1908), 72 J. P. 321, affirmed, [1909] 2 K. B. 845, C. A.

(*r*) *Hill* v. *Thomas*, *supra*; *R.* v. *Williamson* (1881), 45 J. P. 505.

(*s*) *Bromley Rural District Council* v. *Croydon Corporation*, *Same* v. *Chittenden and Simmons*, *Same* v. *Wood & Sons* (1907), 5 L. G. R. 453; *Williams* v. *Davies*, *supra*.

(*t*) *Hemsworth Rural District Council* v. *Micklethwaite* (1904), 2 L. G. R. 1084, *per* WILLS, J.

(*a*) *Whitebread* v. *Sevenoaks Highway Board*, [1892] 1 Q. B. 8; *Bromley Rural District Council* v. *Croydon Corporation*, *Same* v. *Chittenden and Simmons*, *Same* v. *Wood & Sons*, *supra*.

(*b*) But see *Bromley Rural District Council* v. *Croydon Corporation*, *Same* v. *Chittenden and Simmons*, *Same* v. *Wood & Sons*, *supra*, *per* WALTON, J., at p. 456. Persons proposing to put unusually heavy traffic on a road for the first time cannot by first improving the road escape liability for damage done to such road in its improved state (*Shepton Mallet Rural District Council* v. *Wainwright & Co.* (1908), 72 J. P. 459).

SECT. 4. Person "by, or in consequence of, whose Order."

SECT. 4.—*Person "by, or in consequence of, whose Order" (c).*

"By whose order."

"In consequence of whose order."

313. "By whose order" is not equivalent to "at whose order"; and a defendant who has nothing to do with the conduct of the traffic, or with the mode in which it is to be conducted, and has no power to give orders in relation to it, is not within those words. Their effect is to render liable the contractor or vendor who orders his servants to conduct the traffic (*d*).

On the other hand, the words "in consequence of whose order" enable the highway authority in most cases to proceed, at its option, against the building owner, or other person ultimately responsible for the existence of the traffic on any road or in any form (*e*). The "consequence" referred to is the natural, and not the necessary, consequence of some order. Thus if a highway authority employ contractors to deliver quantities of stone for road repairing, knowing that in preceding years similar contracts have been executed by traction engine haulage, it may properly be held that the stone is so carried as a consequence of its order (*f*). As soon as it has been proved that, if the order had not been given, the damage would not have occurred, the plaintiff has made out a *primâ facie* case; but the defendant may rebut it by showing that the traffic complained of was not the natural consequence of his order, *e.g.*, by showing that the mode of haulage adopted was unusual, or one which a person giving such an order would not reasonably contemplate (*g*).

Excessive weight.

In cases of excessive weight the mere fact that a defendant has ordered a large quantity of material to be delivered does not necessarily make him responsible, if the vendors choose for their own reasons to overweight their vehicles (*h*).

(*c*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12 (1) (c), amending the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23, in consequence of the decision in *Kent County Council* v. *Gerard* (*Lord*), [1897] A. C. 633.

(*d*) *Kent County Council* v. *Gerard* (*Lord*), *supra*. See also the earlier cases now rendered practically obsolete by the alteration of the law in 1898 (*Barnett* v. *Hoo Highway Board* (1882), 46 J. P. 805; *R.* v. *Ellis* (1882), 8 Q. B. D. 466; *Lapthorn* v. *Harvey* (1885), 49 J. P. 709; *Colchester, Wemyss & Co.* v. *Gloucestershire County Council* (1897), 66 L. J. (Q. B.) 290; *Pethick Brothers* v. *Dorset County Council* (1898), 62 J. P. 579, C. A.). In only two cases, apparently (*Williams* v. *Davies* (1880), 44 J. P. 347, and *Kent County Council* v. *Vidler*, [1895] 1 Q. B. 448, C. A.), was the owner or ultimate recipient of the goods (and not the contractor) held liable, and in the latter case several contractors had been employed, and it was only the aggregate amount of their traffic that was extraordinary.

(*e*) See the several actions tried together, *sub nom. Bromley Rural District Council* v. *Croydon Corporation*, *Same* v. *Chittenden and Simmons*, *Same* v. *Wood & Sons* (1907), 5 L. G. R. 453. As to joining both in one action, see p. 179, *post*.

(*f*) *Bromley Rural Council* v. *Croydon Corporation*, [1908] 1 K. B. 353, C. A., affirming [1907] 2 K. B. 39; *Epsom Urban Council* v. *London County Council* [1900] 2 Q. B. 751; *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, C. A. See also *Kent County Council* v. *Kent Coal Concessions, Ltd.* (1909), 73 J. P. 305, C. A.; a case of "parent" company and "subsidiary" company.

(*g*) *Reigate Rural District Council* v. *Sutton District Water Co.* (1907), 71 J. P. 405.

(*h*) *Egham Rural Council* v. *Gordon*, [1902] 2 K. B. 120. It was there proved that other large deliveries of bricks had been made in other ways without causing similar damage.

SECT. 4. Person "by, or in consequence of, whose Order."

A contractor will be liable for damage caused by his carts although his employer, a railway company, might also be held liable for it under the provisions of the Railways Clauses Consolidation Act, 1845 (*i*).

SECT. 5.—*Recovery of Expenses.*

Nature of the remedy.

314. The above provisions are not penal, and are intended to apply not only to unlawful user amounting to a public nuisance, but also to user which, though not ordinary, is perfectly legitimate and reasonable, the object being to ensure that a person using a highway for unusual purposes should pay for any damage caused thereby (*k*); and contributory negligence on the part of the authority in failing to keep their road in repair affords no defence (*l*).

Certificate of surveyor.

315. The certificate by the authority's surveyor (*m*) is a condition precedent to an action (*n*). Its object is to bring to the authority's attention the fact that extraordinary expenses within the meaning of the section have been incurred; and, if it does this, its form is immaterial (*o*).

Expense must be incurred before action.

It is also necessary that the damaged highway should have been repaired, and the expenses actually incurred, before the action is launched (*p*).

Period of limitation.

316. Such actions must be commenced, as a general rule, within twelve months of the time when the damage was done (*q*); and, therefore, an authority can only recover in respect of so much of the damage as was done within the twelve months preceding the issue of the writ. If the injury has been going on for a longer period, evidence must be given to show how much of the expense is to be attributed to those twelve months (*r*).

(*i*) 8 & 9 Vict. c. 20; see *Barnett* v. *Hoo Highway Board* (1882), 46 J. P. 805, and, generally, title RAILWAYS AND CANALS.

(*k*) *Hill* v. *Thomas*, [1893] 2 Q. B. 333, C. A.; *Aveland (Lord)* v. *Lucas* (1880), 5 C. P. D. 211, 351, C. A.; *Savin* v. *Oswestry Highway Board* (1880), 44 J. P. 766. See *Story* v. *Sheard*, [1892] 2 Q. B. 515, for a decision that such actions are proceedings for a personal tort, and do not lie against the executor of the person who did the damage; and see title TORT.

(*l*) *Hemsworth Rural District Council* v. *Micklethwaite* (1904), 2 L. G. R. 1084.

(*m*) A person who has acted as surveyor, though appointed only by a minute not sealed or countersigned, can give a valid certificate (*Lancaster* v. *Harlech Highway Board* (1888), 52 J. P. 805). *Quære* whether a mere temporary surveyor could do so; see *Lewis* v. *Weston-super-Mare Local Board* (1888), 40 Ch. D. 55.

(*n*) *Chesterfield Rural Council* v. *Newton*, [1904] 1 K. B. 62, C. A.; *Bromley Rural District Council* v. *Chittenden* (1906), 70 J. P. 409, C. A.

(*o*) *Epsom Urban Council* v. *London County Council*, [1900] 2 Q. B. 751; and see *Wirral Highway Board* v. *Newell*, [1895] 1 Q. B. 827, where the certificate included several roads; *Milne & Co.* v. *Aberdeen District Committee* (1899), 2 F. (Ct. of Sess.) 220, a case under a similar Scottish statute, where it was admitted that the figures in the certificate were arrived at by guesswork, but it was held to be sufficient.

(*p*) *Little Hulton Urban District Council* v. *Jackson* (1904), 68 J. P. 451. For the time limit of actions, generally, see title LIMITATION OF ACTIONS.

(*q*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12 (1) (b).

(*r*) See, *e.g.*, *Bromley Rural Council* v. *Croydon Corporation*, [1908] 1 K. B. 353, C. A.

SECT. 5. Recovery of Expenses.

Exceptions to general rule:

(1) Particular building contract or work extending over long period.

317. To this rule there are two exceptions:—

In the first place, where the damage done to the road is the consequence of any particular building contract or work extending over a long period, the action may be commenced within six months after the completion of the contract or work (*s*). The effect of this provision is to enable the authority, in the cases mentioned, to recover for damage done more than twelve months before action (*t*).

What is "work."

The mere existence of contractual obligations, the performance of which is spread over a lengthy period, does not necessarily make the performance of such obligations a work extending over a long period of time within the meaning of this provision (*a*): there must be the execution of some definite and entire "work" as distinct from the mere performance of a quantity of labour (*b*). A contract for the building of any physical construction is a "building contract" (*c*).

Where a building contract involves different operations within the same district and connected together so that each would be useless without the others, the six months run from the constructional completion of the whole work contracted for, and not from the completion of the particular operation actually causing the damage (*d*), nor yet from the final termination of contractual relations between the parties, where by the existence of a maintenance clause, or provisions for retention money, such relations may last beyond the date of actual completion of the works (*e*).

(2) Public authorities.

318. Secondly, where the defendant is a public authority and the damage has been done by it in pursuance, or execution, or intended execution of some Act of Parliament, or some public duty

(*s*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12 (1) (b). This exception applies equally whether the traffic has been carried "by" or "in consequence of" the defendant's order; see *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, C. A.

(*t*) *Kent County Council* v. *Folkestone Corporation, supra, per* VAUGHAN WILLIAMS, L.J., at p. 631.

(*a*) The removal of a large quantity of felled timber under several contracts extending over two years is not such a work (*Norfolk County Council* v. *Green* (1904), 68 J. P. 223), nor is the supply of road materials as and when required for general purposes during a period of twelve months (*Bromley Rural Council* v. *Croydon Corporation*, [1908] 1 K. B. 353, C. A.).

(*b*) There must be a "unity of work" (*Kent County Council* v. *Folkestone Corporation, supra*). How far the "work" must be a work of construction, or demolition, or the like, *ejusdem generis* with work done under a "building contract," is not settled.

(*c*) *Carlisle Rural Council* v. *Carlisle Corporation*, [1909] 1 K. B. 471, C. A., *per* BUCKLEY, L.J.

(*d*) *Lancaster Rural Council* v. *Fisher and Le Fanu*, [1907] 2 K. B. 516, C. A.; *Carlisle Rural Council* v. *Carlisle Corporation, supra*. The date of completion is a question of fact; see *Reigate Rural District Council* v. *Sutton District Water Co.* (1909), 73 J. P. 161, C. A., where defects had to be remedied after apparent completion. See also title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 158.

(*e*) *Lancaster Rural Council* v. *Fisher and Le Fanu, supra; Carlisle Rural Council* v. *Carlisle Corporation, supra; Reigate Rural District Council* v. *Sutton District Water Co., supra.*

or authority, the limit of six months under the Public Authorities Protection Act, 1893 (*f*), applies. This, however, is only the case where the authority carries out work directly through its servants or agents; where it carries it out indirectly through an independent contractor, the statute does not apply, for the contractor is not executing a statutory duty, and the traffic is not conducted "by" the order of the authority (*g*).

In what court action may be brought.

319. The expenses, if not exceeding £250, may be recovered in the county court, otherwise in the High Court (*h*); but it is doubtful whether, when the claim is for less than £250, the county court has exclusive jurisdiction (*i*). If a claim in the High Court is for more than £250 and the judgment for less, costs will be taxed on the High Court scale, if the judge certifies that the action was a proper one for the High Court (*k*).

Joint defendants.

320. Two or more separate defendants, who have conducted traffic on a road, cannot be sued in one action unless they are sued jointly; if so sued, the plaintiffs will not be required to give particulars as to the number and weight of the loads attributable to each defendant (*l*).

Third party proceedings.

321. Where a contractor has given an indemnity to his employer against such expenses, he may be brought in as a third party (*m*).

Inspection of books.

322. A defendant is not entitled to inspection of the authority's books so far as they relate to other highways in the neighbourhood (*n*), but only of books relating to the particular highway (*o*).

(*f*) 56 & 57 Vict. c. 61, s. 1; and see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*g*) *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, C. A. The traffic is not conducted "by" the order of the authority, which is only liable at all because a person is specially rendered liable for damage done "in consequence of" his order.

(*h*) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12 (1) (a); see title COUNTY COURTS, Vol. VIII., p. 655. Under the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), s. 23, they were recoverable summarily; but are not so any longer, even in the case of damage by "light locomotives" (*R.* v. *Bath County Court Judge*, [1908] 1 K. B. 958).

(*i*) *Chesterfield Rural Council* v. *Newton*, [1904] 1 K. B. 62, C. A.; *Chertsey Rural District Council* v. *Binns* (1904), unreported, but see S. C. (1905), 69 J. P. (Journal) 28; Pratt and Mackenzie, Law of Highways, 16th ed., 810. *Quære* whether there is power to remove into the High Court by *certiorari* an action commenced in the county court (*ibid.*; *Godmanchester Rural District Council* v. *Hooley* (1901), *Times*, 5th August). Even if there is power it will seldom be exercised (*ibid.*).

(*k*) And *quære* whether a certificate is necessary (*Chesterfield Rural Council* v. *Newton*, *supra*).

(*l*) *Chesterfield Rural Council* v. *Newton*, *supra*; Local Government Chronicle, 1902, 13th December.

(*m*) See, *e.g.*, *Bromley Rural District Council* v. *Croydon Corporation*, *Same* v. *Chittenden and Simmons*, *Same* v. *Wood & Sons* (1907), 5 L. G. R. 453, and as to the construction of such an indemnity, see *Croydon Rural District Council* v. *Sutton District Water Co.* (1908), 72 J. P. 217, C. A.

(*n*) *Bromley Rural District Council* v. *Chittenden* (1906), 4 L. G. R. 967.

(*o*) And only by his solicitor, not by an engineer (*ibid.*).

SECT. 5. Recovery of Expenses.

Measure of damages.

323. The measure of damages is *primâ facie* the difference between the sum expended in maintaining and repairing the particular (*p*) highway during the year or period (*q*) in question, and the average sum expended on it in previous years or in corresponding periods in such years.

Cost of remaking a road.

When a road has been so badly damaged that it is necessary to remake it entirely, the person responsible for the traffic may be required to bear the whole expense, although the road has been remade up to a higher standard (*r*); when, however, remaking is not really necessary, but the authority takes the opportunity of remaking and improving the road, the court will apportion the expense as best it can (*s*).

Consideration of weather.

In considering how much damage is attributable to extraordinary traffic, and how much of it would have ordinarily occurred during the period in question, wet or frost may be taken into account (*t*).

Neglect to maintain road up to proper standard.

324. Although the fact that an authority has neglected to repair its roads is not a complete answer to its claim (*a*), it may reduce the damages to a minimum; for if the road was unfit for ordinary traffic, it is difficult, if not impossible, to show that any damage was occasioned by extraordinary traffic or excessive weight (*b*).

Part XII.—Footpaths.

Public footpaths are highways.

325. Public footpaths are highways (*c*); and the general law as to highways applies to them (*d*).

(*p*) *Bromley Rural District Council* v. *Chittenden* (1906), 4 L. G. R. 967; (1907), 5 L. G. R. 453; *Tonbridge Highway Board* v. *Sevenoaks Highway Board* (1884), 49 J. P. 340; *Kent County Council* v. *Kent Coal Concessions, Ltd.* (1908), 72 J. P. 507; and compare *Poole Highway Board* v. *Gunning* (1882), 46 J. P. 708; *Barnett* v. *Hoo Highway Board* (1882), 46 J. P. 805; *Exford Iron Ore Co.* v. *Dulverton Highway Board* (1881), 45 J. P. 80. It would seem that the statement in *Aveland (Lord)* v. *Lucas* (1880), 5 C. P. D. 211, 351, C. A., that the cost of repairing other highways may in some degree be considered must now be taken as incorrect.

(*q*) In *Williams* v. *Davies* (1880), 44 J. P. 347, the expense per quarter was taken as the basis.

(*r*) *Savin* v. *Oswestry Highway Board* (1880), 44 J. P. 766; *Kent County Council* v. *Kent Coal Concessions, Ltd., supra.*

(*s*) See, *e.g.*, *Bromley Rural District Council* v. *Croydon Corporation, Same* v. *Chittenden and Simmons, Same* v. *Wood & Sons* (1907), 5 L. G. R. 453; *Kent County Council* v. *Kent Coal Concessions, Ltd., supra.*

(*t*) See *Williams* v. *Davies, supra.*

(*a*) *Savin* v. *Oswestry Highway Board, supra; Hemsworth Rural District Council* v. *Micklethwaite* (1904), 2 L. G. R. 1084.

(*b*) *Hemsworth Rural District Council* v. *Micklethwaite, supra*; *Aveland (Lord)* v. *Lucas, supra; Kent County Council* v. *Kent Coal Concessions, Ltd., supra.*

(*c*) They are so at common law; see pp. 7, 9, *ante.* They are included in the definition of "highways" contained in the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 5 (see p. 8, *ante*), and also in that contained in the Highways and Bridges Act, 1891 (54 & 55 Vict. c. 63), s. 6; "in this Act the word 'highway' includes any public bridle path or footway." See also title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 284 *et seq.*

(*d*) Except where some statutory provision applies only to footpaths, or by its terms excludes them from its operation.

Origin of.

326. Like other highways, public footpaths owe their origin either to some statute or to dedication express or inferred (*e*); but Inclosure Acts and awards are the source from which the great majority of statutory public footpaths originate (*f*). In the case of public footpaths claimed by inferred dedication, it is necessary to bear in mind the rule that no such right as *jus spatiandi* is known to the law (*g*), and also the possibility of a restricted dedication. Footpaths, more often than any other kind of highway, are dedicated subject to rights reserved by the owner (*h*), such as the right to maintain gates and stiles on the path, or to plough it out periodically in due course of husbandry; again, a footpath may be dedicated subject to an existing private right of carriage way (*i*), or along a towing path, embankment, or similar place, where the rights of the public must necessarily be subordinate to those of particular persons. In a town a footpath is frequently subject to the right of tradesmen to deposit goods, to market rights and, in a "mews," to the right to groom horses or wash carriages (*h*).

No *jus spatiandi*.

Restricted dedication.

So-called churchways or church paths may or may not be public footways (*j*).

Churchways.

327. The parish council (or, if there be no council, the parish meeting) of a rural parish may acquire public rights of way (including footways) for the benefit of the parish or part thereof (*k*).

Acquisition by parish council.

328. In the case of footpaths which run by the side of and form part of public roads, the person or body liable to repair the roadway is liable also to repair the footway. Thus the county council is liable to repair footpaths by the side of main roads (*l*), and the highway authority is liable to repair those by the side of ordinary highways repairable by the public; but the county council may contribute, if it thinks fit, towards the repair and improvement thereof (*m*).

Repair of footpaths by side of roads.

Where a footpath has been recently dedicated by the side of, but on land not included in, an old highway, it is doubtful who (if anyone) ought to repair it; and the question depends upon whether, on the facts of the particular case, the footpath is to be treated as an

(*e*) As to which, see p. 33, *ante*.

(*f*) Therefore any local inclosure award should be consulted in case of dispute as to rights of public footway.

(*g*) As to this, see pp. 39 *et seq.*, *ante*.

(*h*) As to such rights, see pp. 46 *et seq.*, *ante*.

(*i*) As to the width of the land subject to the public right in such cases, see p. 68, *ante*, and as to the possibility of a public footpath being subsequently dedicated for more extended purposes, see p. 11, *ante*.

(*j*) See p. 23, *ante*.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (g), as to which see p. 29, *ante*. A parish meeting may obtain the same powers by order of the county council.

(*l*) Even in urban districts and where the county had between 1878 and 1888 contributed nothing towards the cost of repairs (*Re Warminster Local Board and Wilts County Council* (1890), 25 Q. B. D. 450; *Re Burslem Corporation and Staffordshire County Council*, [1896] 1 Q. B. 24, C. A.; *Derby County Council* v. *Matlock Bath and Scarthin Nick Urban District*, [1896] A. C. 315).

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (10); see p. 129, *ante*.

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accretion to, and subject to the same incidents as, the roadway, or as a path unconnected with it (*n*).

Other footpaths.

Other footpaths, if dedicated before 1836, are repairable by the inhabitants at large (*o*), unless some individual is liable to repair them *ratione tenuræ*, or otherwise. If dedicated since 1836, they are perhaps repairable by no one, unless they have been formally adopted (*p*).

Extent of repairs.

329. As regards the extent of repairs, it may be that the duty to repair is not so extensive as in the case of a carriage road (*q*). Apart from this, extensive repairs to a path running across agricultural land, such as metalling, or replacing stepping-stones by a bridge, may be unlawful, as tending to enlarge the public right and throw a greater burden on the landowner (*r*).

Repairs of gates, stiles, and footbridges.

330. The occupier of land over which a footpath passes is not liable for the repair of gates, stiles, and footbridges (*s*) along its course unless he is liable for the repair of the path as a whole (*t*); for when a path is dedicated subject to the existence of fences and ditches the public must accept it subject to the liability of gates, stiles, and bridges to wear and decay. But a person or body liable for the repair of a public footpath is apparently liable in law for the maintenance of the stiles and footbridges in a condition to admit of reasonably convenient passage by the public (*u*).

Erection of gates or stiles.

331. The erection of a gate or stile across a public path, where none has ever existed before, is a nuisance and illegal (*a*).

Although a landowner or occupier cannot justify the substitution of a high locked gate for a low stile in a public footpath (*b*), he may substitute such a gate as a jury would find to be no prejudice to the

(*n*) *Derby County Council* v. *Matlock Bath and Scarthin Nick Urban District*, [1896] A. C. 315, *per* Lords HERSCHELL and DAVEY. It may be doubted whether a dedicating owner would ever be held liable for the repairs of such an added footpath, even though he was liable for the repair of the existing roadway.

(*o*) See pp. 82 *et seq.*, *ante*.

(*p*) 5 & 6 Will. 4, c. 50, s. 23. As to the effect of this provision, see pp. 84, 85, *ante*, and as to adoption, see pp. 92 *et seq.*, *ante*.

(*q*) See p. 101, *ante*.

(*r*) *Arnold* v. *Blaker* (1871), L. R. 6 Q. B. 433, Ex. Ch.; *Sutcliffe* v. *Sowerby* (*Highways Surveyors*) (1859), 1 L. T. 7; *Radcliffe* v. *Marsden Urban District Council* (1908), 72 J. P. 475, in which *Sutcliffe* v. *Sowerby* (*Highways Surveyors*), *supra*, was followed, and *R.* v. *Helaugh* (*Inhabitants*) (1863), *Times*, 18th April, not followed; *R.* v. *Barnes* (1884), 1 T. L. R. 24. Where there is no duty to repair, there is no right to do so (*Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518).

(*s*) Such a footbridge will not be a "county bridge" (*R.* v. *Southampton County* (*Inhabitants*) 1852), 18 Q. B. 841).

(*t*) *I.e.*, *ratione tenuræ* or under a statute or award (*Rundle* v. *Hearle*, [1898] 2 Q. B. 83; *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221). In the latter case the owner of an area grating was held not liable for an accident due to its condition because it was not used or worn out by him otherwise than as one of the public using a public highway on the side of which his house stands. But, of course, an occupier, although under no liability to the public, in order to have an effective fence, generally repairs gates and stiles before they become a nuisance to passengers, who would probably remove them.

(*u*) See pp. 103, 104, *ante*.

(*a*) *James* v. *Hayward* (1630), Cro. Car. 184; and see p. 46, *ante*.

(*b*) *Bateman* v. *Burge* (1834), 6 C. & P. 391.

public (*c*), but it is doubtful whether he might replace an existing gate by a stile (*d*), or whether the highway authority might substitute the one for the other without his consent (*e*).

Stepping-stones and footbridges.

332. Where a public footpath crosses a stream by means of stepping-stones (*f*), or where the public using it have to jump across a narrow stream or ditch (*g*), the highway authority may not substitute a bridge without the owner's consent.

Power of parish council to repair certain public footpaths.

333. The parish council (*h*) of a rural parish may (subject to the general restrictions on its expenditure) undertake the repair and maintenance of all or any of the public footpaths within its parish, not being footpaths at the side of a public road; but neither the existence nor the exercise of this power is to relieve any other authority or person from any liability in respect of such repair or maintenance (*i*).

Width of footpaths.

334. Where the width of a public footpath is not prescribed by the statute or document to which it owes its origin, the width must be ascertained by the extent of the public user (*k*). Where a made or formed footway exists by the side of a carriage or cart way repairable by the highway authority, it is the duty of the authority to maintain it 3 feet in width (*l*).

Obstructions and nuisances

335. An obstruction, nuisance, or encroachment upon a public footway is punishable by indictment as in the case of any other highway (*m*); and certain obstructions and methods of user are specially forbidden by statute (*n*).

Guard posts.

336. Highway authorities must secure footpaths from damage by vehicular traffic by erecting posts, stones, or banks of earth (*o*) at the

(*c*) Compare *R.* v. *Bartholomew*, [1908] 1 K. B. 554, C. C. R.

(*d*) For a stile, unless exceptionally low, must be more inconvenient to women and aged persons.

(*e*) He may require the gate as a means of access, or the stile as a safer fence for his stock. See the opinion of the Local Government Board on this point, referred to at 62 J. P. 617.

(*f*) *Sutcliffe* v. *Sowerby* (*Highways Surveyors*) (1859), 1 L. T. 7.

(*g*) *Lade* v. *Shepherd* (1735), 2 Stra. 1004; *Radcliffe* v. *Marsden Urban District Council* (1908), 72 J. P. 475, not following *R.* v. *Helaugh* (*Inhabitants*) (1863), *Times*, 18th April. But a trifling widening of an existing footbridge may be permissible; see *R.* v. *Barnes* (1884), 1 T. L. R. 24.

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 13 (2). A parish meeting may be empowered to do so by the county council.

(*i*) The Local Government Board treats this provision as sanctioning expenditure on gates and stiles (see 62 J. P. 617). It is submitted that, except with the consent of the owner and occupier, the council may not do any more extensive repairs than it would be the duty of a private individual to do if he were liable to repair the path; and it is arguable that the provision confers no right to do repairs to any path which no person or authority is liable to repair; see p. 102, *ante*, and cases cited in notes (*l*), (*q*), *ibid.*

(*k*) As to this, see pp. 66 *et seq.*, *ante*.

(*l*) Such appears to be the effect of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 80, now that the consent of the vestry is in effect the consent of the authority itself.

(*m*) As to nuisances on highways, see pp. 151 *et seq.*, *ante*.

(*n*) See Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 72; Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; and title STREET TRAFFIC.

(*o*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 24.

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side of such paths (*p*) or otherwise; and urban authorities may erect posts even in the middle or at the end of a footpath, but must have lights attached to them at night to prevent injury to passengers (*q*).

Part XIII.—Bridges and Approaches thereto.

SECT. 1.—"*County Bridge.*"

Liability to repair.

337. At common law the liability to repair a public bridge (*r*) or any part thereof lay *primâ facie* upon the inhabitants of the county (*s*), riding or other subdivision of a county in the nature of a riding (*t*), or county of a town (*a*) in which it was situate. But this liability might be rebutted by showing that the bridge in question was repairable by some other district or by an individual or corporate body, or as part of the highway by the persons responsible for the repair of such highway (*b*). By statute this *primâ facie* liability has, in the case of a county or a county borough, been transferred to the county council or the corporation of the borough, as the case may be (*c*).

"County bridge." Two meanings.

338. The term "county bridge" is used in two senses. In its narrower sense it means a bridge which lies within and is repairable by a county or riding, and is contrasted with a "hundred bridge," a "borough bridge," a "district bridge," or a bridge

(*p*) But not at the extremities (*Ellis* v. *Woodbridge* (1860), 8 C. B. (N. S.) 290).

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149; *Lamley* v. *East Retford Corporation* (1891), 55 J. P. 133, C. A.; *Sheringham Urban District Council* v. *Halsey* (1904), 68 J. P. 395.

(*r*) *I.e.*, a bridge in a public highway (*R.* v. *Bucks* (*Inhabitants*) (1810), 12 East, 192).

(*s*) Statute of Bridges (1530-31), 22 Hen. 8, c. 5, s. 2, which only affirms the common law: see 13 Co. Rep. 33 (Fraser's ed.), Note (A); 2 Co. Inst. 702; *R.* v. *St. Peter's in York Justices* (1706), 2 Ld. Raym. 1249. "A parish as to highways and a county as to bridges are precisely on the same footing" (*R.* v. *Oxfordshire* (*Inhabitants*) (1825), 4 B. & C., 194, *per* LITTLEDALE, J.). See also *R.* v. *Salop* (*Inhabitants*) (1810), 13 East, 95 *per* Lord ELLENBOROUGH, C. J.; *R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1802), 2 East, 342; *R.* v. *New Sarum* (*Inhabitants*) (1845), 7 Q. B. 941; *A.-G.* v. *West Riding of Yorkshire County Council* (1903), 67 J. P. 173.

(*t*) As to such subdivisions, see *R.* v. *Isle of Ely* (*Inhabitants*) (1850), 15 Q. B. 827. They are now administrative counties of themselves.

(*a*) As to counties of towns, see *R.* v. *New Sarum* (*Inhabitants*), *supra*; *R.* v. *Dorset* (*Inhabitants*) (1881), 45 L. T. 308; *R.* v. *Southampton County* (*Inhabitants*) (1886), 17 Q. B. D. 424, 438; *R.* v. *Southampton County* (*Inhabitants*) (1887), 19 Q. B. D. 590. Most of them are now county boroughs, and therefore administrative counties.

(*b*) See p. 190, *post*. The county must plead specially the liability of any other body or person (*West Riding of Yorkshire* (*Inhabitants*) v. *R.* (1813), 2 Dow, 1, H. L.; *R.* v. *Norfolk County Council* (1910), 26 T. L. R. 269).

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 34 (1), (2), 79 (2); and see pp. 188, 189, 192, *post*.

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repairable by individuals. In its wider sense it includes all public bridges (*d*).

The liability to repair bridges at once attaches to a newly-created administrative county (*e*); and if the boundary of a county or borough be extended, a "county bridge" in the added area becomes repairable by the authority to which such area is transferred (*f*); but a transfer of area does not affect a liability which is based upon prescription or statute (*g*)

Bridge in a highway.

339. Every bridge in a public highway (*h*), whether it be a foot-bridge, horse bridge, or carriage bridge (*i*), and whether erected by individuals (*k*), or by a public body (*e.g.*, turnpike trustees) acting under statutory powers (*l*), is a "county bridge" in the wider sense of the term subject to the following qualifications:—

Super flumen.

(1) It must be a "bridge," that is, it must be erected over water flowing in a channel between banks more or less defined (*m*), but the fact that the channel is occasionally dry is immaterial (*n*). Where a highway crosses a stream and adjacent low-lying land by a series of arches, some of which are normally dry, it is a question of fact whether the whole series forms one entire bridge, or whether there are several bridges, or whether the dry arches are mere culverts in the highway leading to the actual bridge (*o*). Every structure which

(*d*) See *R.* v. *Chart and Longbridge* (1870), L. R. 1 C. C. R. 237.

(*e*) *R.* v. *Southampton County* (*Inhabitants*) (1886), 17 Q. B. D. 424.

(*f*) *R.* v. *Norwich* (*Inhabitants*) (1719), 1 Stra. 177; *R.* v. *St. Peter's in York Justices* (1706), 2 Ld. Raym. 1249; *R.* v. *Brecon* (*Inhabitants*) (1849), 15 Q. B. 813. But the extension of a borough not liable to repair bridges does not relieve the county of its liability in respect of bridges in the added area (*R.* v. *New Sarum* (*Inhabitants*) (1845), 7 Q. B. 941; compare also *R.* v. *Dorset* (*Inhabitants*) (1881), 45 L. T. 308).

(*g*) See *Re Staffordshire and Derbyshire County Councils* (1890), 54 J. P. 566.

(*h*) *R.* v. *Bucks* (*Inhabitants*) (1810), 12 East, 192. A bridge dedicated to, and used by, the public does not differ from an ordinary highway so far as the public right of passage is concerned (*Bury Corporation* v. *Lancashire and Yorkshire Rail. Co.* (1888), 20 Q. B. D. 485, C. A.).

(*i*) *R.* v. *Salop* (*Inhabitants*) (1810), 13 East, 95, *per* Lord ELLENBOROUGH, C.J.

(*k*) *R.* v. *Wilts* (*Inhabitants*) (1704), 6 Mod. Rep. 307; *R.* v. *Isle of Ely* (*Inhabitants*) (1850), 15 Q. B. 827; *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221, *per* ERLE, C.J.

(*l*) *R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1802), 2 East, 342; *R.* v. *Derbyshire* (*Inhabitants*) (1832), 3 B. & Ad. 147; *R.* v. *Oxfordshire* (*Inhabitants*) (1825), 4 B. & C. 194.

(*m*) Such was the interpretation put upon the words of the old form of indictment, namely, "*pons publicus et communis situs in altâ regiâ viâ super flumen seu cursum aquæ*," in *R.* v. *Oxfordshire* (*Inhabitants*) (1830), 1 B. & Ad. 289, 294; and compare *R.* v. *Gloucestershire* (*Inhabitants*) (1842), Car. & M. 506. A bridge over a canal may be a county bridge (*North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 73 J. P. 477, C. A).

(*n*) *R.* v. *Oxfordshire* (*Inhabitants*), *supra*. Sir E. Coke defined *pons* as denoting *omne quod super aquas transimus* (2 Co. Inst. p. 700); and in explanation of the use of the word in a verse relating to Tadcaster, "*magnifice structum sine flumine pontem*," suggests "*vidit et scripsit poeta in æstate.*"

(*o*) In *R.* v. *Oxfordshire* (*Inhabitants*), *supra*, arches at intervals in the road giving access to a bridge were held to be mere culverts and not separate bridges (see *R.* v. *Oxfordshire* (*Inhabitants*) (1827), 1 B. & Ad. 297, n.). In *R.* v. *Derbyshire Inhabitants* (1842), 2 Q. B. 745, forty-two arches were held to form one entire bridge, although the twenty-nine centre ones only took running water in flood time.

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enables a passenger to cross a stream is not necessarily a county bridge (*p*); and it is a question of fact depending upon size and construction (*q*) (the existence of parapets, though not conclusive, being important (*r*)), whether it is such a bridge, or a mere culvert (*s*) or insignificant structure (*t*) repairable as part of the actual highway.

Adoption.

(2) Although a bridge may be a public bridge (*a*) in the sense that it lies in the highway and the public have a right to use it, it is not a county bridge unless it has been adopted or recognised by the inhabitants as a bridge for which the county or other area ought to be liable (*b*). In determining whether an inference of adoption or recognition should be drawn, the facts attending the erection of the bridge, its utility to the public (*c*), and the amount and character of the public user are all matters for consideration (*d*). A bridge erected by private persons for their own purposes, where no highway previously existed, may in course of time become so useful to, and so much used by, the public as to justify such an inference (*e*); but in such a case the inference ought not to be hastily drawn, if the cost of maintenance is heavy and the private advantage to the builders substantial (*f*). Where, however, a bridge has been built in the line of an existing highway, the inference is much more easily drawn, especially where the bridge, if not useful

(*p*) *R.* v. *Southampton County* (*Inhabitants*) (1852), 18 Q. B. 841, 853, *per* Lord CAMPBELL, C.J.

(*q*) *R.* v. *Lancaster County* (*Inhabitants*) (1868), 32 J. P. 711, *per* BLACKBURN, J.

(*r*) *R.* v. *Whitney* (*Inhabitants*) (1835), 3 Ad. & El. 69.

(*s*) As in *R.* v. *Whitney* (*Inhabitants*), *supra*; *R.* v. *Lancaster County* (*Inhabitants*), *supra*.

(*t*) *R.* v. *Southampton County* (*Inhabitants*), *supra*; *R.* v. *Middlesex* (*Inhabitants*) (1832), 3 B. & Ad. 201; *R.* v. *Lancashire* (*Inhabitants*) (1831), 2 B. & Ad. 813.

(*a*) As to the meaning of the term "public bridge," which does not occur in the Statute of Bridges (1530-31), 22 Hen. 8, c. 5, s. 2, see *R.* v. *Bucks* (*Inhabitants*) (1810), 12 East, 192, and note (*h*), p. 185, *ante*.

(*b*) *R.* v. *Southampton County* (*Inhabitants*) (1887), 19 Q. B. D. 590. Prior to this decision it was understood to be the law that a bridge thrown open to the public, if in fact used by them and useful to them, became a county bridge (see *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221). It was recognised in earlier cases that where a bridge was built in a highway, and no indictment for a nuisance was preferred, the county in a sense acquiesced in its construction and adopted the bridge (see *R.* v. *St. Benedict, Cambridge* (*Inhabitants*) (1821), 4 B. & Ald. 447, *per* BAYLEY J.); but such acquiescence and adoption were regarded only as evidence of utility, which was treated as the "grand criterion" (see *R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1802), 2 East, 342; *R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1770), 2 Wm. Bl. 685; *R.* v. *Leake* (*Inhabitants*) (1833), 5 B. & Ad. 469). In future it would seem that utility must be regarded merely as evidence of a tacit adoption.

(*c*) Utility to the public must be distinguished from benefit to the landowner; see *R.* v. *Oxfordshire* (*Inhabitants*) (1827), 1 B. & Ad. 297, n.

(*d*) *R.* v. *Southampton County* (*Inhabitants*) (1887), 19 Q. B. D. 590.

(*e*) *R.* v. *Wilts* (*Inhabitants*) (1704), 6 Mod. Rep. 307. "If a private person build a private bridge which afterwards becomes of public convenience, the whole county is bound to repair it" (*R.* v. *Southampton County* (*Inhabitants*), (1887), 19 Q. B. D. 590, 601, *per* Lord COLERIDGE, C.J., but in *R.* v. *Southampton County* (*Inhabitants*) (1886), 17 Q. B. D. 424, WILLS, J., had doubted this).

(*f*) *R.* v. *Southampton County* (*Inhabitants*) (1887), 19 Q. B. D. 590.

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to and used by the public, would be a nuisance to the highway (*g*). The following are instances of bridges in previously existing highways, which from evidence of user and utility have been held to be county bridges: a bridge erected by turnpike trustees (*h*); a bridge erected in lieu of a ferry (*i*); a carriage bridge erected in lieu of a footbridge and ford by the township customarily liable to repair the footbridge (*k*); a bridge used only when a ford is dangerous (*l*); a brick carriage bridge substituted by turnpike trustees for a wooden bridge used by carriages only in flood time (*m*); a wooden footbridge affixed by turnpike trustees to the side of a cart bridge repairable by an individual (*n*); a bridge erected by an individual to give more commodious access to his tin works (*o*); and a bridge built by a miller over a ford which had always been inconvenient and sometimes unsafe, but which he had for his own purposes rendered more inconvenient to the public (*p*).

Public user and utility.

(3) Bridges built since the 24th June, 1803, in a county (*q*) by or at the expense of any individual or body (*r*), although used by and useful to the public, are *primâ facie* not county bridges, unless erected under the direction or to the satisfaction of the county surveyors (*s*). But in the case of disturnpiked roads (*t*) all bridges formerly repairable (*a*) by the trustees (*b*) have become county bridges (*c*); and

Date of construction.

(*g*) *R.* v. *Southampton County* (*Inhabitants*) (1887), 19 Q. B. D. 590; and see note (*b*), p. 186, *ante*. In many cases a bridge could be built by the side of a ford on land dedicated to, but not in fact used by, the public without interfering with passengers; in such cases the preferment of an indictment in the past would have been unlikely.

(*h*) *R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1802), 2 East, 342.

(*i*) *R.* v. *Bucks* (*Inhabitants*) (1810), 12 East, 192.

(*k*) *R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1770), 2 Wm. Bl. 685. As to the effect of widening or altering a bridge upon the liability of a person bound to repair the old bridge, see p. 195, *post*.

(*l*) *R.* v. *Northamptonshire* (*Inhabitants*) (1814), 2 M. & S. 262; *R.* v. *Devon* (*Inhabitants*) (1824), Ry. & M. 144; compare *R.* v. *Buckingham* (*Marquis*) (1815), 4 Camp. 189.

(*m*) *R.* v. *Surrey* (*Inhabitants*) (1810), 2 Camp. 455.

(*n*) *R.* v. *Middlesex* (*Inhabitants*) (1832), 3 B. & Ad. 201.

(*o*) *R.* v. *Glamorganshire* (*Inhabitants*) (1788), 2 East, 356, n.

(*p*) *R.* v. *Kent* (*Inhabitants*) (1814), 2 M. & S. 513. Had the miller created the inconvenience, he would have been liable to repair the bridge; see p. 191, *post*.

(*q*) This provision appears not to extend to hundred or borough bridges; see Bridges Act, 1814 (54 Geo. 3, c. 90), s. 2; *R.* v. *Chart and Longbridge* (1870), L. R. 1 C. C. R. 237.

(*r*) Including turnpike trustees (*R.* v. *Derbyshire* (*Inhabitants*) (1832), 3 B. & Ad. 147; *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 73 J. P. 477, C. A.).

(*s*) Bridges Act, 1803 (43 Geo. 3, c. 59) (commonly called "Lord Ellenborough's Act"), s. 5. The surveyor must, if requested, superintend and inspect the erection of a bridge, and an appeal lies to sessions against his decision (*ibid.*).

(*t*) Although the language of the enactment is not clear, it appears to apply whether the road was disturnpiked before or after 1870.

(*a*) Even if the trustees had never in fact done any repairs to them (*R.* v. *Somerset* (*Inhabitants*) (1878), 38 L. T. 452; *North Staffordshire Rail. Co.* v. *Hanley Corporation*, *supra*).

(*b*) The provision applies where the same persons were trustees under the same Act, but under different trusts, of a bridge and the turnpike roads leading thereto (*R.* v. *Dorset* (*Inhabitants*) (1881), 45 L. T. 308).

(*c*) Annual Turnpike Acts Continuance Act, 1870 (33 & 34 Vict. c. 73), s. 12. Where a road with a bridge repairable *ratione tenuræ* became a turnpike road, and the trustees added new arches to the bridge and kept them in repair, it was

SECT. 1. "County Bridge."

from the 16th August, 1878, to 1889 quarter sessions had power to take over as a county bridge any bridge erected after the 24th June, 1803, provided that the county surveyor certified it to be in good repair and condition (*d*). Since, the 1st April, 1889, the council of a county or county borough has had general power to take over, maintain, and improve any existing bridge (*e*).

A bridge built after the 24th June, 1803, to the approval of the county surveyor does not become a county bridge unless it has been adopted or converted by statute (*f*).

The provision requiring the superintendence of the county surveyor does not apply to a bridge built before the 24th June, 1803, but widened or reconstructed afterwards (*g*).

SECT. 2.—*Liability to repair Bridges.*

SUB-SECT. 1.—*County Councils.*

Bridges in counties.

340. In a county the *primâ facie* liability to repair all "county bridges" (*h*) within it lies upon the county council (*i*); but it may rebut this presumption by pleading and proving (*k*) that other persons are liable. Thus by immemorial custom or usage the inhabitants of some hundred (*l*), rape (*m*), parish (*n*), township (*o*),

held that on the expiration of the trust the new arches became repairable by the county, the old ones remaining repairable *ratione tenuræ* (*R.* v. *Buckingham County* (1878), 43 J. P. 175).

(*d*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 21.

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 6, 109 (1).

(*f*) *R.* v. *Southampton County* (*Inhabitants*) (1887), 19 Q. B. D. 590.

(*g*) *R.* v. *Lancashire* (*Inhabitants*) (1831), 2 B. & Ad. 813; *R.* v. *Devon* (*Inhabitants*) (1833), 5 B. & Ad. 383; in the latter case a new wooden bridge was erected on the old stone abutments. See also *R.* v. *Southampton County* (*Inhabitants*) (1852), 18 Q. B. 841.

(*h*) *I.e.*, "county bridges" in the wider sense of the term; see *R.* v. *Chart and Longbridge* (1870), L. R. 1 C. C. R. 237.

(*i*) As successors to the inhabitants, the quarter sessions, and the county authority (Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 3 (viii.), 79. Compare *Salford County Borough Corporation* v. *Lancashire County Council* (1890), 25 Q. B. D. 384, C. A. As to county bridges in the soke of Peterborough, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 64 (6).

(*k*) See note (*b*), p. 184, *ante*.

(*l*) *R.* v. *Chart and Longbridge*, *supra*; *R.* v. *Oswestry Hundred* (*Inhabitants*) (1817), 6 M. & S. 361; even though the boundaries of the hundred have varied within the time of legal memory. Hundred bridges still exist in Lancashire; see stat. (1670) 22 Car. 2, c. 12, s. 13, for their probable origin. The provisions of Lord Ellenborough's Act (Bridges Act, 1803 (43 Geo. 3, c. 59)), as to widening, improving, and rebuilding county bridges (see pp. 194 *et seq.*, *post*) apply equally to them (Bridges Act, 1814 (54 Geo. 3, c. 90), s. 2). The hundred rate for the purpose of repairing them is levied by the county council (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (i.); see also Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 20). In Kent hundred bridges were made county bridges by the Annual Turnpike Acts Continuance Act, 1875 (38 & 39 Vict. c. cxciv.), s. 10.

(*m*) As to the repair of county bridges in the different rapes of West Sussex, see the County of Sussex Act, 1865 (28 & 29 Vict. c. 37), s. 13.

(*n*) *R.* v. *Ecclesfield* (*Inhabitants*) (1818), 1 B. & Ald. 348; *R.* v. *Hendon* (*Inhabitants*) (1833), 4 B. & Ad. 628.

(*o*) *R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1821), 4 B. & Ald. 623;

SECT. 2. Liability to repair Bridges.

or borough (*p*), may be liable to repair all county bridges (*q*) within it, and no consideration for such liability need be alleged (*r*). A corporation or individual may also be liable *ratione tenuræ*, or by prescription, or statute to repair some particular bridge (*s*), or it may be repairable by individuals whose interference with the highway necessitated its erection (*t*).

Main road bridges.

341. The county council must also repair and maintain every bridge in the county carrying a main road (*a*), if repairable (*b*) by the highway authority, unless an urban authority has elected to retain such road.

The expenses of the county council in repairing bridges are payable out of the county fund (*c*).

Bridge not a county bridge.

342. A bridge in a highway, if it be not a county bridge (*d*), is repairable as part of the highway (*e*) by the persons (if any), liable to repair the highway.

SUB-SECT. 2.—*Borough Councils.*

Bridges in boroughs.

343. A borough which is either a county borough or a county of a town, is *primâ facie* liable to repair all "county bridges" (*f*) within it, and other boroughs may be liable by immemorial custom to repair all bridges, or a particular bridge, within them (*g*); but notwithstanding such general liability a corporation or individual may be liable to repair any particular bridge within the borough (*h*).

The powers and duties of the borough with regard to the repair of bridges within it are exercised by the borough council (*i*), and the

A.-G. v. *West Riding of Yorkshire County Council* (1903), 67 J. P. 173; *R.* v. *Machynlleth and Pennegoes* (*Inhabitants*) (1823), 2 B. & C. 166.

(*p*) See the text *infra*.

(*q*) See note (*h*), p. 188, *ante*.

(*r*) *R.* v. *Hendon* (*Inhabitants*) (1833), 4 B. & Ad. 628.

(*s*) *R.* v. *Oxfordshire* (*Inhabitants*) (1812), 16 East, 223; *R.* v. *Stratford-upon-Avon Corporation* (1811), 14 East, 348; *Baker* v. *Greenhill* (1842), 3 Q. B. 148; *R.* v. *Sutton* (1835), 3 Ad. & El. 597; *R.* v. *Middlesex* (*Inhabitants*) (1832), 3 B. & Ad. 201; *R.* v. *Hayman* (1829), 1 Mood. & M. 401; and see further, as to such liabilities, pp. 87 *et seq.*, *ante*.

(*t*) See p. 191, *post*.

(*a*) Local Government Act, 1888 (51 & 52 Vict, c. 41), s. 11.

(*b*) *I.e.*, if so repairable before the Act was passed or before the particular road was made a main road.

(*c*) Formerly a rate in the nature of a county rate was levied under the statutes (1530-31) 22 Hen. 8, c. 5; (1702) 1 Anne, c. 12, and the County Rates Act, 1738 (12 Geo. 2, c. 29). There may be trusts for the repair of public bridges; see p. 130, *ante*. As to county finance, see title LOCAL GOVERNMENT.

(*d*) *I.e.*, if it comes within one of the three exceptions mentioned on pp. 185 *et seq.*, *ante*.

(*e*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 5; *R.* v. *Southampton County* (*Inhabitants*) (1852), 18 Q. B. 841.

(*f*) *I.e.*, "county bridges" in the wider sense of the term; see p. 185, *ante*.

(*g*) See *supra*.

(*h*) See *supra*.

(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 119, re-enacting the Municipal Corporations (Bridges) Act, 1850 (13 & 14 Vict. c. 64); Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34 (2). As to indictments for non-repair, see p. 192, *post*.

SECT. 2. Liability to repair Bridges.

expense is paid out of the borough fund or borough rate or money borrowed on the security thereof (*k*).

Exemption from county contributions.

344. Larger quarter sessions boroughs which have immemorially repaired their own bridges, and were prior to 1888 exempt from contributing towards the cost of maintaining county bridges, are still so exempt (*l*).

Liability to repair as highway authority.

345. Even if a structure in a highway within a borough is not repairable by the council out of the borough fund *qua* public bridge, it may yet be repairable by it in its capacity of highway authority out of another fund; but in a non-county borough the county council must repair any bridge carrying a main road not retained by the urban authority, if it is repairable by the highway authority (*m*).

SUB-SECT. 3.—*Highway Authorities.*

Non-county bridges.

346. Highway authorities are liable to repair as part of the highway any bridge, culvert, or similar structure in a highway repairable by the inhabitants at large which is not a county bridge (*n*), unless the county council is liable on the ground that the highway is a main road (*o*).

Maintenance etc. of roads over county bridges.

347. An urban or rural highway authority (*p*) may, by agreement with the county council (*q*), take on itself the maintenance, repair, cleansing, or watering of any road over any county bridge and the approaches (*r*) thereto, on such terms as may be agreed upon.

Adoption of bridges over canals etc.

Such an authority may also, by agreement with the proprietors of any canal, railway, or tramway, either adopt or maintain any existing or projected bridge, viaduct, or arch within its district over or under any such canal, railway, or tramway, and the approaches (*r*) thereto, as parts of roads repairable by the inhabitants at large (*s*); or itself construct it at the expense of the proprietors or, with the consent of two-thirds of their number, pay any portion of the expenses of such construction or alteration, or of the purchase of any adjoining lands required for the purpose (*t*).

(*k*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 119; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 32 (2). As to borrowing powers, see Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 119 (4); and as to mortgages, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72.

(*l*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 35 (2); *Bury St. Edmunds Corporation* v. *West Suffolk County Council*, [1898] 2 Q. B. 246.

(*m*) See p. 189, *ante*.

(*n*) For definition of highway in the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 5, see p. 8, *ante*.

(*o*) As to which, see p. 189, *ante*.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 148; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25.

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 79 (3).

(*r*) As to the liability to repair roads over and approaches to bridges, see p. 193, *post*.

(*s*) Apparently, therefore, the inhabitants of the parish might be indicted in case of non-repair.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 147; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25. As to the effect of such an agreement where the railway bridge covered by it was subsequently widened by a tramway company, see *Teddington Urban District Council* v. *London and South Western Rail. Co.* (1910), 74 J. P. 119.

SUB-SECT. 4.—*Individuals: Bridges necessitated by Interference with Highways* (*u*).

SECT. 2. **Liability to repair Bridges.**

348. Individuals may be liable to repair bridges by prescription, or statute or *ratione tenuræ* (*a*).

Liability by prescription.

Where individuals have for their private purposes created a necessity for a public (*b*) bridge, *e.g.*, by cutting a canal or drain across an existing highway, or by deepening the water at a ford, and have built (*c*) a bridge in order to enable the public to exercise the right of passage, they must maintain and repair it, at any rate until they abandon their operations and restore the highway to its original condition (*d*). This liability is usually expressly imposed and defined, in the case of a statutory undertaking, by the undertakers' special Act; but, apart from any special provision, the liability both to build (*e*) and maintain a bridge attaches where the highway is interrupted, or rendered seriously inconvenient (*f*), either with or without statutory authority (*g*). Subsequent user by the public, being compulsory, cannot have the effect of adopting the bridge as a county bridge (*h*); but a mere plausible hypothesis that a bridge was probably made in such circumstances, without definite evidence to support it, is not sufficient to rebut the presumptive liability of the county (*i*).

Bridges necessitated by interference with highways.

Toll bridges.

349. If a statute authorises an individual to erect a bridge over a river and to take tolls, and also while the bridge is being rebuilt or repaired to establish a ferry and take tolls, he cannot allow the

(*u*) As to railway bridges and level crossings, see title RAILWAYS AND CANALS.

(*a*) See p. 189, *ante*.

(*b*) As to the liability of a canal company to erect private or occupation bridges, see *Birmingham Canal Navigation* (*Proprietors*) v. *Hickman* (1892), 56 J. P. 598, C. A.

(*c*) In *R.* v. *Kerrison* (1815), 3 M. & S. 526, there was no evidence as to who built the bridge, but it had been repaired by the proprietors of the navigation who took tolls from vessels.

(*d*) *R.* v. *Kerrison*, *supra*; *R.* v. *Kent* (*Inhabitants*) (1811), 13 East, 220; *R.* v. *Lindsey Parts* (*Inhabitants*) (1811), 14 East, 317; *R.* v. *Isle of Ely* (*Inhabitants*) (1850), 15 Q. B. 857; *Manley* v. *St. Helens Canal and Rail. Co.* (1858), 2 H. & N. 840; *Caledonian Railway* v. *Glasgow Corporation*, [1909] A. C. 138. *Semble*, the liability attaches to successive owners of the undertaking or lands benefited by the operations.

(*e*) See *R.* v. *Kerrison*, *supra*, and *R.* v. *Isle of Ely* (*Inhabitants*), *supra*, where apparently there was no express statutory direction upon the point.

(*f*) *R.* v. *Kent* (*Inhabitants*) (1814), 2 M. & S. 513 (as to which see *R.* v. *Kerrison*, *supra*, and *R.* v. *Isle of Ely* (*Inhabitants*), *supra*), must apparently be explained on the ground that the ford was previously an inconvenient one and was only made slightly more inconvenient. *Semble*, therefore, in any particular case it may be a question whether the public have received such a benefit as would justify the bridge being treated as a county bridge.

(*g*) At the present time such an interference with a highway without statutory powers could hardly be possible; but "if a man erect a mill . . . and make a new cut . . . and a bridge over it . . . this bridge ought to be repaired by him who has the mill and not by the county" (*R.* v. *Stratford* (*Prior*) (1314), 1 Roll. Abr. 368, questioned in *R.* v. *Kent* (*Inhabitants*) (1814), 2 M. & S. 513; but supported in *R.* v. *Isle of Ely* (*Inhabitants*), *supra*).

(*h*) See *R.* v. *Isle of Ely* (*Inhabitants*), *supra*.

(*i*) *A.-G.* v. *West Riding of Yorkshire County Council* (1903), 67 J. P. 173.

SECT. 2. Liability to repair Bridges.

bridge to remain permanently impassable and yet take ferry tolls, but must either repair it or abandon his enterprise (*j*).

Swing bridges over canal.

350. A canal company erecting swing bridges to carry a highway over its canal must see that such bridges are not kept open for an unreasonably long time (*k*), and that while they are properly open the public run no danger of walking unawares into the canal (*l*).

SUB-SECT. 5.—*Enforcement of Liability.*

Remedy for non-repair.

351. The ordinary remedy in case of non-repair of a public bridge or its approaches is an indictment at common law (*m*); but if the liability be in dispute, it may be determined in an action at the suit of the Attorney-General (*n*). A single justice may also, either on his own view or on information, still present at quarter sessions a county bridge insufficiently repaired (*o*). In a county the indictment should be against the council (*p*), in a county borough against the corporation (*q*), and in other boroughs against the inhabitants, except of course where the liability is upon the corporation (*r*).

Damage due to non-repair.

352. No action will lie against a county council, a county surveyor, or the inhabitants of a county in respect of damage due to the non-repair of a county bridge (*s*).

SECT. 3.—*Extent of Repair.*

SUB-SECT. 1.—*Rebuilding.*

Duty to repair extends to rebuilding but not widening.

353. The duty to repair a county bridge extends to rebuilding it, if necessary, even though it be completely destroyed by natural causes (*t*), but not to widening it, even though it be dangerously

(*j*) *Nicholl* v. *Allen* (1862), 1 B. & S. 916, 934, Ex. Ch. As to tolls generally, see p. 62, *ante;* and as to ferry tolls, title FERRIES, Vol. XIV., p. 560.

(*k*) *Wiggins* v. *Boddington* (1828), 3 C. & P. 544.

(*l*) *Manley* v. *St. Helens Canal and Rail. Co.* (1858), 2 H. & N. 840.

(*m*) Either at assizes or sessions (stat. (1530-1531) 22 Hen. 8, c. 5, s. 1). A grand jury can no longer "present" a bridge except by indictment (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 78 (3)). As to indictments and other common law remedies, see further, p. 138, *ante*. If the obligation to repair is *bonâ fide* disputed the indictment may be removed into the King's Bench Division (see stat. (1694) 5 & 6 Will. & Mar. c. 11, s. 5; *R.* v. *Hampshire (Justices)* (1834), 3 Dowl. 47), and the provision in the stat. (1702) 1 Anne, c. 12, s. 5, that no indictment for not repairing bridges shall be removed by *certiorari* does not prevent a change of venue (*R.* v. *Wilts (Inhabitants)* (1704), Holt (K. B.), 339; *R.* v. *Southampton County (Inhabitants)* (1886), 17 Q. B. D. 424). The statute of Anne does not apply to bridges repairable by a parish or private person (*R.* v. *Hamworth (Inhabitants)* (1731), 2 Stra. 900); nor does it prevent a *certiorari* issuing at the prosecutor's instance (*R.* v. *Cumberland (Inhabitants)* (1795), 6 Term Rep. 194). Any fine imposed is payable to the county and not to the Exchequer (stat. (1702), 1 Anne, c. 12, s. 4).

(*n*) *A.-G.* v. *West Riding of Yorkshire County Council* (1903), 19 T. L. R. 192.

(*o*) *R.* v. *Brecon (Inhabitants)* (1850), 15 Q. B. 813.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 79 (2).

(*q*) *Ibid.*, ss. 34 (1), (2), 79 (2).

(*r*) A municipal corporation liable by prescription, charter, or otherwise to repair a bridge is a private party who "owen" to repair within the stat. (1530-31) 22 Hen. 8, c. 5; see *R.* v. *Oswestry Hundred (Inhabitants)* (1817), 6 M. & S. 361, 365.

(*s*) See p. 133, *ante*, for the distinction between acts of nonfeasance and misfeasance.

(*t*) *R.* v. *West Riding of Yorkshire (Inhabitants)* (1770), 5 Burr. 2594; *R.* v. *Bucks (Inhabitants)* (1810), 12 East, 192. As to a covenant to repair including rebuilding, see *Brecknock Navigation Co.* v. *Pritchard* (1796), 6 Term Rep. 750.

narrow (*u*); and a company required by statute to build and keep in repair a substantial bridge is probably not liable to erect a new bridge sufficient for the heavier traffic of a later period (*v*).

SECT. 3. Extent of Repair.

An obligation to construct or repair a bridge over a highway or canal may entail an obligation to raise the bridge if the land subsides and the highway or canal is properly raised to its original level, thus not leaving sufficient headway (*w*).

Obligation to raise the bridge.

SUB-SECT. 2.—*Repair of Approaches and Roadway.*

354. The liability to repair a county bridge *primâ facie* includes a liability to repair (*x*) the highway on either side forming the approaches thereto (*y*) for a distance of 300 feet from each end of the bridge (*a*), unless it can be proved that other persons are liable by prescription or otherwise to repair such highway (*b*). If, however, the bridge was built, or is to be treated as built (*c*), after 1835 (*d*), and is repairable by a county, or part of a county, the actual surface of the highway leading to and passing over the bridge is repairable by the authority or persons liable to repair such highway before the bridge was erected (*e*); but this provision does not relieve the county of the liability to repair the actual structure of the bridge, or the earthwork, walls, or fences of the raised causeways and raised approaches or the land arches thereof (*f*).

Duty to repair extends to approaches.

Exceptions.

A highway authority may, however, agree with the county council to repair the roadway of and approaches to county bridges (*g*).

The above provision as to repairing 600 feet of highway applies

(*u*) *R.* v. *Devon* (*Inhabitants*) (1825), 4 B. & C. 670, overruling a *dictum* of Lord KENYON, C.J., in *R.* v. *Cumberland* (*Inhabitants*) (1795), 6 Term Rep. 194.

(*v*) *R.* v. *East India Dock Co.* (1888), 53 J. P. 277; but see *Manley* v. *St. Helens Canal and Rail. Co.* (1858), 2 H. & N. 840.

(*w*) *Glamorganshire Canal Navigation Co.* v. *Rhymney Rail. Co. and Great Western Rail. Co.* (1903), 19 T. L. R. 240, C. A.; *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 73 J. P. 477, C. A. (bridges over canals); see further, as to repairs due to subsidence, *Atherton* v. *Cheshire County Council* (1896), 60 J. P. 6, C. A., and p. 61, *ante*.

(*x*) As to raising the level to counteract a subsidence, see *ibid.*

(*y*) *R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1806), 7 East, 588, affirmed *sub nom. West Riding of Yorkshire* (*Inhabitants*) v. *R.* (1813), 5 Taunt. 284, H. L.; *R.* v. *Gloucestershire* (*Inhabitants*) (1829), 8 L. J. (O. S.) (K. B.) 97.

(*a*) Stat. (1530-31) 22 Hen. 8, c. 5, s. 7; *West Riding of Yorkshire* (*Inhabitants*) v. *R.* (1813), 2 Dow, 1, H. L. A county council may thus be liable to repair a length of highway in an adjoining county (*R.* v. *Devon* (*Inhabitants*) (1811), 14 East, 477); if, however, the other county erects a bridge over another stream in such length, that county must itself repair such bridge (*ibid.*). The erection of a county bridge in an ancient highway relieved the parish of its existing liability to repair 600 feet of highway and transferred it to the county (*West Riding of Yorkshire* (*Inhabitants*) v. *R.* (1813), 5 Taunt. 284, *per* Lord ELDON, L.C., at p. 300).

(*b*) See *West Riding of Yorkshire* (*Inhabitants*) v. *R.* (1813), 5 Taunt. 284; and *R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1821), 4 B. & Ald. 623.

(*c*) Bridges in disturnpiked roads which became county bridges by virtue of the Annual Turnpikes Acts Continuance Act, 1870 (33 & 34 Vict. c. 73), s. 12 (see p. 187, *ante*), are to be treated as if built after the passing of the Highway Act, 1835 (5 & 6 Will. 4, c. 50).

(*d*) Or 1836; see note (*k*), p. 84, *ante*.

(*e*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 21.

(*f*) *Ibid.*; *R.* v. *Southampton County* (*Inhabitants*) (1886), 17 Q. B. D. 424.

(*g*) See p. 190, *ante*.

SECT. 3. Extent of Repair.

equally to individuals who are liable to repair the bridge by prescription (*h*) or *ratione tenuræ* (*i*); and the presumption of liability is not rebutted by proof that the parties charged have never repaired more than the actual bridge, and that no repairs are known to have been done to the approaches except by a modern turnpike trust (*k*).

Where, however, persons have been authorised by a comparatively modern statute (*l*) to cut through a highway upon condition of maintaining a bridge, the provision as to repairing 600 feet does not apply; and their liability to maintain and repair the approaches and roadway extends, or is confined, to so much of the highway on each side of the bridge as has been raised or otherwise interfered with by the construction of the bridge (*m*).

Duty to maintain approach and roadway.

355. A statutory obligation to construct a bridge, followed by a provision that the roadway over the same shall be formed and continued of a certain width (not specifying by whom), imposes on the undertakers the duty of maintaining not only the bridge, but also the approach and roadway (*n*).

SECT. 4.—*New Bridges: Improvement of Bridges.*

New bridges.

356. A county council (*o*) may erect new bridges and maintain, repair, and improve them (*p*). It may also contribute half the cost of erecting any bridge, if its surveyor has certified it to be substantially built and proper to be maintained by the county (*q*), and may borrow money for all the above purposes (*r*).

Widening and improvement of bridges.

357. If any bridge or road at the end thereof (*s*), repairable by the county or any hundred therein (*t*), is narrow and incommodious, the county council (*u*) may order it to be widened and improved;

(*h*) *R.* v. *Lincoln Corporation* (1838), 8 Ad. & El. 65.

(*i*) *Hertfordshire County Council* v. *New River Co.*, [1904] 2 Ch. 513.

(*k*) *R.* v. *Lincoln Corporation, supra.*

(*l*) *E.g.*, one since 1600; see *Hertfordshire County Council* v. *New River Co., supra.*

(*m*) *Nottingham County Council* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1894), 71 L. T. 430; *A.-G.* v. *Midland Rail. Co.* (1909), 73 J. P. 337, C. A.; *R.* v. *Staffordshire and Worcestershire Canal Co.* (1901), 65 J. P. 505; *Hertfordshire County Council* v. *New River Co., supra.* But the statute may relieve them of liability, *e.g.*, may direct them to make approaches and maintain them for one year, as in *A.-G.* v. *Oxford Canal Navigation* (1902), 71 L. J. (CH.) 660.

(*n*) *A.-G.* v. *Midland Rail. Co. supra*; compare *Caledonian Railway* v. *Glasgow Corporation*, [1909] A. C. 138. As to repairs of approaches, see p. 193, *ante.*

(*o*) Or county borough council.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 6, 34. The common law imposes no obligation on the inhabitants of a county to erect a bridge where there was none before (*R.* v. *Devon* (*Inhabitants*) (1825), 4 B. & C. 670).

(*q*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 22; Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 11, 34.

(*r*) County Bridges Loans Extension Act, 1880 (43 & 44 Vict. c. 5), s. 2, subject to the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 69.

(*s*) As to the liability to repair approaches to county bridges, see p. 193, *ante.*

(*t*) Bridges Act, 1814 (54 Geo. 3, c. 90), s. 2.

(*u*) Formerly the quarter sessions. Borough councils have similar powers in the case of borough bridges; see note (*i*), p. 189, *ante.*

SECT. 4. New Bridges: Improvement of Bridges.

and, if it is so decayed that it is necessary or expedient to take it down, the county council may order it to be rebuilt either on the old site or on any more convenient one within two hundred yards (*a*).

The county council may, if necessary for any of the above purposes, acquire any land (not exceeding an acre for each bridge) or buildings (*b*), by agreement (*c*) with the owners and persons interested (*d*), either for a lump sum or an annual rent; and in default of agreement, or if the owners cannot be found, compensation for the land and damage must be assessed by a jury at quarter sessions (*e*).

A county council has also a general power to purchase land, and to borrow money for the purpose; and it may acquire compulsory powers by means of a provisional order (*f*).

Combination of authorities for bridge and highway improvements.

The council of an administrative county (*g*) and highway authorities have the same power of entering into agreements (*h*) with each other and with the council of an adjoining county, in relation to the construction, alteration, improvement (*i*), or freeing from tolls of any bridge (*k*) or its approaches, as they have in the case of main roads and other highways (*l*).

Where original liability is transferred to county.

358. Where a bridge repairable by individuals or by a parish or township has been widened or rebuilt (but not by the county), questions have arisen as to whether the original liability to repair

(*a*) Bridges Act, 1803 (43 Geo. 3, c. 59), s. 2. At common law there was no power to alter the site of a county bridge (*R.* v. *Wilts* (*Inhabitants*) (1704), Holt (K. B.), 339).

(*b*) Bridges Act, 1740 (14 Geo. 2, c. 33); Bridges Act, 1814 (54 Geo. 3, c. 90), s. 1.

(*c*) The agreement must now be made with the council and not the surveyor (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 79).

(*d*) As to trustees and guardians, see note (*e*), *infra*.

(*e*) Bridges Act, 1803 (43 Geo. 3, c. 59), s. 2. No presentment by a jury is now necessary (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 78 (3)). The Bridges Act, 1803 (43 Geo. 3, c. 59), s. 2, incorporates the provisions of stat. (1773) 13 Geo. 3, c. 78, ss. 16, 18, as to procedure at quarter sessions, sales by corporations and other incapacitated persons etc., which are practically re-enacted by the Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 82, 83 (see note (*b*), p. 196, *post*). There appears to be implied power for guardians and trustees to agree as to the compensation to be paid. Apparently also, if a bridge be re-erected on a new site and the highway diverted, compensation will be payable to persons injured by such diversion.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 65, 69.

(*g*) "Administrative county" does not apparently include a county borough; see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100. This provision does not seem to authorise an agreement between highway authorities, unless the county council is also a party.

(*h*) Such an agreement should be under seal; see *Tunbridge Wells Improvement Commissioners* v. *Southborough Local Board* (1889), 60 L. T. 172; and for suitable forms, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 415, 419.

(*i*) A definition of "improvement" is contained in the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 48 (see p. 105, *ante*), and in the Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47) (see note (*t*), p. 106, *ante*).

(*k*) A bridge constructed under this provision under the superintendence of the county surveyor will apparently become a county bridge, at any rate if the highway authority does not covenant to repair it.

(*l*) Highways and Bridges Act, 1891 (54 & 55 Vict. c. 63), s. 3; and see pp. 188 *et seq.*, *ante*; and as to forms, see note (*h*), *supra*.

SECT. 4. New Bridges: Improvement of Bridges.

it remained or was transferred to the county. Alterations carried out by persons other than those liable to repair the original bridge (*e.g.*, by turnpike trustees) cannot increase the liability of the persons originally liable, who are discharged altogether if a new bridge of an entirely different character is substituted (*m*), and remain liable *pro rata* if the bridge is merely widened (*n*), the new bridge or added portion becoming repairable by the county (*o*). Where the persons liable to repair the bridge themselves effect alterations, it is a question of fact whether the resulting bridge is substantially the same or not. If so, the private liability to repair continues, at any rate *pro rata* (*p*); if not, it is extinguished (*q*); and so far as it does not continue, the liability of the county attaches (*o*).

Conveyance by Office of Works.

359. The Commissioners of Works may convey to a bridge authority (*r*) willing and able to accept such a conveyance any bridge (*s*) under their management, and any land required for the purpose of widening or improving any bridge (*s*), either unconditionally or upon such terms as may be agreed upon (*t*).

Construction and maintenance by Road Board.

360. The Road Board has the same powers of constructing and maintaining, and of contributing to the construction or improvement of, bridges and viaducts as it has in the case of roads (*u*).

SECT. 5.—*Miscellaneous.*

SUB-SECT. 1.—*The County Surveyor.*

Powers in respect of county bridges and the approaches thereto.

361. The county surveyor, who is appointed by the county council (*a*), has, in respect of county bridges and the approaches thereto, all the powers, authorities, and duties given by the Highway Acts of 1773 (*b*) and 1835 (*c*) to surveyors of highways in

(*m*) *R.* v. *Surrey* (*Inhabitants*) (1810), 2 Camp. 455; compare *R.* v. *Barker* (1890), 25 Q. B. D. 213, C. A.; *R.* v. *Pickering* (1877), 41 J. P. 564.

(*n*) *R.* v. *Middlesex* (*Inhabitants*) (1832), 3 B. & Ad. 201 (where turnpike trustees bolted a wooden footbridge to a carriage bridge repairable *ratione tenuræ*); *R.* v. *Buckingham County* (1878), 43 J. P. 175 (where they added new arches at the end of a bridge so repairable).

(*o*) Unless prevented from so becoming by the Bridges Act, 1803 (43 Geo. 3, c. 59); see p. 187, *ante*. See also *Macclesfield Corporation* v. *Great Central Rail. Co.* (1911), 103 L. T. Jo. 547, C. A. (voluntary expenditure by county council on roadway repairable by defendants).

(*p*) *R.* v. *Adderbury East* (*Inhabitants*) (1843), 5 Q. B. 187. If the widening is comparatively insignificant, and merely a mode of repair, *semble*, the private liability extends to the whole of the widened bridge (*ibid.*). If a footbridge is enlarged to a carriage bridge, the liability of those who formerly repaired the footbridge remains *pro rata* (*R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1787), 2 East, 353, n.).

(*q*) As where a footbridge is entirely pulled down and a carriage bridge substituted (*R.* v. *West Riding of Yorkshire* (*Inhabitants*) (1770), 5 Burr. 2594).

(*r*) *I.e.*, any local authority having the duty of the care and maintenance of bridges.

(*s*) Including approaches and abutments.

(*t*) Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 6.

(*u*) As to these powers see p. 28, *ante*.

(*a*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (x); stat. (1530-31) 22 Hen. 8, c. 5, s. 1.

(*b*) Stat. (1773) 13 Geo. 3, c. 78, which for this purpose is still in force (*R.* v. *Merionethshire* (*Inhabitants*) (1844), 6 Q. B. 343): these powers are practically identical with those of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), which otherwise repealed the former Act.

(*c*) 5 & 6 Will. 4, c. 50.

relation to getting materials, and the prevention and removal of nuisances and annoyances (*d*).

SUB-SECT. 2.—*Materials.*

Materials for repair of bridges.

362. The county surveyor or any person under contract for the rebuilding or repair of any county or hundred bridge, with the consent and by the order (*e*) of two justices, may also obtain the necessary stone from any quarry in the county to which the bridge belongs, and must pay compensation for the value of the stone and the damage done, such compensation, unless agreed, to be ascertained by a jury at quarter sessions. But, unless with the owner's consent, no stone may be taken from a garden, avenue, park, or inclosed plantation, or from land which has ornamental timber trees growing thereon (*f*).

SUB-SECT. 3.—*Contracts and Conveyances.*

Contracts for repair.

363. The county council may contract with any person for maintaining and keeping in repair any county or hundred bridge and its approaches for any term not exceeding seven years nor less than one year (*g*).

Form of contracts and conveyances.

364. Where any statute prior to the 13th August, 1888, provides for a conveyance being made to, or a contract being made in the name of, the county surveyor, such conveyance or contract must now be made to or with the county council (*h*).

SUB-SECT. 4.—*Property in Tools and Materials.*

Property in tools etc.

365. All tools and materials are now vested in the county council (*i*), and it may sue for any damage done to bridges and other works maintained at the expense of the county, and to recover any property belonging to the county (*k*).

SUB-SECT. 5.—*Tolls.*

Tolls.

366. There are certain bridges for the passage of which tolls may be taken (*l*).

(*d*) These powers are conferred by the Bridges Act, 1803 (43 Geo. 3, c. 59), s. 1, and the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 22. See *R.* v. *Merionethshire* (*Inhabitants*) (1844), 6 Q. B. 343; *R.* v. *Brecon* (*Inhabitants*) (1850), 15 Q. B. 813, as to these provisions remaining in force.

(*e*) Against which an appeal lies to quarter sessions (Bridges Act, 1815 (55 Geo. 3, c. 143), s. 4).

(*f*) *Ibid.*, s. 1. The procedure is prescribed by ss. 1, 3, *ibid.*

(*g*) County Rates Act, 1738 (12 Geo. 2, c. 29), s. 14; Bridges Act, 1812 (52 Geo. 3, c. 110), s. 5; Bridges Act, 1815 (55 Geo. 3, c. 143), s. 5.

(*h*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 79 (3).

(*i*) Bridges Act, 1803 (43 Geo. 3, c. 59), s. 3; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 64.

(*k*) Bridges Act, 1803 (43 Geo. 3, c. 59), s. 4 (the county council and not the surveyor (as under the Act of 1803) should now bring the action); see *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, C. A., for an instance of an action in respect of damage to a county bridge. As to the property in the materials of a bridge erected and repaired by an individual, see *Harrison* v. *Parker* (1805), 6 East, 154.

(*l*) As to tolls on highways and bridges, see p. 62, *ante.*

SECT. 6. Bridges in South Wales.

SECT. 6.—*Bridges in South Wales.*

Bridges in South Wales.

367. Prior to the 1st April, 1889, the Highways and Locomotives (Amendment) Act, 1878 (*m*), did not apply to the six counties of South Wales (*n*); but the bridges in that district were regulated by the similar provisions of the South Wales Bridges Act, 1881 (*a*).

Part XIV.—Interference with Highways under Statutory Powers.

Statutory powers to break up highways.

368. By various statutes powers are given to local authorities, companies, undertakers and private individuals to break up, obstruct, and interfere with highways and bridges for the purpose of works of public utility (*b*), such as electric wires and mains (*c*), gas pipes (*d*), the construction and working of railways (*e*), sewers and drains (*f*), telegraph or telephone wires (*g*), light railways, tramways (*h*), and water pipes (*i*).

Part XV.—Streets.

SECT. 1.—*Metropolitan.*

SUB-SECT. 1.—*Statutes, Authorities and Areas.*

Principal statutes.

369. In the metropolis (*k*) the principal statutes relating to streets are the Metropolitan Paving Act, 1817 (*l*) (commonly known

(*m*) 41 & 42 Vict. c. 77.

(*n*) *Ibid.*, s. 2; and see now Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 13, 109 (1). As to highways in South Wales, see p. 31, *ante*.

(*a*) 44 & 45 Vict. c. 14.

(*b*) For appropriate forms of agreement for such works, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 421, 426, 428.

(*c*) See title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 564, 570 *et seq.*

(*d*) See title GAS, Vol. XV., pp. 307 *et seq.*, pp. 325 *et seq.*

(*e*) See title RAILWAYS AND CANALS.

(*f*) See title SEWERS AND DRAINS.

(*g*) See title TELEGRAPHS AND TELEPHONES.

(*h*) See title TRAMWAYS AND LIGHT RAILWAYS.

(*i*) See title WATER SUPPLY.

(*k*) This title does not deal with the law applicable to the City of London (see p. 199, *post*) or certain special areas, *i.e.*, Westminster Cathedral Close, Lincoln's Inn, Gray's Inn, Staple Inn, Furnival's Inn, the Charterhouse and Liberty of Saffron Hill, Hatton Garden, Ely Rents, and Ely Place. As to these, see Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 146; Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 237, Sched. C; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76); London Government Act, 1899 (62 & 63 Vict. c. 14), and schemes made thereunder; see also title METROPOLIS.

(*l*) 57 Geo. 3, c. xxix. As to the implied repeal of certain provisions of this Act, see *Fortescue* v. *St. Matthew, Bethnal Green, Vestry*, [1891] 2 Q. B. 170; *Gard* v. *City of London Sewers Commissioners* (1885), 28 Ch. D. 486, C. A. There has been no general repeal, express or implied (*Wyatt* v. *Gems*, [1893] 2 Q. B. 225).

SECT. 1. Metropolitan.

Areas and authorities for executing.

Saving clauses and exemptions.

as Michael Angelo Taylor's Act), the Metropolis Management Acts, 1855, 1862, 1890 (2) (*m*), the Public Health (London) Act, 1891 (*n*), the London Building Act, 1894 (*o*), and the various "General Powers" Acts of the London County Council. The authorities concerned with the execution of these statutes are the London County Council (*p*) and the councils of the various metropolitan boroughs (*q*). These statutes contain a number of saving clauses (*r*) in favour of (*inter alia*) markets (*s*), railway, canal, dock, gas, and electricity companies (*t*), gardens in squares (*a*), the Commissioners of Works (*b*), the Crown and Government buildings (*c*), the London Education Authority (*d*) and other local authorities (*e*), the Inns of Court (*f*), and certain public or *quasi*-public or historical buildings (*g*). Where the provisions of these statutes conflict with those of a special Act authorising works, the special Act in general prevails (*h*). The City of London forms the subject-matter of

(*m*) 18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102; 53 & 54 Vict. c. 54; 53 & 54 Vict. c. 66.

(*n*) 54 & 55 Vict. c. 76.

(*o*) 57 & 58 Vict. c. ccxiii., as amended by later Acts.

(*p*) As successors to the Metropolitan Board of Works; see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40.

(*q*) As successors to the vestry or district board of works (as the case might be); in Woolwich, which until 1899 was extra-metropolitan, as successors to the local board of health (London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4, 19, 23).

(*r*) As to old saving clauses operating in favour of modern authorities, see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 210.

(*s*) *Ibid.*, s. 91; *Horner* v. *Whitechapel District Board of Works* (1885), 53 L. T. 842, C. A.

(*t*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 34, 35; London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 13 (6), 20, 31, 203, 205; London Building Act (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), ss. 3 (4), 9. As to these, see *London County Council* v. *Coal Co-operative Society, Ltd.* (1907), 72 J. P. 68; *South Eastern and Chatham Rail. Cos.* (*Managing Committee*) v. *London County Council* (1907), 71 J. P. 260; *Elliott* v. *London County Council*, [1899] 2 Q. B. 277; *Coole* v. *Lovegrove*, [1893] 2 Q. B. 44; *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Barnsley Union Guardians* (1892), 67 L. T. 119; *North Kent Rail. Co.* v. *Badger* (1858), 27 L. J. (M. C.) 106.

(*a*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 239.

(*b*) *Ibid.*, ss. 240, 241.

(*c*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 202; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 116, 117; *Drury* v. *Rickard* (1899), 63 J. P. 374.

(*d*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 21; *London County Council* v. *London School Board*, [1892] 2 Q. B. 606; *London County Council* v. *District Surveyors' Association and Willis*, [1909] 2 K. B. 138; *Marsland* v. *Wallis & Sons* (1900), 65 J. P. 166; *Galbraith Brothers* v. *Dicksee* (1910), 74 J. P. 348.

(*e*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss 6, 13 (5), 213.

(*f*) *Ibid.*, s. 204.

(*g*) *Ibid.*, ss. 191, 201.

(*h*) See *London and Blackwall Rail. Co.* v. *Limehouse District Board of Works* (1856), 3 K. & J. 123; *City and South London Rail. Co.* v. *London County Council*, [1891] 2 Q. B. 513, C. A.; *London County Council* v. *Wandsworth and Putney Gas Co.* (1900), 64 J. P. 500; *Surrey Commercial Dock Co.* v. *Bermondsey Corporation*, [1904] 1 K. B. 474; *Moran & Son, Ltd.* v. *Marsland*, [1909] 1 K. B. 744; and cases in notes (*t*) and (*d*), *supra*.

SECT. 1. Metropolitan.

certain exceptions in the general code and also of several special enactments (*i*).

SUB-SECT. 2.—*Vesting, Control, Repair and Improvement of Streets, Bridges and Embankments.*

Vesting and control of streets.

370. All streets which are highways and the materials thereof and all property relating thereto are vested in and under the control of the council of the metropolitan borough (*k*), which has the powers and duties of surveyors of highways (*l*). If a borough boundary divides a street, the whole of such street may, by order of the county council, be put under the charge of one of the councils concerned, the expenses being apportioned between them (*m*). There are now, for practical purposes at any rate, no main roads in the County of London (*n*).

Repair of streets.

371. A borough council has wide discretionary powers as to paving streets in such way and with such materials as it thinks fit, altering levels, width of carriage and foot ways, gas and water pipes, channels and ditches etc. (*o*), and it may by notice in writing adopt (subject to objection) any street which it considers ought to be repairable at the public expense (*p*). A borough council and the

(*i*) For the statutory provisions applicable to the City (including the Inner Temple and the Middle Temple), see the City of London Sewers Acts, 1848 (11 & 12 Vict. c. clxiii.), 1851 (14 & 15 Vict. c. xci.), 1897 (60 & 61 Vict. c. cxxxiii.); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 99; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 22; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 73; London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 4, 30, 104, 135, 165, 199.

(*k*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 90, 96; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 71.

(*l*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 96; Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), ss. 6—9.

(*m*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 140, 160; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 86; and see *R.* v. *Strand Board of Works* (1863), 4 B. & S. 526; *St. Giles, Camberwell, Vestry* v. *Greenwich District Board of Works* (1887), 19 Q. B. D. 502; *Shoreditch Borough Council* v. *Wakeham* (1904), 69 J. P. 239.

(*n*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6 (1); *R.* v. *Local Government Board, Ex parte Hackney Borough Council* (1908), 72 J. P. 211; Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 10 (2). But *semble* the county council could create new main roads for the maintenance of which it would be responsible; see London County Council (General Powers) Act, 1896 (59 & 60 Vict. c. clxxxviii.), s. 31.

(*o*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 52; Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 87, 98; and see *Corsellis* v. *London County Council*, [1908] 1 Ch. 13, C. A.; *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*, [1898] 2 Ch. 603, C. A; *Tutill* v. *West Ham Board of Health* (1873), L. R. 8 C. P. 447 The word "pave" "includes the formation of the roadway or footway in any street" (Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 112; compare *Hampstead Vestry* v. *Hoopel* (1885), 15 Q. B. D. 652).

(*p*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 106; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 80; *St. George the Martyr, Southwark, Vestry* v. *Pethebridge* (1867), 31 J. P. 279. But, of course, in such a case the council may be able in the first instance to pave it at the frontagers' expense as a "new street"; see p. 201, *post.*

SECT. 1. Metropolitan.

County Council have power to close streets during the execution of authorised works (*q*).

Bridges and embankments.

372. The County Council may make bye-laws for the management and regulation of certain bridges and embankments (*r*); and, where the roadway or footway of a bridge or embankment is repairable by it, may require the borough council to repair it in return for an annual contribution (*s*).

Improvement and widening of streets and bridges.

373. A borough council has statutory powers (either alone or in conjunction with another borough council or the County Council) to widen and improve streets (including canal bridges) and to acquire land compulsorily for the purpose (*t*). The County Council has also statutory powers for improving "through" communication (*u*).

Advances by Road Board.

374. The Road Board may make advances to a borough council or the County Council in respect of the construction of new roads or the improvement of existing roads: in this case also land may be acquired compulsorily (*x*).

SUB-SECT 3.—*Paving New Streets.*

Paving new streets.

375. If a new street (*y*) or part thereof is not paved to the satisfaction of the borough council, it is its duty (*a*) to pave (*b*) it and apportion the cost amongst the owners of the houses forming the street and of the land bounding or abutting on it (*c*). The

(*q*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 21, 84; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6 (3).

(*r*) Metropolitan Board of Works (Various Powers) Act, 1882 (45 & 46 Vict. c. lvi.), s. 41; London County Council (General Powers) Act, 1892 (55 & 56 Vict. c. ccxxxviii.), s. 40.

(*s*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6 (2). It is then to be regarded as vested in the borough council.

(*t*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), ss. 80—96. See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 8, 172; *Wild* v. *Woolwich Borough Council*, [1909] 2 Ch. 287, affirmed, [1910] 1 Ch. 35, C. A.; *Green* v. *Hackney Corporation*, [1910] 2 Ch. 105; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 72, 100.

(*u*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 144.

(*x*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), ss. 7—15. The term "roads" includes bridges, viaducts, and subways (*ibid.*, s. 8 (5)). As to the term "improvement," see note (*t*), p. 106, *ante*.

(*y*) As to what is a "new street" for this purpose, see p. 20, *ante*.

(*a*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 105; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77. If the street is in fact a "new street," it is illegal not to enforce the liability of the owners (*A.-G.* v. *Wandsworth District Board of Works* (1877), 6 Ch. D. 539; *Dryden* v. *Putney Overseers* (1876), 1 Ex. D. 223).

(*b*) As to what the term "pave" includes, see note (*o*), p. 200, *ante*; and *Wandsworth Borough Council* v. *Golds*, [1911] 1 K. B. 60.

(*c*) As to what houses or lands "form" or "abut" on the street, see *London School Board* v. *St. Mary, Islington* (1875), 1 Q. B. D. 65; *Wright* v. *Ingle* (1885), 16 Q. B. D. 379, C. A.; *Caiger* v. *St. Mary, Islington, Vestry* (1881), 45 J. P. 570. Compare *Baddeley* v. *Gingell* (1847), 1 Exch. 319; *Paddington Vestry* v. *Bramwell* (1880), 44 J. P. 815; *Williams* v. *Wandsworth Board of Works* (1884), 13 Q. B. D. 211; *Hampstead Borough Council* v. *Western* (1907), 71 J. P. 565; *Elsdon* v. *Hampstead Corporation*, [1905] 2 Ch. 633; *Pound* v. *Plumstead Board of Works* (1871), L. R. 7 Q. B. 183; *Plumstead Board of Works* v. *British Land Co.* (1875), L. R. 10 Q. B. 203, Ex. Ch.; *Dodd* v. *St.*

SECT. 1. Metropolitan.

council is the judge of the necessity for the work (*d*): it cannot pave a street more than once at the expense of the frontagers (*e*); but it may pave the footway and roadway at different times (*f*), or deal with a street in lengths (*g*). If thought fit, it may recover the estimated expenses before the work is begun, or may wait until it is finished (*h*). The apportionment must be made upon the owners on both sides of the street (*i*) except where a strip of land added to an old street is itself treated as a new street (*k*); it is not to be made on any particular basis, but the council must exercise an honest discretion as to the share which each owner ought to bear (*l*). Apportioned sums may be recovered summarily or by action (*m*) from the owner at the time being or from any future owner of the premises. The liability is a personal one upon successive owners (*n*), and creates no charge upon the premises (*o*).

Pancras Vestry (1869), 34 J. P. 517; and see, also, pp. 216, 217, *post*. The Crown (see p. 219, *post*) and owners of property which is *extra commercium* (see p. 218, *post*) are not liable.

(*d*) *R.* v. *Marsham*, [1892] 1 Q. B. 371, C. A.; *Stroud* v. *Wandsworth District Board of Works*, [1894] 2 Q. B. 1, C. A.; *Chelsea Vestry* v. *Evans* (1870), 34 J. P. 404; 35 J. P. 23.

(*e*) *R.* v. *Hackney Board of Works* (1873), L. R. 8 Q. B. 528, and cases cited in notes (*f*) and (*g*), p. 22, *ante*.

(*f*) *St. Mary, Islington, Vestry* v. *Barrett* (1874), L. R. 9 Q. B. 278. Compare *Wilson* v. *St. Giles, Camberwell*, [1892] 1 Q. B. 1.

(*g*) See *Whitchurch* v. *Fulham Board of Works* (1866), L. R. 1 Q. B. 233.

(*h*) The council makes the apportionment (but see *St. Helen's Corporation* v. *Riley* (1883), 47 J. P. 471), and its surveyor estimates or ascertains the cost. In the former case there will be an adjustment of accounts after completion, as to which see *St. Mary Vestry, Islington* v. *Goodman* (1894), 58 J. P. 703. The expenses include the cost of paving at the intersection of streets and incidental out-of-pocket expenses (Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77; *Bridgett* v. *Wandsworth Corporation* (1905), 69 J. P. 394; *Ballard* v. *Wandsworth Borough Council* (1906), 70 J. P. 331; *Poplar Board of Works* v. *Love* (1874), 29 L. T. 915). As to the "surveyor," see *Kendal* v. *Lewisham Borough Council* (1903), 67 J. P. 236, settled 20 T. L. R. 21, C. A.; and as to proof of his estimate, see *Hobman* v. *Greenwich Board of Works* (1894), 58 J. P. 349.

(*i*) *Mile End Vestry* v. *Whitechapel Union* (1876), 1 Q. B. D. 680, C. A.

(*k*) *Property Exchange, Ltd.* v. *Wandsworth Board of Works*, [1902] 2 K. B. 61, C. A.; *White* v. *Fulham Vestry* (1896), 60 J. P. 327.

(*l*) *Stotesbury* v. *St. Giles Vestry* (1888), 59 L. T. 473; *London School Board* v. *St. Mary, Islington* (1875), 1 Q. B. D. 65; *Metropolitan District Rail. Co.* v. *Fulham Vestry*, [1895] 2 Q. B. 443, C. A.; *Ballard* v. *Wandsworth Borough Council, supra*; *Chelsea Vestry* v. *Evans* (1871), 34 J. P. 404; *Davis* v. *Greenwich District Board of Works*, [1895] 2 Q. B. 219, C. A.; *Nesbitt* v. *Greenwich Board of Works* (1875), L. R. 10 Q. B. 465.

(*m*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77; *Hampstead Corporation* v. *Caunt*, [1903] 2 K. B. 1. As to the court's jurisdiction, see *R.* v. *Marsham, supra*; *Ballard* v. *Wandsworth Borough Council, supra*; *Scott* v. *Lowe* (1902), 66 J. P. 520; *Chelsea Vestry* v. *Evans, supra*; *Stroud* v. *Wandsworth District Board of Works*, [1894] 2 Q. B. 1, C. A.; *Wandsworth Borough Council* v. *Golds*, [1911] 1 K. B. 60. As to a demand and the period of limitation, see *Hampstead Corporation* v. *Caunt, supra*, at p. 3, n. (5); *Marr* v. *Greenwich Board of Works* (1880), 44 J. P. 424; *Wortley* v. *St. Mary Islington, Vestry* (1886), 51 J. P. 166; *Bradley* v. *Greenwich Board of Works* (1878), 3 Q. B. D. 384; *Prescott* v. *Nicholson* (1889), 53 J. P. 597.

(*n*) *Bermondsey Vestry* v. *Ramsey* (1871), L. R. 6 C. P. 247; compare *Blackburn Corporation* v. *Micklethwait* (1886), 50 J. P. 550.

(*o*) *Egg* v. *Blayney* (1888), 21 Q. B. D. 107; *Allum* v. *Dickinson* (1882),

There are also provisions as to payment by instalments (*p*), and as to demanding payment from the tenants of the person liable (*q*).

Invalid apportionment.

376. If an incorrect or illegal apportionment is made, it would seem that the council may rescind it and make a valid one (*r*). If an apportionment has been duly made upon the persons properly chargeable, no court can question it in the absence of *mala fides* (*s*); but if some owners are wrongly omitted, an aggrieved owner may assail it (*t*), or rely upon the omission as a defence to a claim against himself (*u*). An owner who on being summoned pays his apportionment cannot recover it on discovering that he was not liable (*v*).

SUB-SECT. 4.—*Temporary Repairs to Private Streets.*

Temporary repairs.

377. A borough council may from time to time do necessary repairs to any carriage road which has been used for public traffic for six months but is not repairable by it, and may recover the expenses from the frontagers. By so doing it does not prejudice its power to pave the street subsequently as a "new street" (*a*).

SUB-SECT. 5.—*Flagging and Paving of Footways, Courts etc.*

Flagging footways,

378. In certain cases the cost of flagging a footway may (*b*) be apportioned upon the owners of houses and land abutting upon the road in which such footway is situate (*c*).

Paving courts etc.

379. When any court, passage, or place, not being a thoroughfare, is vested in the owner of any adjoining house, such owner

Q. B. D. 632, C. A. *Semble, Bermondsey Vestry* v. *Ramsey* (1871), L. R. 6 C. P. 247, and *Plumstead Board of Works* v. *Ingoldby* (1873), L. R. 8 Exch. 63, 174, Ex. Ch., are not authorities to the contrary.

(*p*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77.

(*q*) *Ibid.*, ss. 96, 97. As to their effect, see *Ryan* v. *Thompson* (1868), L. R. 3 C. P. 144; *Skinner* v. *Hunt*, [1904] 2 K. B. 452, C. A.

(*r*) *Hampstead Borough Council* v. *Western* (1907), 71 J. P. 565; *Property Exchange, Ltd.* v. *Wandsworth Board of Works*, [1902] 2 K. B. 61, C. A.; *Elsdon* v. *Hampstead Corporation*, [1905] 2 Ch. 633; *Bishop* v. *Wandsworth District Board of Works* (1900), 64 J. P. 630. As to the form of an apportionment, see *Elsdon* v. *Hampstead Corporation, supra.*

(*s*) See cases cited in note (*l*), p. 202, *ante*; *Elsdon* v. *Hampstead Corporation, supra*; *Davis* v. *Greenwich District Board of Works*, [1895] 2 Q. B. 219, C. A.; *R.* v. *Marsham*, [1892] 1 Q. B. 371, C. A.; *Nesbitt* v. *Greenwich Board of Works* (1875), L. R. 10 Q. B. 465.

(*t*) *Elsdon* v. *Hampstead Corporation, supra.*

(*u*) *St. Mary, Islington, Vestry* v. *Cobbett*, [1895] 1 Q. B. 369; *Crosse* v. *Wandsworth Board of Works* (1898), 62 J. P. 807.

(*v*) *Moore* v. *Fulham Vestry*, [1895] 1 Q. B. 399, C. A.

(*a*) Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66), s. 3; and see *Ballard* v. *Wandsworth Borough Council* (1906), 70 J. P. 331; *Stroud* v. *Wandsworth District Board of Works*, [1894] 2 Q. B. 1, C. A.; *R.* v. *Garrett*, [1907] 1 K. B. 881, C. A. As to the proviso in favour of railway companies, see cases cited in note (*r*), p. 230, *post.*

(*b*) In manner similar to that described on p. 202, *ante.*

(*c*) Metropolis Management Act, 1862, Amendment Act, 1890 (53 & 54 Vict. c. 54), s. 1; see *Paddington Vestry* v. *North Metropolitan Rail. and Canal Co.*, [1894] 1 Q. B. 633.

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may be required by the borough council to pave and drain it and keep the work in good repair (*d*).

SUB-SECT. 6.—*Closing of Courts and Alleys.*

Closing of courts and alleys.

380. There are statutory provisions under which a borough council may with certain consents obtain an order of justices for stopping up courts, alleys, and places which may be closed without inconvenience to the public, and which from their private and confined situation, and being likely to become harbours or receptacles for filth and rubbish, are noisome and offensive (*e*).

SUB-SECT. 7.—*Miscellaneous.*

Lighting streets.

381. It is the duty of a borough council to light the streets within its borough, providing a sufficient number of lamps in every street, and causing them to be lighted at such times as it thinks necessary (*f*). It is also its duty to keep such streets as are repairable by the inhabitants at large, and the footways thereof, properly swept and cleansed, so far as is reasonably practicable, and to collect and remove therefrom all street refuse, employing either its own scavengers or contractors for the purpose (*g*).

Scavenging

Watering streets.

Crossing sweepers.

Refuges and guard posts.

382. A borough council has power to water, or contract for the watering of, streets and public places within its borough (*h*); to appoint, or join in appointing, crossing sweepers (*i*); to erect refuges in streets for the assistance of persons desiring to cross, and also posts and rails as a protection against carriages and dangerous places

(*d*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 99, 100; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 81; see *Harrison* v. *New Street Mews* (*Owner*), [1906] 1 K. B. 703.

(*e*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 79. As to the effect of this section, see *R.* v. *Cloete* (1890), 64 L. T. 90; an appeal lies to quarter sessions.

(*f*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 130; *R.* v. *St. Mary, Islington, Vestry* (1858), 22 J. P. 383; *Young* v. *St. Mary, Islington, Vestry* (1896), 60 J. P. 821. As to injuries to lamps, see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 206, 207; and Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 90. As to the duty of gas companies in the matter, see Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), ss. 22, 23, and title GAS, Vol. XV., p. 384. As to the whole subject, see titles ELECTRIC LIGHTING AND POWER, Vol. XI., pp. 553 *et seq.*; GAS, Vol. XV., pp. 375 *et seq.*

(*g*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 29, 31, 32, 34, 99, 141. Penalty for default, a sum not exceeding £20 (*ibid.*, s. 29 (2)). As to the sale and disposal of the refuse, see *ibid.*, s. 32; as to nuisances caused by the removal and disposal thereof, see *ibid.*, ss. 21, 22, and ss. 2—14. As to emptying snow into sewers, see London County Council (General Powers) Act, 1894 (57 & 58 Vict. c. ccxii.), s. 15. The duty to cleanse extends as a rule to gullies and gratings communicating with sewers of the County Council (*ibid.*, s. 16). As to borrowing for purposes of refuse collection and disposal, see Public Health (London) Act, 1891, Amendment Act, 1893 (56 & 57 Vict. c. 47), s. 3. As to scavenging and cleansing provisions of general application, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*h*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 77; Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 116.

(*i*) *Ibid.*, s. 118. Crossing sweepers should wear a badge or distinctive dress (*ibid.*). As to shoeblacks and messengers, see title STREET TRAFFIC.

adjoining a street (*k*); to construct sanitary conveniences beneath streets (for which purpose the subsoil of the street is vested in it (*l*)); to plant and protect, or join with other persons in planting and protecting, trees in any highway, provided that the reasonable use of the highway is not impeded, nor a nuisance caused to adjoining owners or occupiers (*m*).

Sanitary conveniences.

Trees.

383. Statues may not be erected in any street, square, or other public place within the metropolitan police district without the written consent of the Commissioners of Works. The Commissioners may themselves, out of public moneys, erect and fence statues in such places, and restore and repair existing public statues, whenever erected (*n*).

Statues.

384. There are statutory provisions regulating the breaking open of streets for the laying or repair of pipes and other purposes, and providing for the repair of damage due to defective pipes or sewers (*o*). A borough council may undertake repairs and maintenance at the expense of the persons breaking open the street (*p*).

Breaking open streets.

There are also provisions requiring the erection of hoardings to protect the public whilst building operations are going on (*q*), or whilst excavations are left open (*r*).

Hoardings.

Areas and cellars, and openings into the same, must be kept securely fenced or covered for the protection of the public (*s*).

Areas and cellars.

(*k*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 58; Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 108.

(*l*) As to sanitary conveniences, public or private, in streets, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 44, 45; London County Council (General Powers) Act, 1909 (9 Edw. 7, c. cxxx.), s. 66; and title PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to making a subway in connection with a convenience, see *Westminster Corporation* v. *London and North Western Railway*, [1905] A. C. 426.

(*m*) London County Council (General Powers) Act, 1904 (4 Edw. 7, c. ccxliv.), s. 49. Notice of the intention to exercise the powers must be given to the occupiers of adjoining premises, and two-thirds of such occupiers can veto the proposal.

(*n*) Public Statues (Metropolis) Act, 1854 (17 & 18 Vict. c. 33).

(*o*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 109—113; see *Metropolitan Water Board* v. *Bradley* (1910), 74 J. P. 331; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 82; Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), ss. 11—23. See also Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15); Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17); Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), and titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 572 *et seq.*; GAS, Vol. XV., pp. 327 *et seq.*; SEWERS AND DRAINS; WATER SUPPLY.

(*p*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), ss. 22, 23, 53; Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 114, 115; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 82; *Commercial Gas Co.* v. *Poplar Borough Council* (1906), 70 J. P. 178; *Metropolitan Water Board* v. *Westminster City Council* (1906), 70 J. P. 52, C. A.; *Metropolitan Water Board* v. *Bradley*, *supra*.

(*q*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 75; Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 121—124 (as to *ibid.*, s. 122, see *Davey* v. *Warne* (1845), 14 M. & W. 199); London County Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), s. 32.

(*r*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 71.

(*s*) *Ibid.*, s. 70.

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Vaults under streets.

385. Vaults, arches, and cellars may only be constructed under any street with the consent of the borough council, and must be constructed substantially and so as not to interfere with drains or sewers except with the consent of the council concerned (*t*). All such vaults, arches, and cellars, and openings into them, must in general be kept in repair by the owners or occupiers of the houses to which they belong (*a*).

Sewers under streets.

386. The County Council and the various metropolitan borough councils may carry their sewers through, across, or under (*inter alia*) any street or place laid out as or intended for a street, or through or under any cellar or vault beneath the pavement or carriage way of any street; and in certain cases they may construct sewers outside the metropolis (*b*).

Subways.

Pipe subways have been constructed under certain London streets. Where they exist, the County Council may in general require pipes and wires to be laid in them instead of in the soil, and may regulate and charge for the use of such subways (*c*). Subways to enable foot passengers to cross streets are constructed under special statutory powers (*d*).

Overhead wires.

The erection of overhead wires over or within 50 feet of any London street is in general regulated by the London Overhead Wires Act, 1891 (*e*). Subject to certain exceptions, it provides for notice of intention to erect such wires, and for their removal or repair should they endanger passengers.

Removal of gates, bars etc.

387. Metropolitan street authorities have no general powers to insist on the removal of gates or bars erected across the entrance to a street or square (*f*); but in the case of certain streets the County Council has acquired special powers to do so (*g*).

(*t*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 101.

(*a*) *Ibid.*, s. 102. If, however, a cellar is not a complete construction in itself with an independent roof, but has for its roof the pavement flags, the council must repair such flags when worn out by the traffic (*Hamilton* v. *St. George, Hanover Square* (1873), L. R. 9 Q. B. 42).

(*b*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 69, 135; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 22, 24, 25, 58. As to the trapping and covering of openings into sewers, see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 71; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 27; and as to making private drains to communicate with sewers, see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 78, 79, and title SEWERS AND DRAINS.

(*c*) Metropolitan Subways Act, 1868 (31 & 32 Vict. c. lxxx.); London County Council (Subways) Act, 1893 (56 & 57 Vict. c. ccii.). As to the meaning of "water company" in this Act, see *London County Council* v. *London Hydraulic Power Co.* (1898), 62 J. P. 229, C. A. It is usual to apply the subway provisions to subways under any new street constructed by the County Council; see the Council's various General Powers, Tramways and Improvements Acts.

(*d*) See *Westminster Corporation* v. *London and North Western Railway*, [1905] A. C. 426, as to the construction of a subway in connection with a sanitary convenience, and note (*l*), p. 205, *ante*.

(*e*) 54 & 55 Vict. c. lxxvii. There are exceptions in favour of the post-office, private wires, railway companies, and electric light undertakings.

(*f*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix), s. 142; Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 107.

(*g*) London Streets (Removal of Gates, Bars etc.) Acts, 1890 (53 & 54 Vict.

Dangerous canals near streets.

388. If a canal is insufficiently protected at any place where it abuts upon a public highway existing in 1898, its owners may be required (subject to a right of appeal) to erect and maintain the necessary fences, gates etc. (*h*).

Obstructions and encroachments in streets.

389. The County Council, or the borough council of the particular metropolitan borough, or both of such bodies, is empowered to deal with persons who erect or place any post, rail, fence, bar, obstruction or encroachment in any street, or who alter or interfere with it so as to impede the traffic for which it was formed or laid out (*i*), or who place any temporary obstruction, such as goods, barrows, stalls etc. in any street (*k*).

Skysigns, dangerous structures, and noxious or dangerous trades.

Construction of arches and floors.

390. The same authorities can also deal with skysigns (*l*), dangerous structures (*m*), and dangerous or noxious trades carried on within 40 feet of a public way (*n*); lamps, signs, and other structures overhanging the public way (*o*); stacks of timber, lathwood, firewood, or casks in front of the general line of buildings in a street (*p*); the construction of arches and floors over any public way, and of arches and other constructions under any public way or intended public way (*q*).

Naming of streets.

391. A person proposing to give a name to any street must submit it to the County Council, which has a power of veto (*r*).

c. ccxlvii.) and 1893 (56 & 57 Vict. c. lxvi.); London County Council (General Powers) Act, 1898 (61 & 62 Vict. c. ccxxi.), ss. 42—45.

(*h*) Canals Protection (London) Act, 1898 (61 & 62 Vict. c. 16). A magistrate (on appeal, quarter sessions) is to decide what works may reasonably be required by an authority, and at whose cost they are to be executed.

(*i*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 199, 200 (1) (b), (c), (d); London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (1), Sched II. (1).

(*k*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), ss. 64—66, 69; Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 6; Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5), s. 1; *Winsborrow* v. *London Joint Stock Bank, Ltd.* (1903), 67 J. P. 289; *Baker* v. *Bradley* (1910), 74 J. P. 341. See further, title STREET TRAFFIC.

(*l*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part XII., ss. 125—132; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (1), Sched. II.

(*m*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part IX., ss. 102—117; London Building Act, 1894 (Amendment), Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 5. A dangerous canal bridge may be so dealt with (*Regent's Canal and Dock Co.* v. *London County Council* (1909), 73 J. P. 276, C. A.).

(*n*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part X., ss. 118—121. For definition of "way," see p. 22, *ante*.

(*o*) *Ibid.*, ss. 5 (42), 164 (1). See also as to projections from buildings, p. 210, *post*.

(*p*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 197, 200 (11) (h) (there are exceptions in favour of railway, canal, and dock companies); London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2), Sched. II. (2).

(*q*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 71, 72. The word "construction" includes the "street boxes" of electricity companies (*County of London Electric Supply Co., Ltd.* v. *Perkins* (1908), 72 J. P. 133, following *Whitechapel District Board of Works* v. *Crow* (1901), 65 J. P. 549, and *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe* (1903), 67 J. P. 286.

(*r*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 32, 200 (11) (j). As to the application of *ibid.*, ss. 32—38, to the City, see *ibid.*, s. 4, and *Daw* v. *Metropolitan Board of Works* (1862), 15 C. B. (N. S.) 161.

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The County Council has also power to change the name of any street after inviting objections to the proposed change (*s*). It is the duty of the borough council concerned to cause street names to be properly indicated (*t*), and also to enforce orders—which the County Council has power to make—for the numbering of houses and buildings in any street (*a*).

Numbering houses.

A register is to be kept by the County Council of all alterations made by it in the names of streets and the numbering of houses therein (*b*).

Formation of new streets, adaptation and widening of streets.

392. Application (*c*) must be made for the sanction of the County Council before commencing (1) to form or lay out (*d*) any street for carriage or foot traffic; (2) to adapt (*e*) or use for carriage traffic any street or way not previously so adapted; (3) to adapt (*e*) for foot traffic any way not previously so adapted; (4) to widen (*f*) streets or ways which fall within certain categories. A period is limited within which the County Council may, in certain circumstances (*g*), refuse its sanction, or give it subject to conditions, but in most cases an appeal (*h*) lies against its decision; and if it allows the period to elapse, unconditional sanction is to be presumed (*i*). In certain cases the County Council must compensate the owner for loss entailed in complying with its conditions (*k*).

New street bye-laws.

The County Council may make bye-laws as to the level, width, and construction of new streets (*l*).

Removal of subsoil.

There are also statutory provisions as to the removal of sand,

(*s*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 34, 35.
(*t*) *Ibid.*, s. 33.
(*a*) *Ibid.*, ss. 36, 37.
(*b*) *Ibid.*, s. 38.
(*c*) As to the procedure on applications, see London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 7, 18; as to the penalty for non-compliance, see *ibid.*, s. 200 (1). The sanction need not be sealed (*Paddington Vestry* v. *Bramwell* (1880), 44 J. P. 815).
(*d*) As to what amounts to "forming or laying out," see London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 8; *London County Council* v. *King* (1905), 69 J. P. 406; *London County Council* v. *Collins* (1905), 69 J. P. 401; *London County Council* v. *Heathman* (1905), 69 J. P. 222; *London County Council* v. *Dixon*, [1899] 1 Q. B. 496; and compare *Metropolitan Board of Works* v. *Cox* (1865), 19 C. B. (N. S.) 445; *Taylor* v. *Metropolitan Board of Works* (1867), L. R. 2 Q. B. 213; *Metropolitan Board of Works* v. *Clever* (1868), L. R. 3 C. P. 531.
(*e*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 10 (1). As to what amounts to "adapting," see *ibid.*, s. 10 (3); *London County Council* v. *King*, *supra*; *London County Council* v. *Collins*, *supra*; *London County Council* v. *Heathman*, *supra*.
(*f*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 5 (5), 10 (4).
(*g*) As to conditions for "forming or laying out," see *ibid.*, s. 9; *Daw* v. *London County Council* (1890), 54 J. P. 502; *Woodham* v. *London County Council*, [1898] 1 Q. B. 863; *Metropolitan Electric Supply Co., Ltd.* v. *London County Council* (1904), 68 J. P. 501; *London County Council* v. *Edmundson* (1892), 56 J. P. 343. As to conditions for "adapting," see London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 11. As to conditions for widening, see *ibid.*, s. 12. As to special provisions applicable to "cleared areas," see *ibid.*, s. 44.
(*h*) As to such appeals, see *ibid.*, ss. 19, 175 *et seq.*
(*i*) *Ibid.*, ss. 9, 10 (2) (4), 11.
(*k*) *Ibid.*, s. 15.
(*l*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 202; Metropolis Management Acts Amendment (Byelaws) Act, 1899 (62 & 63 Vict. c. 15), s. 3; London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 164.

gravel etc. from the site of any new street or proposed new street, and as to making good excavations and providing proper foundations for new streets (*m*).

Space in front of buildings.

393. The distance from the centre of a roadway at which, apart from any question of a "building line" (*n*), buildings or forecourt walls may be erected or re-erected is prescribed by statute. Different provisions apply to highways (*o*) and streets which are not highways (*p*), and there are special provisions as to working-class dwelling-houses (*q*). Buildings erected in contravention of the provisions may be ordered to be set back (*r*).

Building line.

394. No building or structure may without the written consent of the County Council be erected beyond the general line of buildings (*s*) in any street or part of a street in which it is situate where such line is within 50 feet of the highway, or within 50 feet of the highway if such line is further away (*t*). There are special provisions regulating the re-erection of buildings (*a*); the Council may require them to be set back upon payment of compensation (*b*); but it may consent to buildings being erected in front of the building line, and may attach conditions to such consent (*c*).

(*m*) Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66), ss. 6—9; *Wandsworth District Board* v. *Bird*, [1892] 1 Q. B. 481.

(*n*) As to the "building line" provisions, see the text, *infra*.

(*o*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 5 (5), 13, 15; *R.* v. *London County Council, Ex parte Webster* (1897), 61 J. P. 439. As to alteration or re-erection of existing buildings, see *London County Council* v. *Patman and Fotheringham* (1903), 67 J. P. 285; *Paynter* v. *Watson*, [1898] 2 Q. B. 31; *London County Council* v. *Davis*, *London County Council* v. *Rowton Houses, Ltd.* (1898), 62 J. P. 68.

(*p*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 15, 16, 17.

(*q*) *Ibid.*, s. 13 (5); London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 4; *London County Council* v. *Davis*, *London County Council* v. *Rowton Houses, Ltd.*, *supra*; *Crow* v. *Davis* (1903), 67 J. P. 319; *Crow* v. *Davis* (1904), 68 J. P. 447.

(*r*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 200 (2); London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 3, passed in consequence of the decision in *London County Council* v. *Aylesbury Dairy Co.*, [1898] 1 Q. B. 106. As to the effect of these statutory provisions upon the powers of a county council with regard to old boundary walls, see *Rea* v. *London County Council*, [1911] 1 K. B. 740.

(*s*) The prohibition applies as soon as there can be said to be a "general line of buildings" (*Simpson* v. *Smith* (1871), 19 W. R. 355; *Spackman* v. *Plumstead Board of Works* (1885), 10 App. Cas. 229, 236; *Wendon* v. *London County Council*, [1894] 1 Q. B. 812, C. A.); see the last case as to buildings in course of construction at the time. An offender may be convicted so long as the line is formally defined before the hearing of the charge (*Bauman* v. *St. Pancras Vestry* (1867), L. R. 2 Q. B. 528; *London County Council* v. *Cross* (1891), 66 L. T. 731, C. A.; *Lavy* v. *London County Council*, [1895] 2 Q. B. 577, C. A.).

(*t*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 22. As to churches, see *Ecclesiastical Commissioners* v. *Clerkenwell Vestry* (1861), 30 L. J. (CH.) 454.

(*a*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 22 (2); and see *Auckland* (*Lord*) v. *Westminster Local Board of Works* (1872) 7 Ch. App. 597; *Worley* v. *St. Mary Abbotts, Kensington, Vestry*, [1892] 2 Ch. 404; *London County Council* v. *Pryor*, [1896] 1 Q. B. 465, C. A.; *Scott* v. *Carritt* (1900), 82 L. T. 67, C. A.

(*b*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 23 (1), (2).

(*c*) *Ibid.*, ss. 26, 28; *London County Council* v. *Best & Co.* (1893), 9 T. L. R. 499.

SECT. 1. Metropolitan.

"Building" or "structure."

395. The words "building" or "structure" extend only to erections in the nature of or forming part of a building, or at any rate attached in a more or less permanent manner to a building (*d*). The question is one of fact and largely of degree (*e*).

Decision of superintending architect.

396. It is for the superintending architect (*f*) to decide (subject to an appeal to the tribunal of appeal) (*g*) in what street or streets a building is situate (*h*) and what is the building line applicable to it (*i*).

Penalty.

397. If any person infringes the building line provisions he is liable to a penalty, and a demolition order may be made (*k*).

Projections from buildings.

398. A metropolitan borough council has power to require the alteration or removal of projections in front of buildings (such as walls, porches, steps, bow-windows, signposts, showboards etc.), which are annoyances and obstruct the passage along any street (*l*).

(*d*) *London County Council* v. *Illuminated Advertisements Co.*, [1904] 2 K. B. 886 (advertisement cases); *London County Council* v. *Schewzik*, [1905] 2 K. B. 695 (portico); *London County Council* v. *Hancock and James*, [1907] 2 K. B. 45 (show cases) (compare *Brown* v. *Leicester Corporation* (1892), 57 J. P. 70); *Coburg Hotel* v. *London County Council* (1899), 81 L. T. 450 (glass portico); *R.* v. *Denman and London County Council, Ex parte Palace Theatre Co., Ltd.* (1907), 71 J. P. 279 (advertisement frame); *St. George, Hanover Square, Vestry* v. *Sparrow* (1864), 16 C. B. (N. S.) 209 (conservatory); *Lavy* v. *London County Council*, [1895] 2 Q. B. 577, C. A. (boundary wall); *Wendon* v. *London County Council*, [1894] 1 Q. B. 812, C. A.; *Ellis* v. *Plumstead Board of Works* (1893), 57 J. P. 359; *Tunmer* v. *Partington Advertising Co.* (1904), 68 J. P. 318.

(*e*) *R.* v. *Denman and London County Council, Ex parte Palace Theatre Co., Ltd., supra.*

(*f*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 22 (1), 24, 29.

(*g*) *Ibid.*, ss. 25, 29. The architect's certificate can only be questioned by such an appeal (*ibid.*, s. 182; *Spackman* v. *Plumstead Board of Works* (1885), 10 App. Cas. 229; *Allen* v. *London County Council*, [1895] 2 Q. B. 587, C. A.). A special case may be stated by the tribunal on a point of law (London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 182). The tribunal can award costs (*ibid.*, s. 183; *London County Council* v. *Metropolitan Rail. Co.* (1907), 71 J. P. 372).

(*h*) A building may be in two streets, and, therefore, subject to two building lines (*Gilbart* v. *Wandsworth District Board* (1888), 53 J. P. 229; *Barlow* v. *St. Mary Abbotts, Kensington, Vestry* (1886), 11 App. Cas. 257, 263; compare *Nixey* v. *London County Council* (1894) 60 J. P. 217; *London County Council* v. *Cannon Brewery Co., Ltd.* (1910), 74 J. P. 461).

(*i*) The architect is to select a length of street and then define a line for that length; and on each point the tribunal of appeal may vary his certificate (*Re London Building Act, 1894, and London County Council* (1904), 68 J. P. 490). In fixing the line, buildings brought forward with the council's consent should not be considered (*London County Council* v. *Metropolitan Railway*, [1909] 2 K. B. 317, C. A.; affirmed, [1911] A. C. 1; *Re London Building Act, 1894, and London County Council, supra*), but *semble* buildings pulled down for re-erection on the same site should be (*Auckland (Lord)* v. *Westminster Local Board of Works* (1872), 7 Ch. App. 597). As to the permanence of a building line once formally defined, see *Lilley* v. *London County Council*, [1910] A. C. 1.

(*k*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 171, 200 (3) (a) (10). An individual cannot prosecute (*Mullis* v. *Hubbard*, [1903] 2 Ch. 431). The proceedings are a criminal cause or matter (*R.* v. *D'Eyncourt* (1901), 85 L. T. 501, C. A.). As to the period of limitation, see *London County Council* v. *Cross* (1891), 66 L. T. 731, C. A.

(*l*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 119, 120.

Projections (*m*) from buildings must, except by permission of the County Council, comply with certain statutory provisions as to mode of construction, materials, projection in front of the building line etc. (*n*).

SECT. 1. Metropolitan.

SECT. 2.—*Extra-Metropolitan.*

SUB-SECT. 1.—*Vesting, Control and Repair of Streets.*

Vesting.

399. In urban districts, and in rural places where the Public Health Act, 1875, s. 149 (*o*), is in force, all streets (*p*) which are highways repairable by the inhabitants at large, except main roads vested in the county council (*q*), and the pavements, stones and other materials thereof, and all buildings, implements and other things provided therefor, vest (*r*) in and are under the control of the local authority, which must from time to time cause them (*s*) to be levelled, paved, metalled, flagged, channelled, altered, and repaired as occasion may arise in such manner as it thinks fit (*t*). The local authority may also from time to time raise lower, or alter the soil of any such street as it thinks fit (*a*); but if it exercises these powers (*b*) it must compensate any person who is injured thereby and is not himself in default (*c*), provided that, in case of dispute, if the compensation claimed does not exceed £20, it may be ascertained

Making up.

Alteration of level.

These sections impliedly repeal the Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 72 (*Fortescue* v. *St. Matthew, Bethnal Green, Vestry*, [1891] 2 Q. B. 170). In the case of projections in existence before 1855, compensation may be payable. As to proof of annoyance or obstruction, see *Gabriel* v. *St. James, Westminster, Vestry* (1859), 23 J. P. 372; *Read* v. *Perrett* (1876), 1 Ex. D. 349.

(*m*) The provisions in question apply only to projections which form part of the buildings from which they project (*Hull* v. *London County Council*, [1901] 1 K. B. 580, questioned, but invariably followed, in later cases; *e.g.*, *London County Council* v. *Illuminated Advertisements Co.*, [1904] 2 K. B. 886; *London County Council* v. *Schewzik*, [1905] 2 K. B. 695).

(*n*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 73, 200 (3) (c). As to s. 73 (3), *ibid.*, see *Fortescue* v. *St. Matthew, Bethnal Green, Vestry, supra* (overruling *St. Mary, Islington, Vestry* v. *Goodman* (1889), 23 Q. B. D. 154).

(*o*) 38 & 39 Vict. c. 55. This provision is in force in all urban districts, and in other districts if it has been applied by the Local Government Board; see *ibid.*, s. 276. Practically identical provisions are contained in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 47, 51, which only apply to places where there is a local Act incorporating them.

(*p*) As to the meaning of the word "street," see p. 16, *ante*.

(*q*) In an urban district "unretained" main roads, and, in rural districts, all main roads, so vest; see p. 57, *ante*.

(*r*) As to the extent of this vesting, see p. 58, *ante*.

(*s*) If the street is not repairable by the inhabitants at large the authority may execute "private street works," as to which see p. 215, *post*. Even if the street be so repairable, the authority may do so if a local Act incorporates the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 53; see p. 213, *post*.

(*t*) The court will not interfere with an authority which has *bonâ fide* exercised its discretion as to the kind of repairs to be done (*R.* v. *Brighton Corporation, Ex parte Shoesmith* (1907), 71 J. P. 265, C. A.).

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149.

(*b*) As distinct from any powers exercised by it merely as surveyors of highways. As to this subject, see further, p. 61, *ante*.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308.

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by and recovered before a court of summary jurisdiction (*d*); otherwise it must be settled by arbitration (*e*).

In districts in which the Public Health Acts Amendment Act, 1907, s. 28 (*f*), is in force, if the local authority is executing works in a street in which there are any old materials it may give the owner thereof forty-eight hours' notice to remove them, and in default may remove and dispose of them itself, but must compensate the owner (*g*).

Removal of old materials.

Alteration of gas and water pipes.

400. In urban districts or in rural places in which the Public Health Act, 1875, s. 153 (*h*), is in force, if the local authority deems it necessary (*i*) to raise, sink, or move any water or gas pipes laid in or under any street, it may give notice to the owner thereof to do the work at the expense of the authority (*k*), and in default may do the work itself; but it must not permanently (*l*) injure the pipes, or works, or interfere with the flow of water or gas (*m*).

Powers to require work to be done to obviate danger.

401. In districts in which the Public Health Acts Amendment Act, 1907, s. 19 (*n*), is in force, if repairs are required in any private street to obviate or remove danger to passengers or vehicles, the local authority may by notice in writing require the owners (*o*) of the lands and premises fronting, adjoining, or abutting on the street to execute specified repairs within a limited time, and in default may itself execute the work, and recover the cost summarily from the owners in default in proportion to the extent of their frontage. But the majority in number or rateable value of owners of lands and premises in the street may within the time specified in the notice require the local authority to "make up" the street and

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308.

(*e*) *Ibid.*, ss. 179, 180; and see title LOCAL GOVERNMENT.

(*f*) 7 Edw. 7, c. 53. This provision may be put in force in any district by order of the Local Government Board. If the street is already repairable by the inhabitants at large such materials will, of course, be the council's property.

(*g*) In accordance with the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308, as to which see note (*d*), *supra*.

(*h*) 38 & 39 Vict. c. 55. This provision is in force in all urban districts and in other districts if applied by the Local Government Board.

(*i*) Apparently an authority which alters the level of a street need not alter pipes unless it is "necessary," even though such pipes will be left with an insufficient covering of soil (*Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*, [1898] 2 Ch. 603, C. A.).

(*k*) Unless under some local Act such expenses are directed to be borne by the owner (proviso to Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 153).

(*l*) For any temporary injury compensation will be payable (*ibid.*, s. 308); if permanent injury be done, *semble*, the remedy will be by action.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 153. Similar powers are given by the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 61, 62, in places where that Act is in force. See also titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 577 *et seq.*; GAS, Vol. XV., p. 358; WATER SUPPLY.

(*n*) 7 Edw. 7, c. 53. This provision may be put in force by order of the Local Government Board on the application of any local authority; for the procedure, see *ibid.*, s. 3.

(*o*) If the owner cannot be found, the notice must be given to the occupier, or, if there is no occupier, be affixed upon some conspicuous part of the premises (*ibid.*, s. 19 (3)). As to the words "fronting" etc., see p. 216, *post*.

then adopt it as a highway repairable by the inhabitants at large (*p*).

Paving streets under Towns Improvement Clauses Act, 1847.

402. In districts in which the Towns Improvement Clauses Act, 1847, ss. 53, 55 (*q*), are in force, if any street (*r*) or part of a street has never previously (*s*) been properly paved, flagged, or made good (*t*), the authority may do the work, and recover the cost as private improvement expenses (*a*) from the occupiers of the lands (*b*) abutting on such street or part; and the street will then be repairable (*c*) by the authority.

If two-thirds of any street (not being a public highway at the passing of the incorporating Act) have been paved or flagged and made good to the satisfaction of the authority, then on the application of the owners of the lands abutting on such parts of it as have been so made good, the authority may require the owners of the lands abutting on the remainder to pave, flag, or make good such parts of the street in front of their lands, and in default the authority may execute the work itself. The cost must be repaid by the owners who ought to have done the work, and, if not so paid forthwith, will be recoverable as private improvement expenses (*a*) from the occupiers. When the whole of the street is paved and made good to the authority's satisfaction, it must, under seal, declare it to be a public highway, and thenceforth it will be repairable by it.

Adoption of private streets.

403. A private street once paved at the cost of the frontagers may under certain statutory provisions become for the future a highway repairable by the inhabitants at large (*d*). Unless a private street when so paved is declared to be a highway, the paving of it confers no rights upon adjoining owners which they did not

(*p*) As to "making up" private streets, see p. 215, *ante*.

(*q*) *I.e.*, where there is in force a local Act incorporating the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 53, 55.

(*r*) The authority cannot under this section deal with a country lane; it must wait until it becomes a "street" in the popular sense, or at any rate until preparations are made for building along it (*Portsmouth Corporation* v. *Smith* (1885), 10 App. Cas. 364). The provision applies whether the street is repairable by the inhabitants at large or not (*Portsmouth Corporation* v. *Smith*, *supra*; *Ashton-under-Lyne Corporation* v. *Pugh*, [1898] 1 Q. B. 45, C. A.; *Crump* v. *Chorley Corporation* (1908), 98 L. T. 805), and whether it is a main road or not (*Lodge* v. *Huddersfield Corporation*, [1898] 1 Q. B. 847, 859, C. A.). Compare *Birkenhead Improvement Commissioners* v. *Sansom* (1876), 40 J. P. 406; *Stockport Corporation* v. *Cheetham* (1860), 24 J. P. 196; *Rochdale Corporation* v. *Leach* (1910), 74 J. P. 89, C. A. (local Act decisions).

(*s*) *I.e.*, previously to the date when the authority decides to pave it (*Portsmouth Corporation* v. *Smith*, *supra*; *R.* v. *Great Western Rail. Co.* (1859), 28 L. J. (M. C.) 246).

(*t*) *I.e.*, well and sufficiently paved etc. according to the standard required in a "street" (as distinct from a rural highway). Whether it has been so paved etc. is a question of fact (*Portsmouth Corporation* v. *Smith*, *supra*). It is open to a jury to find that a path which is only gravelled is "otherwise made good," and it is immaterial by whom the previous work has been done (*ibid.*).

(*a*) As to the recovery of private improvement expenses, see title LOCAL GOVERNMENT.

(*b*) Including "messuages, lands, tenements, and hereditaments of any tenure" (s. 3).

(*c*) *I.e.*, up to the standard of a "street."

(*d*) As to these, see p. 95, *ante*.

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possess before, and deprives the owner of the soil of none of his rights (*e*).

Penalty for injury to pavement etc.

404. Any person who wilfully displaces, takes up, or injures the pavement, stones, materials, fences or posts (*f*) of, or the trees (*g*) in, any street which is vested in the local authority (*h*), is liable on summary conviction to a penalty not exceeding £5, and a further penalty of 5*s.* for every square foot affected; and in the case of injury to trees he must compensate the authority (*i*).

Repairs to damaged footway.

405. In districts in which the Public Health Acts Amendment Act, 1907, s. 20 (*k*), is in force, if the footway of any street repairable by the inhabitants at large be injured by or in consequence of any excavations or other works on adjoining lands, the local authority may repair and replace the footway at the expense of the owner of such lands or of the person causing or responsible for the injury.

SUB-SECT. 2.—*Widening and Improvement of Streets and Bridges* (*l*).

Power of purchase for widening and improvement.

406. An urban authority, or a rural authority with the necessary urban powers (*l*), may purchase any premises (*m*) for the purpose of widening, opening, enlarging, or otherwise improving (*n*) any street (*o*). It may, with the sanction of the Local Government Board, borrow money for the purpose (*p*); and, if necessary, obtain by provisional order powers of compulsory purchase (*q*). Where land is thus added to an old street repairable by the inhabitants at large,

(*e*) *Moubray, Rowan and Hicks* v. *Drew*, [1893] A. C. 295, P. C.

(*f*) *Quære* whether these words will include tree guards.

(*g*) As to planting trees in highways, see p. 258, *ante*.

(*h*) *I.e.*, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149 (see p. 211, *ante*), which is in force in all urban districts, and in other districts if applied by the Local Government Board. The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 56, which is in force if incorporated in a local Act, contains practically identical provisions as to streets which are public highways.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149.

(*k*) 7 Edw. 7, c. 53. This provision may be put in force in any district by order of the Local Government Board. The expenses are recoverable summarily (*ibid.*, s. 6).

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 154. The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 67 (incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 160), confers practically identical powers.

(*m*) Including "messuages, buildings, lands, easements, and hereditaments of any tenure" (*ibid.*, s. 4). Under a faculty part of a churchyard may be acquired for the purpose of widening a highway (*Re Bideford Parish, Ex parte Bideford (Rector etc.)*, [1900] P. 314; *St. Nicholas, Leicester (Vicar)* v. *Langton*, [1899] P. 19; *Ex parte St. John's, Hampstead (Vicar etc.)* (1908), 72 J. P. (Journal) 298); and see title ECCLESIASTICAL LAW, Vol. XI., p. 541.

(*n*) This provision apparently will not justify the taking of any land from a highway, although the highway be widened on the other side; see *R.* v. *Platts* (1880), 43 L. T. 159. In such a case the portion not required should be formally stopped up; see p. 69, *ante*.

(*o*) As to bridges, see p. 194, *ante*.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 233 *et seq.*; and see title LOCAL GOVERNMENT.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 176; and see title LOCAL GOVERNMENT.

the authority must, apart from agreement upon the point, make good and repair the added portion as a part of the original highway (*r*).

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SUB-SECT. 3.—*Paving Private Streets.*

(i.) *In General.*

407. Outside the metropolis and apart from local Acts (*s*), there are two distinct and alternative (*t*) statutory codes under which local authorities can sewer, level, pave and "make up" private streets at the expense, not of the ratepayers as a whole, but of the owners of property in such streets. These codes are:

Two statutory codes:

(1) The Public Health Act, 1875 (*a*), ss. 150—152, as amended by the Public Health Acts Amendment Act, 1890 (*b*), s. 11 (2), and supplemented by s. 41 of that Act and by the Public Health Acts Amendment Act, 1907 (*c*), s. 19, in districts where either or both of those sections is or are in force; and

(i.) Public Health Acts;

(2) the Private Street Works Act, 1892 (*d*), supplemented by the Public Health Acts Amendment Act, 1907 (*c*), s. 19, in districts where that section is in force.

(ii.) Private Streets Works Act.

(ii.) *Public Health Acts.*

408. Where (*e*) an urban authority, or a rural authority with the necessary urban powers either generally or in respect of some contributory place within its district (*f*), considers that any street (*g*) or part of a street within (*h*) its district, or within the particular contributory place (not being a highway repairable by the inhabitants at large (*i*)), is not sewered, levelled, paved,

Powers of local authority.

(*r*) *Portsmouth Corporation* v. *Hall* (1908), 71 J. P. 564, C. A.

(*s*) Many of the local Acts now in force are practically identical with the Private Street Works Act, 1892 (55 & 56 Vict. c. 57).

(*t*) Where the Private Street Works Act, 1892 (55 & 56 Vict. c. 57) is in force it supersedes the Public Health Act code; see note (*g*), p. 227, *post*.

(*a*) 38 & 39 Vict. c. 55.

(*b*) 53 & 54 Vict. c. 59. Part III. of this Act (containing s. 41) is adoptive.

(*c*) 7 Edw. 7, c. 53. S. 19 (*ibid.*) may be put in force by Order of the Local Government Board (see *ibid.*, s. 3). As to its provisions, see p. 212, *ante*.

(*d*) 55 & 56 Vict. c. 57.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.

(*f*) The provision applies primarily only to urban authorities. Under *ibid.*, s. 276, the same powers may be conferred on rural authorities; but in practice the Local Government Board usually confers such powers only in respect of some part of the district, and frequently only in respect of named streets. As a rule, too, sewering powers are not conferred, and the other powers only conferred in respect of streets already sewered. An order giving to a rural authority urban powers in respect of some so-called "street" is not conclusive evidence that the road referred to is a "street" for the purposes of the Act (*Fenwick* v. *Croydon Union Rural Sanitary Authority*, [1891] 2 Q. B. 216), or that it lies within the particular district or contributory place (*R.* v. *Cheshire Justices, Ex parte Vyner* (1909), 73 J. P. 499).

(*g*) See definition of "street," p. 16, *ante*. For the purposes of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, a road, though not a "street" in the popular sense of the term, is yet a street if it comes within the wide definition in s. 4, *ibid.*, as to which see p. 16, *ante*.

(*h*) As to streets forming the boundary of a district, see cases cited in note (*j*), p. 217, *post*.

(*i*) As to what highways are "repairable by the inhabitants at large," see p. 15, 82, *et seq.*, *ante*. If a street is in fact a highway repairable by the inhabitants at large, no agreement with the frontagers can give the authority power to carry

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metalled, flagged, channelled, made good, or lighted to its satisfaction, it may resolve that the necessary (*k*) works shall be executed. Under this provision it is not obligatory on an authority to take action; but, where the Public Health Acts Amendment Act, 1907 (*l*), s. 19, is in force, the majority of the owners or occupiers in the street can compel the authority to do so (*m*).

Part of street repairable by inhabitants.

In general, where part of a street is not repairable by the inhabitants at large, but part is a public footpath or is so repairable, the authority may treat the whole street as if it were not repairable by the inhabitants at large (*n*); or it may treat any strip (*o*) of land thrown into an ancient highway as being in itself a "street" not repairable by the inhabitants at large (*p*). But where land has been purchased by an authority for widening an ancient highway, or has been thrown into the highway by its owners under an agreement tantamount to a purchase by the authority, the latter must treat the whole road as repairable by the inhabitants at large (*q*); and apparently a trifling addition to an ancient highway should be disregarded, in accordance with the maxim *de minimis non curat lex* (*r*).

Preparation of plans and estimates.

409. If the authority resolves that works shall be executed, it must prepare plans and sections of any structural works required, and an estimate of the probable cost, and keep them open for inspection by persons interested (*s*).

Notice to owners or occupiers.

410. The authority must then give notice to the owners (*t*) or occupiers of the premises fronting, adjoining, or abutting on the

out private street works in it under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150 (*Folkestone Corporation* v. *Marsh* (1905), 70 J. P. 113). As to the effect of such an agreement, see further *Folkestone Corporation* v. *Rook* (1907), 71 J. P. 550.

(*k*) For a form of resolution, see Encyclopædia of Forms and Precedents, Vol. XI., p. 64. As to the works which may be required under the words "sewering, levelling, paving" etc., see p. 220, *post*. As to the validity of an agreement to postpone paving requirements if temporary work is done, see *Booth* v. *Stone* (1855), 19 J. P. 68.

(*l*) 7 Edw. 7, c. 53.

(*m*) See p. 212, *ante*.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150; *Evans* v. *Newport Urban Sanitary Authority* (1889), 24 Q. B. D. 264. See also *Montague* v. *Goole Local Board* (1888), 52 J. P. 84; cases cited in note (*p*), *infra*; and 71 J. P. (Journal) 53. As to a street with tram lines, see *Standing* v. *Bexhill Corporation* (1909), 73 J. P. 241.

(*o*) The site of a filled-up ditch might form an added strip; see *Chorley Corporation* v. *Nightingale*, [1906] 2 K. B. 612, affirmed [1907] 2 K. B. 637, C. A.; *Chippendale* v. *Pontefract Rural District Council* (1907) 71 J. P. 231.

(*p*) *Richards* v. *Kessick* (1888), 52 J. P. 756; *Property Exchange, Ltd.* v. *Wandsworth Board of Works*, [1902] 2 K. B. 61, C. A.; *White* v. *Fulham Vestry* (1896), 60 J. P. 327; *West Hartlepool Corporation* v. *Robinson* (1897), 62 J. P. 35, C. A.

(*q*) *Portsmouth Corporation* v. *Hall* (1907), 71 J. P. 564, C. A.

(*r*) *Chorley Corporation* v. *Nightingale* (1906), 70 J. P. 500.

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150. It is not clear how far this provision can be regarded as only directory; see on the one hand, *Shanklin Local Board* v. *Millar* (1880), 5 C. P. D. 272; *Cook* v. *Ipswich Local Board* (1871), L. R. 6 Q. B. 451; on the other, *Manchester Corporation* v. *Hampson* (1887), 35 W. R. 334, 591, C. A.; and *Stourbridge Urban Council* v. *Butler and Grove*, [1909] 1 Ch. 87.

(*t*) For the meaning of the word "owner" in the Public Health Acts, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. For a form of notice, see Encyclopædia of Forms and Precedents, Vol. XI., p. 65.

parts of the street in which the work is required (*u*). Premises are not prevented from "fronting, adjoining, or abutting" on the street by the fact that they have no access to it (*a*); thus property on a different level, *e.g.*, railway lines running in a cutting (*b*), or on an embankment (*c*), and a raised garden (*d*), will come within the term. Premises at the end of a *cul de sac* abut on it (*e*), and a cross street abuts on the main street (*f*); but premises do not front, adjoin, or abut on a street unless there is actual contact (*g*); and if there be an intervening strip of land (however narrow), or a wall, belonging to different owners, such strip will be the "adjoining" premises to the exclusion of property lying behind it (*h*). If the premises on one side of a street are in the district of another local authority, or in another contributory place in which the Public Health Act, 1875, s. 150 (*i*), is not in force, no expenses can be charged against them or their owners, and they must be disregarded (*j*).

"Fronting, adjoining, or abutting."

411. The following classes of premises must be disregarded, namely:—

Premises exempt.

(1) Places appropriated to public religious worship which are by law exempt from payment of poor rates, and churchyards or burial

Churches etc.

(*u*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.

(*a*) *Walthamstow Urban District Council* v. *Sandell* (1904), 68 J. P. 509; *Paddington Vestry* v. *Bramwell* (1880), 44 J. P. 815; *Manchester Corporation* v. *Chapman* (1868), 32 J. P. 582.

(*b*) *London and North Western Rail. Co.* v. *St. Pancras Vestry* (1868), 17 L. T. 654; *Great Eastern Rail. Co.* v. *Hackney Board of Works* (1883), 8 App. Cas. 687; compare *R.* v. *Newport Local Board of Health* (1863), 3 B. & S. 341; *Paddington Vestry* v. *North Metropolitan Rail. Co.*, [1894] 1 Q. B. 633 (canal towing paths). Tram lines do not abut on the street on which they are laid (*Standing* v. *Bexhill Corporation* (1909), 73 J. P. 241). As to whether land below a bridge carrying a road can be said to abut thereon, see *Brighton Rail. Co.* v. *St. Giles, Camberwell* (1879), 4 Ex. D. 239; *Great Eastern Rail. Co.* v. *Hackney Board of Works, supra.*

(*c*) *Caledonian Rail. Co.* v. *Edinburgh Magistrates* (1901), 3 F. (Ct. of Sess.) 645; *Higgins* v. *Harding* (1872), L. R. 8 Q. B. 7.

(*d*) *Newport Urban Sanitary Authority* v. *Graham* (1882), 9 Q. B. D. 183.

(*e*) *Dodd* v. *St. Pancras Vestry* (1868), 34 J. P. 517; *Manchester Corporation* v. *Chapman, supra; Sheffield* v. *Fulham Board* (1876), 1 Ex. D. 395.

(*f*) *Pound* v. *Plumstead Board of Works* (1871), L. R. 7 Q. B. 183.

(*g*) *Leith Magistrates* v. *Gibbs* (1882), 9 R. (Ct. of Sess.) 627. In *Wakefield Local Board* v. *Lee* (1867), 1 Ex. D. 336, the intervention of a narrow beck was held not to prevent premises from "adjoining" a street; and in *Lightbound* v. *Higher Bebington Local Board* (1886), 16 Q. B. D. 577, C. A., it was suggested that the word "adjoining" might include premises standing back from the street, but having access to it by a passage between two of the houses in it. These cases, however, appear to stand alone. For the meaning of "abut" and "adjoin" in other contexts, see *Barnett* v. *Covell* (1904), 68 J. P. 93; *London County Council* v. *Collins* (1905), 69 J. P. 401; *Ind, Coope & Co., Ltd.* v. *Hamblin* (1900), 84 L. T. 168, C. A.; *R.* v. *South Eastern Rail. Co.* (1910), 74 J. P. 137, C. A.; *A.-G.* v. *Rowley Brothers* (1910), 75 J. P. 81; *Rockleys, Ltd.* v. *Pritchard* (1909), 74 J. P. 11; *Stockport Corporation* v. *Rollinson* (1910), 74 J. P. 236.

(*h*) *Williams* v. *Wandsworth Board of Works* (1884), 13 Q. B. D. 211; *Elsdon* v. *Hampstead Corporation*, [1905] 2 Ch. 633, C. A.; *Hall* v. *Bolsover Urban District Council* (1909), 73 J. P. 140; *Arter* v. *Hammersmith Vestry*, [1897] 1 Q. B. 646. But it will be open to a court to find that the intervening strip no longer exists as such, but has been added to the street (*Hampstead Borough Council* v. *Western* (1907), 71 J. P. 565).

(*i*) 38 & 39 Vict. c. 35.

(*j*) *Hornsey Corporation* v. *Birkbeck Freehold Land Society*, [1906] 1 K. B. 521;

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grounds attached thereto. The incumbent or minister of such a place is not personally liable for paving expenses, nor are such expenses a charge on the premises; and the authority may undertake any work for which any incumbent or minister would otherwise be liable (*k*).

Premises *extra commercium.*

(2) Premises which are *extra commercium*, *i.e.*, incapable of yielding a rack-rent because they are so appropriated to some purpose that nothing short of an Act of Parliament can restore to them the capacity to yield a rent (*l*). Examples of such premises are a church (*m*); a common vested under a statutory scheme in the London County Council for the use of the public (*n*); the soil of a cross street running into the road to be paved, such cross street having been dedicated to the public as a highway (*o*); the parapets of a bridge carrying a highway over a railway line, such parapets being unnecessary for the purposes of the railway company and no source of profit to them (*p*). On the other hand, premises are not to be regarded as *extra commercium* if their capacity to yield a rent can be restored by the mere act of the parties who have temporarily destroyed it (*q*), or if the statutory purpose for which they have been acquired is not necessarily inconsistent with their being let at a rent (*r*); therefore a local authority should include in a paving notice a cemetery belonging to a company (*s*); a school (*t*); a

Premises not *extra commercium.*

R. v. *Cheshire Justices, Ex parte Vyner* (1909), 73 J. P. 499. Compare *Shoreditch Borough Council* v. *Wakeham* (1904), 69 J. P. 239.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 151. But trustees of a chapel are not exempt, at any rate where part of the building is not exempt from poor rate (*Brewis* v. *Hornsey Local Board* (1890), 60 L. J. (M. C.) 48; *College Street United Free Church (Trustees)* v. *Edinburgh Parish Council* (1901), 3 F. (Ct. of Sess.) 414). See also title ECCLESIASTICAL LAW, Vol. XI., p. 819.

(*l*) *Hampstead Corporation* v. *Midland Railway*, [1904] 2 K. B. 802, affirmed [1905] 1 K. B. 538, C. A.; see also title RATES AND RATING.

(*m*) *Angell* v. *Paddington Vestry* (1868), L. R. 3 Q. B. 714; *Plumstead District Board of Works* v. *Ecclesiastical Commissioners for England*, [1891] 2 Q. B. 361; but not a chapel (*Wright* v. *Ingle* (1885), 16 Q. B. D. 379, C. A.; *Caiger* v. *St. Mary, Islington* (1881), 45 J. P. 570). Both the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), contain special exemptions in favour of churches and chapels.

(*n*) *London County Council* v. *Wandsworth Borough Council*, [1903] 1 K. B. 797, C. A., overruling *Fulham Vestry* v. *Minter*, [1901] 1 K. B. 501. It is immaterial that the council receives small sums (far less than it expends) as rent for refreshment pavilions or for rights of grazing.

(*o*) *Plumstead Board of Works* v. *British Land Co.* (1875), L. R. 10 Q. B. 203, Ex. Ch.; *Stretford Urban District Council* v. *Manchester South Junction and Altrincham Rail. Co.* (1904), 68 J. P. 59, C. A.

(*p*) *Great Eastern Rail. Co.* v. *Hackney Board of Works* (1883), 8 App. Cas. 687. Compare *North London Rail. Co.* v. *St. Mary, Islington, Vestry* (1872), 27 L. T. 672 (where the bridge carried a station); *Cameron* v. *Caledonian Rail. Co.* (1904), 6 F. (Ct. of Sess.) 763 (where the railway company had a station below such a bridge with a staircase giving access to the road through an opening in the bridge parapet).

(*q*) *Hampstead Corporation* v. *Midland Railway, supra; Herne Bay Urban Council* v. *Payne and Wood*, [1907] 2 K. B. 130 (recreation ground purchased by a council under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 164).

(*r*) *Hackney Corporation* v. *Lee Conservancy Board*, [1904] 2 K. B. 541, C. A.

(*s*) *St. Giles, Camberwell, Vestry* v. *London Cemetery Co.*, [1894] 1 Q. B. 699.

(*t*) *Bowditch* v. *Wakefield Local Board* (1871), L. R. 6 Q. B. 567; *Hornsey District Council* v. *Smith*, [1897] 1 Ch. 843, C. A.; *London School Board* v. *St. Mary, Islington* (1875), 1 Q. B. D. 65.

pleasure ground which the owners are bound by covenant to use only as a public garden or open space (*u*); a strip of land which a railway company has covenanted with a private individual to maintain for ever as a shrubbery for the advantage of his house (*a*); the soil of a cross street not irrevocably dedicated to the public (*b*); a strip of land purchased under statutory powers by conservators of a navigable river in order to strengthen the banks, but not necessarily incapable of other uses compatible with the main purpose (*c*); common land vested under an inclosure award in the lord of a manor subject to the rights of cottagers (*d*).

Crown property.

(3) Crown premises, *i.e.*, lands owned and occupied solely for purposes of the Crown, such as a volunteer storehouse and mess-room vested in a commanding officer (*e*).

Whole street not dealt with.

(4) If an authority decides to deal only with a pavement or added strip on one side of an old street, it should exclude premises upon the other side (*f*).

Address and service of notice

412. A paving notice may be addressed either to the owner or to the occupier of the premises in question (*g*); and must be served in the manner directed by the Public Health Act, 1875 (*h*). Unless a notice has been duly served on the owner or occupier of all premises in the street, the authority can recover no share of any expenses incurred by it (*i*).

Form of notice.

413. A paving notice should follow as far as possible the prescribed form (*k*), and may be authenticated by the signature of the authority's clerk, surveyor, or inspector of nuisances (*l*). A copy of the deposited plans or sections need not be annexed; but the notice must refer to them, and state where and when they may be inspected (*m*). It must require the respective owners or occupiers to sewer, level, pave, metal, flag, channel, or make good the street, or provide means for lighting it, within a specified time, and must give reasonable details of the work required (*n*).

(*u*) *St. Mary, Islington, Vestry* v. *Cobbett*, [1895] 1 Q. B. 369; *Herne Bay Urban Council* v. *Payne and Wood*, [1907] 2 K. B. 130.

(*a*) *Hampstead Corporation* v. *Midland Railway*, [1905] 1 K. B. 538, C. A.

(*b*) *Pound* v. *Plumstead Board of Works* (1871), L. R. 7 Q. B. 183.

(*c*) *Hackney Corporation* v. *Lee Conservancy Board*, [1904] 2 K. B. 541, C. A. As to the Thames Conservators, see p. 230, *post*.

(*d*) *Re Christchurch Inclosure Act, Meyrick* v. *A.-G.*, [1894] 3 Ch. 209.

(*e*) *Hornsey Urban Council* v. *Hennell*, [1902] 2 K. B. 73; and see title CONSTITUTIONAL LAW, Vol. VII., p. 118.

(*f*) As to this, see p. 216, *ante*, and p. 221, *post*.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.

(*h*) See *ibid.*, s. 267, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) See p. 224, *post*. But the council's contractor is not thereby prejudiced (*Worthington* v. *Sudlow* (1862), 2 B. & S. 508).

(*k*) See Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. IV., Form G. It may be written or printed or partly written and partly printed (*ibid.*, s. 266).

(*l*) The scheduled form contemplates the clerk's signature; but see *ibid.*, s. 266.

(*m*) *Ibid.*, s. 150. At any rate, a notice which neither refers to deposited plans nor gives details of the work required is insufficient (*Stourbridge Urban Council* v. *Butler and Grove*, [1909] 1 Ch. 87). Compare *Parkinson* v. *Blackburn Corporation* (1859), 23 J. P. 294; *Bayley* v. *Wilkinson* (1864), 16 C. B. (N. S.) 161.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150; and see note (*m*),

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"Paving."

"Levelling."

"Paving" includes asphalting, wood-paving, tar-paving, artificial stone-paving, or any other improved kind of paving, and a street is not to be deemed to be paved to the authority's satisfaction unless it is paved with such kind and quality of paving as it thinks suitable (*o*). The power to require a street to be "levelled" only applies where the street itself, as an isolated unit, is unlevel; an owner cannot be required to alter its level so that it may conform to that of other streets (*p*); and the authority may not alter the respective widths of the carriage way and footway where they have been expressly determined by the dedicating landowner (*q*).

Recurring liability.

Frontagers may be called upon to carry out any of the works above mentioned (except sewering) as often as may be necessary, until the street is duly declared to be a highway repairable by the inhabitants at large (*r*); but they cannot be required to re-sewer a street when once it has been sewered to the authority's satisfaction (*s*).

Sewering.

"Satisfaction."

Where a sewer has been laid in a street it is a question of fact whether the authority has accepted it as satisfactory for that street; its approval of the sewer as sufficient for the purposes for which it is being used ought to be inferred after a reasonable time from its silence (*t*), and there may be a binding approval though the sewer is ineffective for want of a proper outfall (*a*). Where, however, a street by reason of building operations changes its character, and in effect becomes a new street, the authority may, within a reasonable time, say that it is not sewered to its satisfaction, although it has hitherto been satisfied with the way in which the sewage of the few original houses was dealt with (*b*).

supra. Provision of "means of lighting" refers to lamp posts etc., and does not include the provision of the actual gas or electricity.

(*o*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 11 (2), getting rid of a difficulty disclosed by *A.-G.* v. *Bidder* (1881), 47 J. P. 263. As to whether "channelling" includes gullies, see *Wandsworth Borough Council* v. *Golds*, [1911] 1 K. B. 60.

(*p*) *Cary* v. *Kingston-on-Hull Local Board of Health* (1864), 34 L. J. (M. C.) 7; compare *Brown* v. *Clegg* (1851), 15 J. P. 609 (local Act case).

(*q*) *Robertson* v. *Bristol Corporation*, [1900] 2 Q. B. 198, C. A.; *Stretford Urban District Council* v. *Manchester South Junction and Altrincham Rail. Co.* (1904), 68 J. P. 59, C. A.; *Wandsworth Borough Council* v. *Golds*, *supra*.

(*r*) *Barry and Cadoxton Local Board* v. *Parry*, [1895] 2 Q. B. 110, not following *Walthamstow Local Board* v. *Staines*, [1891] 2 Ch. 606, C. A.; *Derby Corporation* v. *Grudgings*, [1894] 2 Q. B. 496.

(*s*) *Bonella* v. *Twickenham Local Board of Health*, *Holmes* v. *Twickenham Board of Health* (1887), 20 Q. B. D. 63, C. A., and cases cited in notes (*t*), (*a*), (*b*), *infra*.

(*t*) *Ibid.*; *Turner* v. *Handsworth Urban District Council* (1908), 73 J. P. 95. The authority may be satisfied with a sewer as a soil sewer whilst intending at a future date to call for the provision of a surface-water sewer (*Bloor* v. *Beckenham Urban Council*, [1908] 2 K. B. 671). As to sewers generally, see title SEWERS AND DRAINS.

(*a*) *Hornsey Local Board* v. *Davis*, [1893] 1 Q. B. 756, C. A.; *Re Hanwell Urban District Council and Smith* (1904), 68 J. P. 496.

(*b*) *Handsworth District Council* v. *Derrington*, [1897] 2 Ch. 438; *Handsworth Local Board* v. *Taylor* (1893), [1897] 2 Ch. 442, n.; *Rishton* v. *Haslingden Corporation*, [1898] 1 Q. B. 294 *Wilmslow Urban District Council* v. *Sidebottom* (1906), 70 J. P. 537.

Contents of notice.

414. A notice should describe the street affected by it intelligibly and accurately, but it will not be vitiated by an immaterial misdescription (*c*). Nor is it invalid because it may involve the execution of works upon soil belonging to a person other than the recipient (*d*). A notice which is partly good and partly bad may be enforced so far as it is good (*e*).

Power of authority to execute works.

415. If the frontagers, or some of them, fail to comply with the notices, the authority may execute the works referred to therein (*f*); and if some of the frontagers have complied, no further notice need be served on the others (*g*). In executing the works the authority is not strictly tied to the terms of the notice and plans; it may omit some of the work (*h*), or use smaller pipes than those specified (*i*), and it may for ulterior reasons carry out more costly sewerage works than are required for the street as a separate unit, provided that it apportions upon the frontagers only the cost of carrying out the work specified in the plans and notices (*k*). If a frontager considers that he is prejudiced by any departure from the plans and notices, his only remedy is by appeal to the Local Government Board (*l*).

Apportionment of expenses.

416. When the work has been finished, the authority's surveyor must apportion the expense incurred between the owners in default (*m*) according to their respective frontages (*n*); and if more than one street has been dealt with at the same time, the expenses incurred in respect of each must be apportioned separately (*o*). Where the authority has paved a footpath on one side only of a street (*p*), or where it has made up a strip added on one side of

(*c*) *Blackburn Corporation* v. *Saunderson*, [1902] 1 K. B. 794, C. A.

(*d*) *West Hartlepool Corporation* v. *Robinson* (1897), 77 L. T. 387, C. A.; see also *Lancaster* v. *Barnes District Council*, [1898] 1 Q. B. 855.

(*e*) *Hall* v. *Potter* (1869), 39 L. J. (M. C.) 1; *Manchester Corporation* v. *Hampson* (1887), 35 W. R. 334, 591, C. A.; *Parkinson* v. *Blackburn Corporation* (1859), 23 J. P. 294.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.

(*g*) *Simcox* v. *Handsworth Local Board* (1881), 8 Q. B. D. 39.

(*h*) If the authority finds that it is unnecessary (*Acton Local Board* v. *Lewsey* (1886), 11 App. Cas. 93); or that it had no legal right to call on the frontagers to do the work (*Manchester Corporation* v. *Hampson*, *supra*).

(*i*) *Kershaw* v. *Sheffield Corporation* (1887), 51 J. P. 759.

(*k*) *Acton Urban District Council* v. *Watts* (1903), 67 J. P. 400.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 268; *Cook* v. *Ipswich Local Board* (1871), L. R. 6 Q. B. 451.

(*m*) Omitting owners of premises upon whom no charge can be made; see p. 217, *ante*. As to who is the "owner in default," when there has been a change of ownership, see p. 223, *post*.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150; *R.* v. *Newport Local Board of Health* (1863), 3 B. & S. 341. He must treat the street as a whole (*Whitchurch* v. *Fulham Board of Works* (1866), L. R. 1 Q. B. 233). Apparently an apportionment can be made after any lapse of time (*Bradley* v. *Greenwich Board of Works* (1878), 3 Q. B. D. 384); but twelve years will bar any action to enforce the statutory charge; see p. 226, *post*. For a form of apportionment, see Encyclopædia of Forms and Precedents, Vol. XI., p. 66. As to time limit of actions generally, see title LIMITATION OF ACTIONS.

(*o*) *Cook* v. *Ipswich Local Board*, *supra*.

(*p*) *Wakefield Sanitary Authority* v. *Mander* (1880), 5 C. P. D. 248; *Clacton Local Board* v. *Young & Sons*, [1895] 1 Q. B. 395.

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an existing street, the expenses must be apportioned between the frontagers on that side only (*q*); *secus* if it treats as one street a road part of which is a public footpath, or already repairable by the inhabitants at large (*q*). If an apportionment is discovered to be erroneous the surveyor may make a fresh one (*r*). Apparently the authority cannot include any charge for preparation of plans, supervision, cost of collection, or other incidental expenses (*s*).

Notice of apportionment.

417. The authority or the surveyor must then serve (*t*) a notice upon every owner stating the amount apportioned upon him; and the apportionment will be binding unless within three months the owner disputes it by notice in writing (*a*). If a sufficient notice (*b*) be given, no proceeding can be taken until the dispute has been determined (*c*) by arbitration (*d*), or, if the amount in dispute is less than £20, by a court of summary jurisdiction (*e*). The justices or arbitrator can only deal with the question whether a proper proportion of the expenses has been apportioned upon the objector (*f*); they cannot decide upon his liability (*g*), nor whether the expenses have been properly incurred (*h*), nor can they go behind the total amount certified by the surveyor and inquire into details (*i*). An arbitrator's award is not binding on other frontagers in the street (*j*);

(*q*) See p. 217, and cases cited in notes (*n*) and (*p*), p. 221, *ante*.

(*r*) *Cook* v. *Ipswich Local Board* (1871), L. R. 6 Q. B. 451; *Shanklin Local Board* v. *Millar* (1880), 5 C. P. D. 272; *Sykes* v. *Huddersfield Corporation* (1871), 35 J. P. 614; *Bishop* v. *Wandsworth District Board of Works* (1900), 64 J. P. 630; even after proceedings have been taken on the incorrect one and have failed (*Manchester Corporation* v. *Hampson* (1887), 35 W. R. 334, 591, C. A.; *Elsdon* v. *Hampstead Corporation*, [1905] 2 Ch. 633).

(*s*) *Re Hanwell Urban District Council and Smith* (1904), 68 J. P. 496; *Ballard* v. *Wandsworth Borough Council* (1906), 70 J. P. 331. For an earlier opinion to the contrary, see *Walthamstow Local Board* v. *Staines*, [1891] 2 Ch. 606, C. A.

(*t*) As to mode of service, see p. 219, *ante*. For forms of notice, apportionment, and demand for payment, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 69, 70.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257. The dispute contemplated is a dispute as to amount, not as to liability (*West Hartlepool Corporation* v. *Robinson* (1897), 62 J. P. 35, C. A.).

(*b*) As to what is a sufficiently definite notice of dispute, see *Folkestone Corporation* v. *Brooks*, *Same* v. *Ladd*, [1893] 3 Ch. 22, C. A.

(*c*) *Sandgate District Local Board of Health* v. *Keene*, [1892] 1 Q. B. 831, C. A.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 179, 257. Such an arbitration will be governed by *ibid.*, ss. 179—181; see title LOCAL GOVERNMENT. As to the extent of the jurisdiction of an arbitrator on adjudging apportionment as bad, see *Thomas* v. *Hendon Rural District Council* (1910), 75 J. P. 161.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 181. As to courts of summary jurisdiction generally, see title MAGISTRATES.

(*f*) *Handsworth District Council* v. *Derrington*, [1897] 2 Ch. 438. The *dicta* in *Bournemouth Commissioners* v. *Watts* (1884), 14 Q. B. D. 87, and in *Sandgate District Local Board of Health* v. *Keene*, *supra*, to the contrary can no longer be relied upon; see *Re Hanwell Urban District Council and Smith*, *supra*, and other cases in notes (*g*), (*h*), (*i*), *infra*.

(*g*) *Re Willesden Local Board and Wright*, [1896] 2 Q. B. 412, C. A.; *West Hartlepool Corporation* v. *Robinson* (1897), 75 L. T. 677, affirmed 77 L. T. 387, C. A.

(*h*) *Bayley* v. *Wilkinson* (1864), 16 C. B. (N. S.) 161.

(*i*) *Cawston* v. *Bromley Urban District Council* (1900), 17 T. L. R. 25; *Cook* v. *Ipswich Local Board*, *supra*.

(*j*) *Tunbridge Wells Local Board* v. *Akroyd* (1880), 5 Ex. D. 199, C. A.

and it cannot be enforced under the Arbitration Act, 1889 (*k*), s. 12, nor, *semble*, can an action be brought upon it (*l*).

Recovery of expenses.

"Owner in default."

418. After three months from the service of notice of apportionment or after the decision of any dispute, the authority may recover the apportioned sum and interest at 5 per cent. from the date of demand from an "owner in default" by summary proceedings (*m*). The authority must first serve upon him a demand for payment (*n*), and within twenty-one days of receipt thereof he may appeal to the Local Government Board (*o*). A person is to be regarded as an "owner in default" if he is the owner of the premises at the time when the works are completed, and the apportioned sum may be recovered from him although he has afterwards ceased to be owner (*p*). A person who sells his property after the paving notice, but before the works are completed, is not an owner in default (*q*).

Summary proceedings.

The summary proceedings must be commenced within six months of the demand (*r*), and in such proceedings the frontager may set up any defence which goes to the root of his liability, but not one which goes only to the amount (*s*), nor can he question the reasonableness of the work (*t*). Thus he may contend that the road in question is not a "street" (*u*); that it is a highway repairable by the inhabitants at large (*u*); that at the date of the completion of the work he

(*k*) 52 & 53 Vict. c. 49; as to which see title ARBITRATION, Vol. I., p. 473.

(*l*) *Re Willesden Local Board and Wright*, [1896] 2 Q. B. 412, C. A.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257. As to proceedings against executors in an administration action, see *West* v. *Downman* (1880), 14 Ch. D. 111.

(*n*) *Ibid.*, s. 257. The notice of apportionment is not such a demand (*Grece* v. *Hunt* (1877), 2 Q. B. D. 389; *R.* v. *Local Government Board* (1882), 10 Q. B. D. 309, 324, C. A.). A demand may apparently be made after any length of time has elapsed (*Wortley* v. *St. Mary, Islington, Vestry* (1886), 51 J. P. 166), but it cannot be made till the time for lodging objections has expired and all objections have been determined (*Simcox* v. *Handsworth Local Board* (1881), 8 Q. B. D. 39; *Re Bettesworth and Richer* (1888), 37 Ch. D. 535).

(*o*) As to appeals to the Local Government Board, see p. 226, *post*.

(*p*) *East Ham Urban Council* v. *Aylett*, [1905] 2 K. B. 22; *Millard* v. *Balby-with-Hexthorpe Urban Council*, [1905] 1 K. B. 60, C. A., overruling a *dictum* in *R.* v. *Swindon Local Board* (1879), 4 Q. B. D. 305.

(*q*) *R.* v. *Swindon Local Board, supra*. As to the inquiries which an intending purchaser should make in such a case, see title SALE OF LAND.

(*r*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257; *Grece* v. *Hunt, supra*; *Jacomb* v. *Dodgson* (1863), 3 B. & S. 461; *Marr* v. *Greenwich Board of Works* (1880), 44 J. P. 424; *Wortley* v. *St. Mary, Islington* (1886), 51 J. P. 166; *Prescott* v. *Nicholson* (1889), 60 L. T. 563; *Harpin* v. *Sykes* (1885), 49 J. P. 148.

(*s*) *Midland Rail. Co.* v. *Watton* (1886), 17 Q. B. D. 30, C. A.; *Walthamstow Local Board* v. *Staines*, [1891] 2 Ch. 606, C. A.; *Re Hanwell Urban District Council and Smith* (1904), 68 J. P. 496; *Wake* v. *Sheffield Corporation* (1883), 12 Q. B. D. 142, C. A.; *Derby Corporation* v. *Grudgings*, [1894] 2 Q. B. 496; *Shanklin Local Board* v. *Millar* (1880), 5 C. P. D. 272.

(*t*) *Bayley* v. *Wilkinson* (1864), 16 C. B. (N. S.) 161; *Cook* v. *Ipswich Local Board* (1871), L. R. 6 Q. B. 451.

(*u*) *Hesketh* v. *Atherton Local Board* (1873), L. R. 9 Q. B. 4; *Midland Rail. Co.* v. *Watton, supra*; *Eccles* v. *Wirral Rural Sanitary Authority* (1886), 17 Q. B. D. 107; *R.* v. *Burnup* (1886), 50 J. P. 598; *Lewis* v. *Cardiff Urban Sanitary Authority* (1878), 47 L. J. (M. C.) 101. A decision that a highway is so repairable is not conclusive in subsequent proceedings (*R.* v. *Hutchings* (1881), 6 Q. B. D. 300, C. A.). It is no defence to say that the contractor, having no sealed contract, could not have recovered as against the authority (*Bournemouth Commissioners* v. *Watts* (1884), 14 Q. B. D. 87).

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was not owner of any premises which fronted, adjoined, or abutted on it (*a*); that no valid notice was served upon him (*b*); that some other frontager was wrongfully omitted from the apportionment (*c*); or that the authority has elected to declare the expenses to be private improvement expenses (*d*). An appeal lies to quarter sessions at the instance of either party (*e*), or the justices may state a special case (*f*). The justices are not bound by a previous finding in similar proceedings that the street in question is or is not repairable by the inhabitants at large (*g*), nor by a ruling on the same point given incidentally by the Local Government Board on an appeal against an apportionment (*h*).

Appeal.

Where the sum apportioned on any frontager is less than £50, the authority may at its option recover it in the county court (*i*). The period of limitation is six months, and it runs apparently from the notice of demand (*k*).

County court.

419. Instead of recovering the expenses as above, the authority may declare them to be private improvement expenses (*l*), and recover them during a period of years by means of a private improvement rate (*m*). If an authority distinctly intimates to frontagers that paving expenses will be declared to be private improvement expenses it cannot change its mind and recover them summarily (*n*); but possibly it may be able to enforce its statutory charge (*o*) in respect of any arrears (*p*). Moreover, if an

Private improvement rate.

(*a*) See cases cited in note (*p*), p. 223, *ante*.

(*b*) *Stourbridge Urban Council* v. *Butler and Grove*, [1909] 1 Ch. 87; *Salford Corporation* v. *Ackers* (1846), 16 M. & W. 85; *Jarrow Local Board* v. *Kennedy* (1870), L. R. 6 Q. B. 128; *Farnworth Local Board* v. *Compton* (1886), 34 W. R. 334, C. A.; *Wallsend Local Board* v. *Murphy* (1889), 61 L. T. 777; *Bacup Corporation* v. *Smith* (1890), 44 Ch. D. 395.

(*c*) *Handsworth District Council* v. *Derrington*, [1897] 2 Ch. 438; *Leeds Corporation* v. *Armitage* (1889), *Times*, 15th February. Compare *Elsdon* v. *Hampstead Corporation*, [1905] 2 Ch. 633.

(*d*) *Gould* v. *Bacup Local Board* (1881), 45 J. P. 325; and see the text, *infra*.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269.

(*f*) As to procedure in stating a special case, see generally, title MAGISTRATES.

(*g*) *R.* v. *Hutchings* (1881), 6 Q. B. D. 300, C. A.; *Wakefield Corporation* v. *Cooke*, [1904] A. C. 31.

(*h*) *Seabrooke* v. *Grays Thurrock Local Board* (1891), 8 T. L. R. 19.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 261; see title COUNTY COURTS, Vol. VIII., pp. 677, 678. Except in such cases no action will lie; see *St. Pancras Vestry* v. *Morgan* (1857), 21 J. P. 260; *St. Pancras Vestry* v. *Batterbury* (1857), 2 C. B. (N. S.) 477; *Sunderland Corporation* v. *Herring* (1853), 17 J. P. 741; *Blackburn Corporation* v. *Parkinson* (1859), 23 J. P. 262.

(*k*) *West Ham Local Board* v. *Maddams* (1876), 1 Ex. D. 516, n.; *Tottenham Local Board* v. *Rowell* (1876), 1 Ex. D. 514, C. A.; *R.* v. *Local Government Board* (1882), 10 Q. B. D. 309, C. A.; *West Derby Local Board* v. *Bell* (1878), 42 J. P. 812. For cases under local Acts upon similar points, see *Leeds Corporation* v. *Robshaw* (1887), 51 J. P. 441; *Blackburn Corporation* v. *Sanderson*, [1902] 1 K. B. 794, C. A.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.

(*m*) As to private improvement expenses and rates, see *ibid.*, ss. 213, 214, 215, 232, 240, 241. Under *ibid.*, s. 232, a rural authority may make such a rate. See also title LOCAL GOVERNMENT.

(*n*) *Gould* v. *Bacup Local Board*, *supra*; *Eddleston* v. *Francis* (1860), 3 L. T. 270.

(*o*) As to this charge, see p. 225, *post*.

(*p*) *Tottenham Local Board* v. *Rowell*, *supra*.

authority in the first instance demand the apportioned sum, but neglect to take proceedings within six months, it cannot subsequently declare the expenses to be private improvement expenses (*q*).

Payment by instalments.

420. Instead of declaring paving expenses to be private improvement expenses, the authority may (*r*) declare them to be payable by annual instalments within a period not exceeding thirty years, with interest at a rate not exceeding 5 per cent. (*s*); and the instalments (*t*) and interest may be recovered summarily (*a*) from the owner or occupier for the time being of the premises, and may be deducted from the rent of such premises as in the case of private improvement expenses under the Public Health Act, 1875 (*b*). The statutory charge (*c*) upon the premises may be enforced in respect of any instalments in arrear (*d*).

Statutory charge.

421. Paving expenses in private streets and interest thereon at a rate not exceeding 5 per cent. are, until recovery, a charge upon the premises in respect of which they were incurred (*e*). The charge attaches as from the date when the work is completed (*f*), though the interest runs only from the date of demand, and it is a charge on the total ownership of the premises, not on the interest of any particular owner (*g*). The charge is enforceable by action (*h*);

(*q*) *Wilson* v. *Bolton Corporation* (1871), L. R. 7 Q. B. 105.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257.

(*s*) Within this limit the authority may fix the rate of interest, which may be higher than the rate at which it borrows (*North British Rail. Co.* v. *Holme Cultram Local Board* (1889), 54 J. P. 86).

(*t*) There is no provision that upon default in payment of any instalment the whole sum shall become due; this, however, may be provided for by agreement.

(*a*) The six months' period of limitation runs from the date when any instalment is demanded (*Prescott* v. *Nicholson* (1889), 53 J. P. 597).

(*b*) See note (*m*), p. 224, *ante*.

(*c*) See the text *infra*.

(*d*) *Tottenham Local Board of Health* v. *Rowell* (1880), 15 Ch. D. 378, C. A.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257. But only if the preliminary notice has been duly served (*Farnworth Local Board* v. *Compton* (1886) 34 W. R. 334, C. A.; *Maguire* v. *Leigh-on-Sea Urban District Council* (1906), 70 J. P. 479). The charge cannot be enforced against a school founded under the School Sites Act, 1841 (4 & 5 Vict. c. 38), so long as it is used for the purpose contemplated by the statute (*Hornsey District Council* v. *Smith*, [1897] 1 Ch. 843); the trustees of the school are nevertheless personally liable as owners (*ibid.*). As to a charge for estimated expenses under a local Act, see *West Ham Corporation* v. *Grant* (1888), 40 Ch. D. 331.

(*f*) *Tottenham Local Board of Health* v. *Rowell, supra*; *Re Bettesworth and Richer* (1888), 37 Ch. D. 535; *Stock* v. *Meakin*, [1900] 1 Ch. 683, C. A.; *Surtees* v. *Woodhouse*, [1903] 1 K. B. 396, C. A.; *Re Allen and Driscoll's Contract*, [1904] 2 Ch. 226, C. A.

(*g*) *Birmingham Corporation* v. *Baker* (1881), 17 Ch. D. 782. When an action is brought to enforce it, the charge must be apportioned between the persons interested in the premises in proportion to the value of their respective interests (*ibid.*). But premises, if ordered to be sold, cannot be sold free from restrictive covenants affecting them (*Tendring Union Guardians* v. *Dowton*, [1891] 3 Ch. 265, C. A.).

(*h*) An action may be brought against the owner of the premises for the time being (*Sunderland Corporation* v. *Alcock* (1882), 51 L. J. (CH.) 546). As to the difficulty which arises when an owner's name is unknown, see *Wealdstone Urban District Council* v. *Evershed* (1905), 69 J. P. 258. An action cannot be brought in the High Court to enforce a charge for a sum under £10 (*Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (1885), 30 Ch. D. 387, C. A.).

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and the period of limitation runs from the date of the completion of the works (*i*). An authority may enforce the charge whether or not they have previously attempted to recover the money (*k*), but, where they have declared expenses to be payable by instalments, they can only enforce it in respect of instalments in arrear (*k*). The charge need not be registered under the Land Charges Registration and Searches Act, 1888 (*l*).

Tenant for life and remainderman.

422. A tenant for life who pays to the authority the amount apportioned upon the settled property is subrogated to the rights of the authority and has a charge on the fee simple; and he may raise money by mortgage under the Settled Land Act, 1890 (*m*), to discharge the incumbrance (*n*). If a tenant for life dies after completion of the works his estate is not liable to the remainderman who is called upon to pay the apportioned expenses (*o*).

Landlord and tenant.

423. As between a landlord and a tenant, the latter is liable for paving expenses in respect of works completed after the date of his lease if he has covenanted to pay all "rates, taxes, and outgoings now payable or hereafter to become payable in respect of the premises" (*p*); but not in respect of works completed before that date, even if the apportionment is made subsequently and he has covenanted to bear "present and future outgoings" (*q*).

Vendor and purchaser.

424. As between a vendor and a purchaser, the expenses must be borne by the vendor, if he has agreed to receive rents and pay outgoings up to a date later than that of completion of the works, though the apportionment be delayed beyond the day agreed upon (*r*).

Appeal to Local Government Board.

425. A frontager may appeal to the Local Government Board within twenty-one days after notice of the decision of which he

(*i*) And not from the date of the apportionment (*Hornsey Local Board* v. *Monarch Investment Building Society* (1889), 24 Q. B. D. 1, C. A.).

(*k*) *Tottenham Local Board of Health* v. *Rowell* (1880), 15 Ch. D. 378, C. A.

(*l*) 51 & 52 Vict. c. 51; *R.* v. *Land Registry Office (Vice-Registrar)* (1889), 24 Q. B. D. 178; and see title REAL PROPERTY AND CHATTELS REAL. As to the inquiries an intending purchaser should make, see title SALE OF LAND.

(*m*) 53 & 54 Vict. c. 69, s. 11; and see titles LAND IMPROVEMENT; SETTLEMENTS.

(*n*) *Re Smith's Settled Estates*, [1901] 1 Ch. 689; *Re Pizzi, Scrivener* v. *Aldridge*, [1907] 1 Ch. 67. Or the trustees may repay him out of capital moneys (*Re Legh's Settled Estate*, [1902] 2 Ch. 274).

(*o*) *Re Boor, Boor* v. *Hopkins* (1889), 40 Ch. D. 572.

(*p*) *Greaves* v. *Whitmarsh, Watson & Co., Ltd.*, [1906] 2 K. B. 340. The words "duties" or "impositions" have a similar effect (*Foulger* v. *Arding*, [1902] 1 K. B. 700, C. A., and cases there cited). See, further, title LANDLORD AND TENANT.

(*q*) *Surtees* v. *Woodhouse*, [1903] 1 K. B. 396, C. A.

(*r*) *Stock* v. *Mealkin*, [1906] 1 Ch. 683, C. A.; *Surtees* v. *Woodhouse*, *supra*; *Re Allen and Driscoll's Contract*, [1904] 2 Ch. 226, C. A.; and see title SALE OF LAND. If no date has been fixed for the purpose of apportioning rents and outgoings, *semble*, he must bear them if the work is finished before the conveyance ought in the usual course to be executed (*Re Bettesworth and Richer* (1888), 37 Ch. D. 535; *Barsht* v. *Tagg*, [1900] 1 Ch. 231).

complains; and if he does so, any legal proceedings commenced by the authority for the recovery of expenses will be stayed (*a*).

(iii.) *Private Street Works Act*, 1892.

Private street works.

426. The Private Street Works Act, 1892 (*b*), is in force in any urban district in which it is adopted (*c*), and in any rural district, or part of a rural district, to which it is applied by order of the Local Government Board (*d*). Neither the Public Health Act, 1875 (*e*), ss. 150—152, nor the Public Health Acts Amendment Act, 1890 (*f*), s. 41, apply in any district or part of a district where it is in force (*g*); but, otherwise, all powers given by it to a local authority are to be deemed to be in addition to their other powers (*h*). It is to be construed as one with the Public Health Acts.

Non-application of Public Health Acts.

Mode of adoption of Act in urban districts.

427. In an urban district the Act is adopted by a resolution of the authority, passed after one month's special notice to every member (*i*). The notice must either be given in the mode in which notices to attend meetings of the authority are usually given, or, if there is no such mode, must be signed by the clerk of the authority, and delivered to each member, or either left at or sent by registered post to his last known place of abode in England. The resolution, when passed, must be advertised in a local newspaper, and published on the door of every church and chapel, and in such other manner as the authority may think sufficient; and a copy of it must be sent to the Local Government Board. The resolution will come into operation at such time, not less than a month after the first publication of the advertisement, as the authority may fix (*i*).

In rural districts.

The Local Government Board may declare (*k*) the provisions of the Act to be in force in any rural district, or part thereof (*l*), and may invest a rural authority with the powers and duties of an urban authority which has adopted it.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 268 *et seq.* The "decision" is the decision to recover the sum due summarily or to declare it private improvement expenses (*R.* v. *Local Government Board* (1882), 10 Q. B. D. 309, C. A.). See also *Cook* v. *Ipswich Local Board* (1871), L. R. 6 Q. B. 451; cases in notes (*s*), (*t*), p. 223, *ante*; *West Hartlepool Corporation* v. *Robinson* (1897), 75 L. T. 677, affirmed, 77 L. T. 387, C. A.

(*b*) 55 & 56 Vict. c. 57; which, for the purpose of brevity, in this division of this title is referred to as "the Act."

(*c*) *Ibid.*, s. 2.

(*d*) *Ibid.*, s. 4.

(*e*) 38 & 39 Vict. c. 55; see pp. 215 *et seq.*, *ante*.

(*f*) 53 & 54 Vict. c. 59; see p. 220, *ante*.

(*g*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 25. But if at the date when it comes into force a paving notice has been served under the earlier statute, the works included in such notice may be carried out and the expenses recovered (*Heston and Isleworth Urban Council* v. *Grout*, [1897] 2 Ch. 306, C. A.).

(*h*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 24.

(*i*) *Ibid.*, s. 3. For the appropriate forms of notices and application for an order, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 71—73.

(*k*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 4.

(*l*) The order is generally confined to a contributory place, or to specified streets, as in the case of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150; see note (*f*), p. 215, *ante*.

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Resolution to execute private street works.

428. In districts where the Act is in force the authority may from time to time (*m*) resolve (*n*) to sewer, level, pave, metal, flag (*o*), channel, or make good, or to provide proper means for lighting (*p*), any street (*q*), or part of a street, which is not sewered, levelled etc., to its satisfaction (*r*); and may include in its resolution any works which it thinks necessary for bringing the street, or part, into conformity with any other streets, whether repairable by the inhabitants at large or not (*s*).

Provisional apportionment of expenses.

429. The expenses so incurred are in general to be apportioned on the premises fronting, adjoining, or abutting on the street or part of the street in question (*a*), according to their respective frontages (*b*), but the authority may resolve that in the apportionment regard shall be had to the greater or less degree of benefit to be derived by any premises from such works; or to the amount and value of any work already done by the owners or occupiers of any such premises. The authority may also include in the apportionment premises not adjoining the street, which obtain access thereto through a court, passage, or otherwise, and which in its opinion will be benefited by the works; and may fix the sum or proportion to be charged against any such premises (*b*).

A resolution to do private street works may include several streets or parts of streets (*c*). The authority may themselves defray all or

(*m*) Until a street is declared to be a highway repairable by the inhabitants at large, private street works, other than sewering, may be done as often as required at the expense of the frontagers. It would seem, however, that under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), as under the Public Health Act, 1875 (38 & 39 Vict. c. 55), when once a street is sewered to the authority's satisfaction, it cannot be re-sewered at the expense of the frontagers; see p. 220, *ante*. The same decisions appear to be applicable here.

(*n*) Under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), the authority does the necessary works without first calling upon the frontagers to do them. For a form of resolution, see Encyclopædia of Forms and Precedents, Vol. XI., p. 74.

(*o*) Words referring to "paving, metalling and flagging" include macadamising, asphalting, gravelling, kerbing and every method of making a carriage way or footway (Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 5); as to gullies, see note (*o*), p. 220, *ante*.

(*p*) "Means for lighting" does not include the provision of gas or electric current.

(*q*) *I.e.*, a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large (Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 5). As to the wide meaning of the word "street" in the Act, see pp. 16 *et seq.*, *ante*. If a street is in fact repairable by the inhabitants at large, no agreement with the frontagers can give the authority power to proceed under the Act. As to such agreements, see *Folkestone Corporation* v. *Marsh* (1905), 70 J. P. 113; *Folkestone Corporation* v. *Rook* (1907), 71 J. P. 550.

(*r*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 6.

(*s*) *Ibid.*, s. 9 (1). This provision obviates the difficulty disclosed by *Cary* v. *Kingston-upon-Hull Local Board of Health* (1864), 34 L. J. (M. C.) 7. Separate sewers for surface waters may be provided (s. 9 (1)). As to altering the proportions of roadway and footway, see p. 220, *ante*.

(*a*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 6 (1). As to the meaning of the words "fronting, adjoining, or abutting," see p. 217, *ante*.

(*b*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57, s. 10. It is for the authority to decide whether to take considerations, other than frontage, into account, and its decision is final (*Bridgwater Corporation* v. *Stone* (1908), 72 J. P. 487).

(*c*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 6 (1).

part of the cost of any private street works as part of the expenses incurred by it in the execution of the Public Health Acts (*d*).

Plans and estimates.

430. The surveyor (*e*) to the authority must prepare, in respect of each street, or part of a street, a specification (*f*) of the works referred to in the resolution, with plans and sections (*g*), if applicable; an estimate of the probable cost, including any commission which the authority may resolve to charge in respect of surveys, superintendence, and notices (*h*), and, if it thinks fit, a sum for "contingencies" (*i*); and a provisional apportionment of the estimated expenses, stating (*k*) the amounts charged on the respective premises, the names of the respective owners or reputed owners (*l*), whether the apportionment is made according to frontage or not, the measurements of the frontages, and any other considerations on which the apportionment is based (*m*).

Premises exempt.

431. All premises in the street must be included in the provisional apportionment, even those which are *extra commercium* (*n*),

(*d*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 15.

(*e*) *Ibid.*, s. 6 (2); *Whitchurch* v. *Fulham Board of Works* (1866), L. R. 1 Q. B. 233; *semble*, an "acting" surveyor not definitely appointed surveyor cannot make a valid apportionment (*Lewis* v. *Weston-super-Mare Local Board* (1888), 40 Ch. D. 55); but see *Kendal* v. *Lewisham Metropolitan Borough* (1903), 19 T. L. R. 384, 20 T. L. R. 21, C. A.

(*f*) Specifications must describe the works and things to be done, and, in the case of structural works, as far as may be, the foundation, form, material, and dimensions thereof (Private Street Works Act, 1892 (55 & 56 Vict. c. 57), Schedule, Part I.).

(*g*) Plans and sections must show the constructive character of the work, and the connections (if any) with existing streets, sewers, or other works, and the lines and levels of the works, subject to such limits of deviation as may be indicated (*ibid.*, Schedule, Part I.).

(*h*) *Ibid.*, Schedule, Part I., and *ibid.*, s. 9 (2), which empowers an authority to charge a commission not exceeding 5 per cent. on the estimated cost, to be carried to the credit of the district fund, or (in a rural district) applied towards general expenses (*ibid.*).

(*i*) *Standring* v. *Bexhill Corporation* (1909), 73 J. P. 241.

(*k*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), Schedule, Part I.

(*l*) A "reputed owner" means "a person whom the local authority really believes to be the owner; and a person who has been the owner, and whom the local authority has dealt with as such, is certainly a reputed owner" (*Wirral Rural Council* v. *Carter*, [1903] 1 K. B. 646, *per* CHANNELL, J, at p. 651).

(*m*) It must be made according to frontage and only upon premises "fronting, adjoining, or abutting," unless the authority resolves otherwise; see p. 228, *ante*. For a form of apportionment, see Encyclopædia of Forms and Precedents, Vol. XI., p. 76.

(*n*) *Herne Bay Urban Council* v. *Payne and Wood*, [1907] 2 K. B. 130. It apparently follows from this decision that if any premises in a street are *extra commercium*, or belong to the Crown, or to the Thames Conservancy, the amount apportioned upon them must be borne by the local authority. As to "owners" and premises "*extra commercium*," see p. 218, *ante*. *Quære*, whether premises in the district of the neighbouring authority should be included; for no share of the expenses can be recovered from their owners (*Hornsey Corporation* v. *Birkbeck Freehold Land Society*, [1906] 1 K. B. 521; *Shoreditch Borough Council* v. *Wakeham* (1905), 69 J. P. 239; *R.* v. *Cheshire Justices, Ex parte Vyner* (1909), 73 J. P. 499). *Semble*, an agreement by an authority to exempt particular premises from any future paving expenses in consideration of work done by the owner is invalid (*Dodworth Urban District Council* v. *Ibbotson* (1903), 67 J. P. 132).

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or belong to the Crown (*o*). Special provision is made as to the following premises:—

Churches, chapels etc.

(1) Places appropriated to public religious worship which are by law exempt from poor rates, and churchyards or burial grounds attached thereto, are also exempt from private street works expenses; and their proportion of such expenses is to be borne by the authority (*p*).

Railways and canals.

(2) In the case of streets not in existence at the date of the adoption of the Act, land belonging to a railway or canal company is exempt (*q*), if at the time of the laying out of the street it was used solely (*r*) as part of a railway line, canal, siding, station, towing-path, or works, and has no direct communication with the street; and the expenses which would otherwise have been paid by the company are to be paid by the other frontagers. But if the company subsequently makes a communication with the street, it must pay to the authority the expenses which it would have had to pay in the first instance, and the authority must divide the sum so paid among the other frontagers, less the cost of division. The proportion to be thus paid or received by each frontager is to be settled by the surveyor, whose decision is final.

Thames Conservancy.

(3) The Conservators of the river Thames are exempt as regards their works on or upon the shores of that river (*s*).

Footpath on one side.

432. Where a new street is made up with a footpath on one side only, the costs applicable to the footpath, as well as those applicable to the roadway, must be apportioned on the frontagers on both sides (*t*).

Approval of plans etc. by authority.

433. The specification, plans, sections, estimate, and provisional apportionment must be submitted to the authority, who may by resolution approve them with or without modification or addition (*u*).

Publication of resolution of approval.

The resolution of approval must be published (*a*) once in each of two successive weeks (*b*) in a local newspaper, and must be publicly posted in or near the street to which it relates once at

(*o*) See p. 219, *ante*.

(*p*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 16.

(*q*) *Ibid.*, s. 22.

(*r*) Whether land is so used is a question of fact (*R.* v. *Jones, Ex parte Mein* (1907), 71 J. P. 326). In that case a railway company had acquired land for the purposes of its undertaking, but allowed its servants to use part of it as garden ground on payment of a nominal rent. The court refused to interfere with a finding that it was not used solely as part of the railway. See also *Re Carlisle Corporation and Saul's Executors* (1907), 71 J. P. 502 (land used for the deposit of ashes).

(*s*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 26. Compare *Thames Conservators* v. *Port of London River Sanitary Authority*, [1894] 1 Q. B. 647; and see the Port of London Act, 1908 (8 Edw. 7, c. 68), s. 7 (2).

(*t*) *Clacton Local Board* v. *Young & Sons*, [1895] 1 Q. B. 395.

(*u*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 6 (2).

(*a*) *Ibid.*, s. 6 (3), Schedule, Part II.

(*b*) Seven days need not elapse between the dates; *e.g.*, publication on a Saturday and the following Monday is sufficient (*Aberdeen City* v. *Watt* (1901), 3 F. (Ct. of Sess.) 787).

least in each of three successive weeks; and copies thereof must be served (*c*) on the owners (*d*) of the premises included in the provisional apportionment within seven days after the date of the first publication.

Plans etc. to be deposited.

The specifications, plans, sections, estimates, and provisional apportionments (or copies thereof certified by the surveyor) must be kept deposited at the authority's offices for a month from the date of the first publication, and be open to inspection at all reasonable times (*e*); and during that period (*f*) any owner (*g*) of any premises charged in a provisional apportionment may, by written notice (*h*) served on the authority, object to its proposals on any of the following grounds:—(1) That the alleged street is not a street (*i*) within the meaning of the Act; (2) that the street is in whole or in part a highway repairable by the inhabitants at large (*k*); (3) that there has been some material informality, defect, or error in, or in respect of, the resolution, notice, plans, sections, or estimate; (4) that the proposed works (*l*) are insufficient or

Objections by owners.

(*c*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 6 (3). As to the mode of service, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. The same provisions apply, since the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), is, by s. 1, to be construed as one with the Public Health Act, 1875 (38 & 39 Vict. c. 55).

(*d*) Service on a "reputed owner," who is not in fact the real owner, will not bind the latter (*Wirral Rural Council* v. *Carter*, [1903] 1 K. B. 646). As to who is an "owner" for the purposes of the Public Health Acts (including the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. For forms of resolution and notice, see Encyclopædia of Forms and Precedents, Vol. XI., p. 77.

(*e*) Private Street Works Act, 1892 (55 & 56 Vict. c. 67), s. 6 (3).

(*f*) *Ibid.*, s. 7.

(*g*) An owner may object if premises in fact belonging to him appear in the apportionment, although his name does not. Joint tenants or tenants in common may object through one of their number authorised in writing by a majority of them (*ibid.*, s. 7).

(*h*) As to what is a sufficiently explicit notice of objection, see *Southampton Corporation* v. *Lord* (1903), 67 J. P. 189, C. A.; compare also note (*b*), p. 222, *ante*. For a form of notice, see Encyclopædia of Forms and Precedents, Vol. XI., p. 78.

(*i*) See pp. 16 *et seq.*, *ante*.

(*k*) This ground is really superfluous, for the objection may be raised on an objection that the *locus* is not a "street"; see *Carey* v. *Bexhill Corporation*, [1904] 1 K. B. 142. Justices cannot enforce an apportionment if the *locus* is a highway repairable by the inhabitants at large, even though the frontagers have purported to agree that the authority may nevertheless proceed under the Act (*Folkestone Corporation* v. *Marsh* (1905), 70 J. P. 113). On the other hand, an agreement by the authority to treat as a highway repairable by the inhabitants at large a street not in fact so repairable is *ultra vires* and invalid (*Folkestone Corporation* v. *Rook* (1907), 71 J. P. 550). Where an authority has agreed to "adopt" a street when certain work has been done by the frontagers, and such work has been done, the street must apparently be regarded as a highway repairable by the inhabitants at large, although owing to forgetfulness no formal adoption has taken place (*Bromley Local Board* v. *Lansbury* (1894), *Times*, 5th December). A finding of justices in proceedings under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), that a street is a highway repairable by the inhabitants at large binds the authority in further proceedings under the Act in respect of the same length of street, even though fresh evidence be available (*Wakefield Corporation* v. *Cooke*, [1904] A. C. 31, distinguishing *R.* v. *Hutchings* (1881), 6 Q. B. D. 300, C. A.).

(*l*) On an objection under head (4) the court has considered a contention that a street has already been sewered to the authority's satisfaction and could

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unreasonable (*m*), or that the estimated expenses are excessive; (5) that any premises ought to be excluded from (*n*), or inserted in, the provisional apportionment; (6) that the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection, or (where a provisional apportionment is made on some other basis than frontage (*o*)) in respect of the degree of benefit to be derived by any persons, or the amount or value of any work already done by the owner or occupier of any premises.

No objection which could be taken under the preceding provisions, or indeed under any section of the Act, can be taken or allowed in any other manner (*p*).

Hearing of objections.

434. If no notice of objection is given within the prescribed period, the authority may execute the work (*q*); but if notice is given, the authority may apply to a court of summary jurisdiction to appoint a time for determining all objections, and must publish a notice of the time and place appointed, and serve copies of such notice (*r*) on the objectors.

not be re-sewered at the frontagers' cost; see *Rishton* v. *Haslingden Corporation*, [1898] 1 Q. B. 294.

(*m*) The word "insufficient" points exclusively to a comparison between the result to be obtained and the means selected for obtaining it. Thus a scheme is not insufficient because a more comprehensive one might be desirable, *e.g.*, because it might be better to pave the street as well as to sewer it. "Unreasonable" is a wider term and includes a consideration of the scheme as a whole, *e.g.*, whether any works at all are required (*Mansfield Corporation* v. *Butterworth*, [1898] 2 Q. B. 274; *Sheffield Corporation* v. *Alexander* (1894), 72 L. T. 242, C. A.). *Semble*, an authority to suit its own purposes may do work unnecessarily costly, *e.g.*, lay a sewer of extra size, so long as it pays the additional cost incurred (*Acton Urban District Council* v. *Watts* (1903), 67 J. P. 400).

(*n*) The objection that premises do not in fact abut on the street ought to be taken on this ground (*Wallasey Urban District Council* v. *Walker & Co.* (1906), 70 J. P. 199). *Semble*, an authority cannot validly agree to exempt particular premises from any further paving expenses in the future merely because the owner has by arrangement with it executed certain works in the street (*Dodworth Urban District Council* v. *Ibbotson* (1902), 67 J. P. 132).

(*o*) The justices cannot interfere with the authority's determination to take into account or disregard such other considerations (*Bridgwater Corporation* v. *Stone* (1908) 72 J. P. 487).

(*p*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 8 (2). An objection which can be taken under s. 7 (*ibid.*) to the provisional apportionment, or under s. 12 (2) (*ibid.*) to the final apportionment, must be taken as therein directed; certain other objections going to the root of a frontager's liability may be taken when the authority seeks to recover expenses from him (see p. 235, *post*); certain other objections can only be raised (if at all) by appeal to the Local Government Board (see p. 235, *post*). For cases in which attempts were made to raise objections in the wrong way or at the wrong time, see *Woodford Urban District Council* v. *Henwood* (1899), 64 J. P. 148; *Wallasey Urban District Council* v. *Walker & Co.*, *supra*; *Hayles* v. *Sandown Urban Council*, [1903] 1 K. B. 169 (where a frontager complained that there had been a departure from the specifications); *Teddington Urban District Council* v. *Vile* (1906), 70 J. P. 381 (where a former owner had by agreement with the authority sewered part of the street); *R.* v. *Livesey* (1870), 34 J. P. 645 (a case on a local Act).

(*q*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 8 (1). The authority may drop its proposals altogether if the objections are fatal. As to amending them or asking the justices to do so, see p. 233, *post*.

(*r*) No summons is necessary. For a form of notice, see Encyclopædia of Forms and Precedents, Vol. XI., p. 79.

At the time and place appointed any court of summary jurisdiction may hear and determine the objections in the same manner as in summary proceedings to enforce the payment of money (*s*); and may quash or amend (*a*) the resolution, plans, sections, estimates and provisional apportionment, or any of them. The court may also adjourn the hearing and direct any further notices to be given. If an error in the apportionment is discovered during the hearing, the justices may rectify it, although no notice of objection specifically directed to it has been given (*b*). The court may state a special case, and an appeal also lies to quarter sessions (*c*).

Costs of proceedings.

The costs (*d*) are in the discretion of the court, who may direct that the whole or any part of any costs ordered to be paid by an objector shall be paid in the first instance by the authority, and charged upon his premises.

Evidence in proceedings

435. Upon the hearing of objections the burden of proof is, in general, upon the authority (*e*); but it may be that when the *locus* is shown to be a "street" the burden of proof is shifted, and that it lies upon the objector to prove that it is a highway repairable by the inhabitants at large (*f*). The adoption of the Act in an urban district may be proved (*g*) by producing a copy of the newspaper advertisement of the resolution of adoption; and, in a rural district (*h*), by the production of a copy of the *London Gazette* containing the Order of the Local Government Board, or of a copy of the Order purporting to be printed by the Government printer or under the superintendence of the Stationery Office.

When authority may proceed.

436. When the justices have approved a scheme, with or without amendments, the authority may proceed to execute the work (*i*).

Amendment of specifications etc.

437. An authority may, from time to time, amend the specifications, plans and sections, estimates, and provisional apportionments; but if the total estimate is increased, the estimate and

(*s*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 8 (1). As to courts of summary jurisdiction, generally, see title MAGISTRATES.

(*a*) If the court makes any material amendment, it should, as a rule, adjourn and direct fresh notices to be given to any persons affected, but it is not bound to do so (*Twickenham Urban Council* v. *Munton*, [1899] 2 Ch. 603, C. A.). When a scheme is finally approved (whether with or without amendments) the authority may carry it out without passing any resolution of approval (*ibid.*); if dissatisfied with the amendments, it may drop the scheme altogether.

(*b*) *Hall* v. *Bolsover Urban District Council* (1909), 73 J. P. 140.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269; *Pearce* v. *Maidenhead Corporation*, [1907] 2 K. B. 96.

(*d*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 8 (3).

(*e*) *Rishton* v. *Haslingden Corporation*, [1898] 1 Q. B. 294.

(*f*) As being an "exception" within the meaning of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 14, or the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 39 (2), and at any rate, if it is not such an "exception," the burden of proof is easily shifted on to the objector; see *Vyner* v. *Wirral Rural District Council* (1909), 73 J. P. 242, *per* JELF, J., at p. 243.

(*g*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 3 (4).

(*h*) Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2; Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 5; Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 2; *Huggins* v. *Ward* (1873), L. R. 8 Q. B. 521; and see title EVIDENCE, Vol. XIII., p. 525.

(*i*) *Twickenham Urban Council* v. *Munton*, *supra*.

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provisional apportionment must be re-published and re-served, and fresh objections may be taken (*j*).

Final apportionment.

438. When the works have been completed and the expenses ascertained, the surveyor must make a final apportionment (*k*) in the same proportions as the provisional apportionment, which will be conclusive for all purposes (*l*). Notice of it must be served (*m*) upon the owners of the premises affected, any of whom may (*n*), within one month, by written notice to the authority, object to it on any of the following grounds (*o*): (1) that the actual expenses have without sufficient reason exceeded the estimated expenses by more than 15 per cent.; (2) that the final apportionment has not been made in the same proportions as the provisional apportionment; (3) that there has been an unreasonable departure from the specification, plans and sections.

Any such objections are to be determined in the same manner as objections to the provisional apportionment (*p*).

Recovery of sums apportioned

Charge.

439. Sums so apportioned are recoverable (*q*), either in the manner mentioned below (*r*), or in the same manner as private improvement expenses under the Public Health Act, 1875 (*s*), and the authority has the power to declare them payable by instalments; the sums are charged upon the premises in the same manner as under the Public Health Act, 1875 (*t*). The charge carries interest at 4 per cent. as from the date of the final apportionment (*a*). For the recovery of such sums and interest the authority has all the same powers and remedies under the Conveyancing and Law of Property Act, 1881 (*b*), as if it were a mortgagee, having powers of sale, of leasing and of appointing a receiver; and it may bring an action to enforce its charge (*c*).

Register of charges.

440. An authority must keep a register of charges and of payments made in satisfaction thereof, which must be open to inspection by all persons at all reasonable times on payment of a sum not

(*j*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 11. *Semble*, this power will not enable an authority to alter an approved apportionment of expenses so as to favour one frontager as against the others.

(*k*) *Ibid.*, s. 12 (1).

(*l*) *I.e.*, as to amount, not as to liability. For a form, see Encyclopædia of Forms and Precedents, Vol. XI., p. 80.

(*m*) *Ibid.*, p. 81. As to mode of service, see p. 231, *ante*. A final apportionment need not be published.

(*n*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 12 (2).

(*o*) If not taken at the proper time such objections cannot be raised at all; see p. 232, *ante*.

(*p*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 12 (3). As to the mode of determination, see p. 232, *ante*. It would appear that if an objection on grounds (1) or (3) is sustained, the justices can leave the authority to bear a proper share of the expenses.

(*q*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 12 (1).

(*r*) See p. 235, *post*.

(*s*) See pp. 224, 225, *ante*, and note (*f*), p. 235, *post*.

(*t*) See p. 225, *ante*.

(*a*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 13 (1); *Stock* v. *Meakin*, [1900] 1 Ch. 683, C. A.; *Surtees* v. *Woodhouse*, [1903] 1 K. B. 396, C. A.

(*b*) 44 & 45 Vict. c. 41, ss. 19—24. See title MORTGAGE.

(*c*) *West Ham Corporation* v. *Sharp*, [1907] 1 K. B. 445.

exceeding 1*s.* for each name or property searched for; and it must furnish copies of any part of the register on payment of such reasonable sum as it may fix (*d*).

Recovery summarily or by actions.

441. An authority (*e*), may, without prejudice to any other remedy (*f*), recover the expenses summarily in a court of summary jurisdiction, or as a simple contract debt by action in any court of competent jurisdiction, from the owner for the time being of the premises, with interest at a rate not exceeding 4 per cent. from the date of final apportionment till payment. In the case of summary proceedings a demand is necessary, and the period of limitation is six months from the date thereof (*g*); the demand may apparently be delayed as long as an authority likes, but cannot be made until a month has elapsed from the making of the final apportionment, or until any objections thereto have been determined (*g*). In the case of proceedings in the county court or High Court it would appear that no demand is necessary (*h*), and that the period of limitation is probably twenty years (*i*).

Objections which can be raised on proceedings to recover.

442. An objection which goes to the root of the whole liability of a frontager, *e.g.*, want of service of notices, can be raised when the authority seeks to recover the apportioned amount (*k*); but not objections which could have been taken on the provisional or final apportionment, nor other objections which do not go to the root of his whole liability.

It would appear that any objection which cannot be taken before justices on the provisional or final apportionment may be raised by an appeal to the Local Government Board (*l*).

Charge by limited owners to pay expenses.

443. All owners of buildings or lands (*m*) who are empowered under the Lands Clauses Acts to sell, convey, or release lands (*n*) may charge such buildings or lands with the whole or part of any expenses apportioned thereon and with the expenses of making the charge; and for that purpose may mortgage them on terms of repayment by equal yearly or half-yearly payments within twenty

(*d*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 13 (2).

(*e*) *Ibid.*, s. 14.

(*f*) *Semble*, these words, which do not appear in the Public Health Act, 1875 (38 & 39 Vict. c. 55), would enable an authority to sue an owner for any sum at the time in arrear, although it has declared the expenses to be private improvement expenses primarily payable by the occupier, or to be payable by instalments otherwise recoverable only within six months (see pp. 224, 225, *ante*).

(*g*) See p. 223, *ante*.

(*h*) *R.* v. *Local Government Board* (1882), 10 Q. B. D. 309, C. A. But see *Hampstead Corporation* v. *Caunt*, [1903] 2 K. B. 1.

(*i*) *Blackburn Corporation* v. *Sanderson*, [1902] 1 K. B. 794, C. A.; *Tottenham Local Board* v. *Rowell* (1876), 1 Ex. D. 514, C. A.; a note by Sir F. Pollock at [1903] 2 K. B. 3; and title LIMITATION OF ACTIONS.

(*k*) *Wirral Rural Council* v. *Carter*, [1903] 1 K. B. 646.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 268; *Pearce* v. *Maidenhead Corporation*, [1907] 2 K. B. 96.

(*m*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 17. As to the liability *inter se* of landlord and tenant, vendor and purchaser, life tenant and remainderman, see p. 226, *ante*.

(*n*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 57, 58.

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years. But a tenant for life, who himself pays the sum due, being subrogated to the rights of the authority, is entitled to a charge on the fee simple, and may raise money without any restrictions as to time for repayment, in order to repay himself (*o*).

Expenses of authority.

444. All expenses incurred by an authority in the execution of the Act, and not otherwise provided for, may be defrayed as part of the expenses incurred by it in the execution of the Public Health Acts (*p*). In the case of a rural authority such expenses will, in almost every case, be special expenses (*q*).

Power to borrow.

445. An urban authority may from time to time, with the sanction of the Local Government Board, borrow money on the security of the district fund or rates for the purpose of temporarily providing for expenses of private street works; and its borrowing powers under the Public Health Acts will be available. A rural authority may be invested with similar borrowing powers (*r*).

Accounts and application of money.

446. An authority must keep separate accounts of all moneys expended and recovered by it in respect of private street works; and all sums recovered by it in respect of such works must be applied in repayment of moneys borrowed for the purpose, or, if there is no such loan outstanding, in such manner as may be directed by the Local Government Board (*s*).

SUB-SECT. 4.—*Lighting Streets* (*t*).

SUB-SECT. 5.—*Construction of New Streets* (*u*).

Construction of new streets.

447. An urban authority (*a*), or a rural authority invested with the necessary urban powers (*b*), may, with the sanction of the Local Government Board, purchase any premises (*c*) for the purpose of making a new street. It may be authorised to borrow money for the purpose (*d*), and may obtain by provisional order powers of compulsory purchase (*e*). A new street thus laid out must be made

(*o*) *Re Pizzi, Scrivener* v. *Aldridge*, [1907] 1 Ch. 67. See also p. 226, *ante*.

(*p*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 23; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*q*) For the Act is seldom, if ever, put in force in the whole of a rural district.

(*r*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 18; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*s*) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 21 (1), (2).

(*t*) This subject is dealt with elsewhere; see pp. 118 *et seq.*

(*u*) As to the meaning of the words "new street," see p. 20, *ante*, and p. 238, *post*.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 154. The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 67, incorporated by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 160, confers practically identical powers.

(*b*) By the Local Government Board (*ibid.*, s. 276).

(*c*) Including "messuages, buildings, lands, easements, and hereditaments of any tenure" (*ibid.*, s. 4). Under a faculty part of a churchyard may be acquired for widening a highway (see note (*m*), p. 214, *ante*), but *quære* whether a faculty would be granted for constructing an entirely new street through consecrated ground.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 233, as to which see title LOCAL GOVERNMENT.

(*e*) *Ibid.*, s. 176.

and kept in repair by the authority, and the burden cannot be put upon the frontagers (*f*).

Any highway authority may enter into agreements with individuals for the construction of new public roads (*g*).

448. An urban authority (*h*), or a rural authority invested with the necessary urban powers (*i*), may make bye-laws (*j*) as to the level, width, construction and sewerage of new streets; and in districts where the Public Health Acts Amendment Act, 1890 (*k*), s. 23 (1), is in force (*l*) the authority may also make bye-laws as to providing, in connection with new streets, secondary means of access for the removal of house refuse.

Power to make bye-laws as to "new streets."

The codes of bye-laws in common use (*m*) provide that every new street shall be laid out at such level (*n*) as will afford the easiest practicable gradients for securing convenient means of communication with other streets; that it shall be of a certain width according as it is intended to be used for a carriage road or footpath, or for a principal or secondary means of access to buildings (*o*); and that it shall be constructed (*p*) in a certain way and, under some

Usual provisions of bye-laws:
(i.) Level;
(ii.) Width;
(iii.) Construction.

(*f*) *Kingston-upon-Hull Local Board of Health* v. *Jones* (1856), 1 H. & N. 489.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 146, as to which see p. 93, *ante*. For a form of agreement, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 546. As to the powers of the Road Board to make or advance money for making new roads and streets, see p. 28, *ante*.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157.

(*i*) *Ibid.*, s. 276; and see title LOCAL GOVERNMENT.

(*j*) As to the making, confirmation etc. of bye-laws, see Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 182—188, and title LOCAL GOVERNMENT.

(*k*) 53 & 54 Vict. c. 59.

(*l*) *I.e.*, in urban districts where Part III. (*ibid.*) has been adopted, or in rural districts where s. 23 (1) (*ibid.*) has been put in force by an Order of the Local Government Board. Where it is not in force there is no power to make bye-laws requiring the provision of secondary means of access (*Waite* v. *Garston Local Board* (1867), L. R. 3 Q. B. 5); but there is power to regulate by bye-laws the width etc. of any secondary or back streets that may be provided voluntarily.

(*m*) There is, of course, considerable variety in bye-laws, which frequently contain other provisions besides those referred to in the text. In *Baker* v. *Portsmouth Corporation* (1878), 3 Ex. D. 157, C. A., the court upheld a bye-law to the effect that no building should be erected in a new street until such street had been constructed to the authority's approval; compare *Hendon Local Board* v. *Pounce* (1889), 42 Ch. D. 602, and *Woodhill* v. *Sunderland Corporation* (1887), 52 J. P. 5. So, too, in *Leyton Urban Council* v. *Chew*, [1907] 2 K. B. 283, a bye-law was upheld which provided for the construction of a channel in certain classes of streets. On the other hand, a bye-law requiring the whole length of the footpaths in any new street to be kerbed before the erection of any building was held to be unreasonable in *Rudland* v. *Sunderland Corporation* (1884), 49 J. P. 359. The building line in a street must be regulated under the appropriate statutory provisions, and cannot be dealt with by a "new street" bye-law (*Robinson* v. *Barton-Eccles Local Board* (1883), 8 App. Cas. 798). Bye-laws as to sewerage are seldom found, authorities relying upon their "Private Street Works" powers, as to which see pp. 215 *et seq.*, *ante*.

(*n*) A bye-law as to the level of new streets will be unnecessary where a local Act incorporates the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 57—61 (see p. 243, *post*), or otherwise deals with the matter. For a case arising under a local Act, see *Great Salterns Syndicate* v. *Portsmouth Corporation* (1904), 68 J. P. 48.

(*o*) For cases as to "principal" streets and back passages, see *A.-G.* v. *Pudsey Local Board* (1895), 59 J. P. 329; *R.* v. *Goole Local Board*, [1891] 2 Q. B. 212.

(*p*) The term "construction" of a new street includes the building of the

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bye-laws, with an entrance of a certain width (*q*) according to its own width and the purposes for which it is to be used.

"New street."

The term "new street" in this connection includes an old roadway which has recently become a "street" in the popular sense of the word by reason of the erection of houses; it also includes any road, lane, alley, passage, or footway newly made or laid out, even though, in the immediate future at any rate, no houses are intended to be built along it (*r*).

"Laying out."

449. Whether a person is "laying out" or "intending to lay out" a new street within the meaning of bye-laws is a question of fact (*s*); and where an owner of land builds houses thereon contemplating that they will form part of a row of houses to which access will be obtained not from any existing highway, but along a strip of his own land in front of them, a finding that he is laying out or intending to lay out such strip as a new street will apparently be justified (*t*). But a person cannot be said to be laying out or intending to lay out a new street if he merely builds two or three houses standing back a short distance from the fence of an old highway (*a*), or of an existing occupation road over which he has a right of way (*b*); nor does it make any difference that when selling the houses so built he reserves the intervening strip of land (giving to his purchasers a right of way across it to the road) and subsequently removes the fence separating it from the road (*c*). Indeed it would appear that in dealing with cases when only two or three houses are being built, the bye-laws must be construed as dealing only with something in the nature of a physical laying out, and as relating only to something to be done or intended to be done on the actual land which is to be the street (*d*).

houses abutting on it. Therefore, until the new street is constructed in the prescribed way and with a sufficient entrance (if the bye-laws so prescribe), houses may not be built abutting on it (*Hendon Local Board* v. *Pounce* (1889), 42 Ch. D. 602), but, *semble*, this decision is inapplicable where building takes place along a previously existing road; see *Devonport Corporation* v. *Tozer*, [1903] 1 Ch. 759, C. A.

(*q*) For cases as to width of entrance, see *Hendon Local Board* v. *Pounce*, *supra*; *Bromley Local Board* v. *Lloyd* (1892), 56 J. P. 278; *Bromley Local Board* v. *Lloyd* (1893), 9 T. L. R. 306; *Barton Regis Rural District Council* v. *Stevens* (1896), 61 J. P. 598.

(*r*) *A.-G.* v. *Gibb*, [1909] 2 Ch. 265; see further, as to "street" and "new street," pp. 16, 20, *ante*.

(*s*) *Williams* v. *Powning* (1883), 47 J. P. 486; *R.* v. *Sheil* (1884), 50 L. T. 590; *Gozzett* v. *Maldon Urban Sanitary Authority*, [1894] 1 Q. B. 327; and see cases in notes (*t*) to (*d*), *infra*.

(*t*) *Robinson* v. *Barton Local Board* (1882), 21 Ch. D. 621, C. A.

(*a*) *Devonport Corporation* v. *Tozer*, *supra*; compare *Taylor* v. *Metropolitan Board of Works* (1867), L. R. 2 Q. B. 213; *a fortiori* if he only builds a corner house alongside the street in question, but fronting on to another street (*St. George's Local Board* v. *Ballard*, [1895] 1 Q. B. 702, C. A.).

(*b*) *Gozzett* v. *Maldon Urban Sanitary Authority*, *supra*; *Williams* v. *Powning*, *supra*; *Fellowes* v. *Sedgley Urban District Council* (1906), 70 J. P. 412.

(*c*) *Fellowes* v. *Sedgley Urban District Council*, *supra*.

(*d*) *Devonport Corporation* v. *Tozer*, *supra*. A man who merely erects a new fence or wall on the verge of his property fronting an existing or defined way does not lay out a street (*Bushell* v. *Creer* (1900), 64 J. P. 600; *Metropolitan*

A builder employed by a landowner to build houses along a new street which he proposes to lay out cannot be regarded as himself laying out such new street (*e*).

Enforcement of bye-laws.

450. An authority empowered to make "new street" bye-laws may provide for their observance (*f*) by including provisions as to giving notices, as to the deposit of plans and sections by persons intending to lay out streets, as to inspection by the authority, and as to the power of the authority (subject as hereinafter mentioned (*g*)) to remove, alter, or pull down any work begun or done in contravention of such bye-laws (*h*). It may also impose reasonable penalties (*i*), not exceeding (*j*) £5 for each offence, and in the case of a continuing offence a further penalty not exceeding 40*s.* per day after written notice. Such penalties are recoverable summarily (*k*), and proceedings for their recovery may be taken by the authority or by any party aggrieved; but other persons may only take proceedings with the written consent of the Attorney-General (*l*). Where an authority may, under the Public Health Act, 1875 (*m*), s. 158, remove any work begun or executed in contravention of any bye-law, or where the execution of the work is an offence punishable by a penalty under any bye-law, the existence of the work in that state is to be deemed to be a continuing offence (*n*), but no penalty is to be incurred after one year from the day when the bye-law was broken.

Demolition.

Penalties.

Injunction.

451. Where a breach of a bye-law constitutes a continuing interference with the rights of the public, it may be restrained by injunction, but the Attorney-General is a necessary party (*o*); and

Board of Works v. *Clever* (1868), L. R. 3 C. P. 531). For earlier decisions to the contrary, see *Roberts* v. *Richards* (1890), 54 J. P. 693; *A.-G.* v. *Rufford & Co., Ltd.*, [1899] 1 Ch. 537; *sed quære* whether they can be reconciled with *Devonport Corporation* v. *Tozer*, [1903] 1 Ch. 759, C. A.

(*e*) *Sunderland Corporation* v. *Brown* (1880), 44 J. P. 831; compare *A.-G.* v. *Gibb*, [1909] 2 Ch. 265. Even if actually employed to lay it out he will not be responsible for breaches of the bye-laws committed by a sub-contractor to whom, with the owner's consent, he has entrusted the work (*Brown* v. *Edmonton Local Board* (1881), 45 J. P. 553).

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157.

(*g*) The authority cannot remove work if it has approved the plans or failed to disapprove them within a month of the deposit; see p. 242, *post*.

(*h*) For forms of notice in connection with such bye-laws, see Encyclopædia of Forms and Precedents, Vol. XVI., pp. 527—529.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 183. The power to remove work does not exclude the power to impose penalties (*Hall* v. *Nixon* (1875), L. R. 10 Q. B. 152).

(*j*) Bye-laws must be so framed as to admit of the recovery of any sum less than the full amount of the penalty (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 183).

(*k*) *Ibid.*, s. 251.

(*l*) *Ibid.*, s. 253; Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 6; *Fletcher* v. *Hudson* (1880), 5 Ex. D. 287, C. A.

(*m*) 38 & 39 Vict. c. 55.

(*n*) As to "continuing offences" under bye-laws and limitations of time for proceeding for penalties, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to time limit for actions generally, see title LIMITATION OF ACTIONS.

(*o*) *A.-G.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101; *Devonport Corporation* v. *Tozer, supra*; *A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904]

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the jurisdiction to grant an injunction is not affected by the fact that the offender has already been convicted and fined for his offence (*p*).

Deposit and approval of plans.

452. Where a bye-law requires notices, plans, or descriptions of any work to be laid before an authority, the authority must (*q*) approve or disapprove them in writing within one calendar month (*r*), and it cannot, as a rule, insist upon alterations. It cannot assume a dispensing power not given by the bye-laws (*s*) and approve plans which contravene them or the general law (*t*); and conversely it may not disapprove plans unless they contravene the bye-laws or the general law (*a*).

Power to require plans to be varied.

In districts in which the Public Health Acts Amendment Act, 1907 (*b*), s. 17, is in force the authority may, on the deposit of the plans and sections, by order (*c*) vary the position, direction, termination, or level of the new street in order to secure either better communication with other streets, or adequate openings at the ends of the new street, or compliance with any enactment or bye-law in force in the district; and it may also by its order fix the points at which the new street shall be deemed to begin or end.

2 Ch. 34. *A.-G.* v. *Pudsey Local Board* (1895), 59 J. P. 329, apparently turned upon the particular facts.

(*p*) *A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34. As to injunctions generally, see title INJUNCTION.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158.

(*r*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3. A bye-law purporting to extend (or reduce) the period would be invalid (*Clark* v. *Bloomfield* (1885), 1 T. L. R. 323).

(*s*) The absence of a dispensing power does not invalidate bye-laws as being unreasonable (*Salt* v. *Scott Hall*, [1903] 2 K. B. 245; *Pomeroy* v. *Malvern Urban District Council* (1903), 67 J. P. 375). In practice the Local Government Board discourages the insertion of such a power.

(*t*) *Baxter* v. *Bedford Corporation* (1885), 1 T. L. R. 424; *R.* v. *Newcastle-on-Tyne Corporation* (1889), 60 L. T. 963; *Re McIntosh and Pontypridd Improvements Co.* (1891), 61 L. J. (Q. B.) 164, affirmed (1892), 8 T. L. R. 203, C. A.; *Yabbicom* v. *King*, [1899] 1 Q. B. 444. An approval of plans which in fact contravene the bye-laws is ineffectual (*ibid.*); and, if express approval is ineffectual, it would seem to follow that *Masters* v. *Pontypool Local Government Board* (1878), 9 Ch. D. 677; *Slee* v. *Bradford Corporation* (1863), 8 L. T. 491, and *Clark* v. *Bloomfield*, *supra*, cannot be relied upon so far as they suggest that if an authority fails to disapprove plans the person depositing them will escape liability to penalties if the plans contravene the bye-laws. *A.-G.* v. *Pudsey Local Board* (1895), 59 J. P. 329, must apparently be regarded as a decision upon the particular facts of that case.

(*a*) Thus, it cannot disapprove plans because they show no system of sewerage, if there are no sewerage bye-laws in force (*R.* v. *Tynemouth Rural District Council*, [1896] 2 Q. B. 451, C. A.), or because it disapproves of the site (*R.* v. *Preston Corporation* (1887), 3 T. L. R. 665), or of the type of house to be built (*R.* v. *Newcastle-on-Tyne Corporation* (1889), 60 L. T. 963). It may, and indeed ought to, consider whether the person depositing plans is in a position to give effect to them, *i.e.*, whether he owns sufficient land to make a street of the approved width (*Thompson* v. *Failsworth Local Board* (1881), 46 J. P. 21); but, apart from any such question, it is not concerned with disputes as to title between him and third persons (*Ex parte Crosby* (1877), 41 J. P. 740). There appears to be no power to charge any fee in respect of the approval; and a bye-law requiring payment of a fee would be *ultra vires*.

(*b*) 7 Edw. 7, c. 53.

(*c*) An aggrieved owner may appeal to quarter sessions against such an order (*ibid.*, s. 7).

The authority must compensate (*d*) any person injuriously affected by the exercise of the above powers; and may not exercise them if compliance with its order will entail the purchase of additional lands or the execution of works elsewhere than on the site of the new street.

Compensation.

Any person who lays out or constructs a new street in contravention of such an order is liable to a maximum penalty of £5 and a maximum daily penalty (*e*) of 40*s*.

Disapproval of plans.

453. An action for damages will not lie against an authority for refusing, even maliciously, to approve plans (*f*); but a mandamus to hear and determine the matter will be granted if it has never applied its mind to the question before it (*g*); and probably a mandamus to approve the plans will be granted if it is clear that the only objection taken to them is untenable in law (*h*). On the other hand, the court will not interfere where the authority has arrived at a decision in good faith, and the correctness of it involves disputed questions of fact (*i*).

Remedies.

A person aggrieved at the disapproval of his plans can test the correctness of the authority's decision upon questions both of law and fact by carrying out the work according to the plans (*k*), when the justices must decide, in proceedings for a penalty, whether his plans and work are in accordance with the bye-laws (*l*); and if the authority removes his work instead of taking summary proceedings, he can raise the same question in an action (*m*).

(*d*) To be ascertained in manner provided by the Public Health Acts (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 10). See titles LOCAL GOVERNMENT; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*e*) *I.e.*, a penalty for each day on which the offence is continued after conviction therefor (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13).

(*f*) *Davis* v. *Bromley Corporation*, [1908] 1 K. B. 170, C. A.

(*g*) *Ibid.*

(*h*) As in *R.* v. *Preston Corporation* (1887), 3 T. L. R. 665; *R.* v. *Newcastle-on-Tyne Corporation* (1889), 60 L. T. 963; *R.* v. *Ormesby Local Board of Health* (1894), 43 W. R. 96; *R.* v. *Middlesbrough Corporation* (1890), *Times*, 7th July; *R.* v. *Tynemouth Rural District Council*, [1896] 2 Q. B. 451, C. A. In view of the last-named case (see also *R.* v. *Llandudno Improvement Commissioners* (1892), *Times*, 28th January; and *R.* v. *St. George, Southwark, Vestry* (1892), 56 J .P. 821) it would seem that it is not necessary to proceed by action for mandamus, as was held in an unreported case, *R.* v. *Harrogate Corporation* (1890), 16th April.

(*i*) Either by prerogative writ of mandamus (*R.* v. *Eastbourne Corporation* (1900), 64 J. P. 724, C. A.; *R.* v. *West Hartlepool Corporation, Ex parte Richardson* (1901), 18 T. L. R. 1; *R.* v. *Chiswick Urban District Council, Ex parte Brickell* (1908), 72 J. P. 165) or in an action for a mandamus (*Smith* v. *Chorley Rural Council*, [1897] 1 Q. B. 678, C. A.). As to mandamus generally, see title CROWN PRACTICE, Vol. X., pp. 77 *et seq.*

(*k*) Under the general law there is no penalty for executing work in accordance with plans which the authority wrongfully refuses to approve; but some local Acts impose a penalty for executing work without the plans having been approved, even though the refusal was unjustifiable; see *Cook* v. *Hainsworth*, [1896] 2 Q. B. 85. Under some local Acts there is an appeal to quarter sessions against an authority's refusal to approve plans (see *Cook* v. *Hainsworth*, *supra*), but not under the general law, unless the effect of the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 7 (1), can be treated as conferring such a right.

(*l*) *R.* v. *Tynemouth Rural District Council*, *supra*; *R.* v. *Chiswick Urban District Council, Ex parte Brickell*, *supra*.

(*m*) See *Hopkins* v. *Smethwick Local Board of Health* (1890), 24 Q. B. D. 712, C. A.

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454. A person who has deposited plans for a new street is not bound to carry out the work, but may abandon it to carry out other work inconsistent with the formation of the proposed street (*n*).

Abandonment of work.

Removal of work improperly executed.

455. Where there has been a failure to deposit plans, a bye-law in the ordinary form (*o*) will justify an authority in removing executed work, the plans of which ought under the bye-laws to have been deposited, even though such work otherwise satisfies the bye-laws (*p*). But where plans have been duly deposited, an authority can only remove such work as is not in conformity with its bye-laws and has been commenced after notice of disapproval of the plans or before the expiration of a calendar month without approval (*q*); and a bye-law purporting to extend these powers would be *ultra vires* (*r*).

Where an authority may remove work executed contrary to the bye-laws, it may apparently remove it at any time (*s*); but it must first give the offender an opportunity of showing cause against the proposed removal (*t*). The removal may be effected in any convenient way not causing danger, but the authority may be held liable if it unreasonably damages other property of the offender (*a*).

Where an authority incurs expense in or about the removal of work executed contrary to a bye-law (*b*), it may recover it summarily (*c*) either from the person executing the works, or from the person causing them to be executed, at its discretion.

Re-deposit of plans.

456. In general, the deposit and approval of plans for a new street enures for any length of time (*d*); but in districts in which

(*n*) *Sunderland Corporation* v. *Skinner* (1889), 53 J. P. 660.

(*o*) *I.e.*, authorising the removal of work done in contravention of any bye-law, which includes a bye-law requiring the previous deposit of plans; see *Baker* v. *Portsmouth Corporation* (1878), 3 Ex. D. 157, C. A.

(*p*) *Baker* v. *Portsmouth Corporation, supra; Fairbrass* v. *Canterbury Corporation* (1902), 67 J. P. 181.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158. This express power is independent of any bye-law giving power to remove. Although under *ibid.*, s. 157, an authority may pass a bye-law enabling it to remove work done contrary to any bye-law, such a bye-law will be subject to the provisions of *ibid.*, s. 158, as to plans being deposited and not disapproved within a month.

(*r*) See *Clark* v. *Bloomfield* (1885), 1 T. L. R. 323.

(*s*) In *Fairbrass* v. *Canterbury Corporation, supra* (where no plans had been deposited), six months had elapsed between the completion of the work and the notice to show cause.

(*t*) *Cooper* v. *Wandsworth District Board of Works* (1863), 14 C. B. (N. S.) 180; *Masters* v. *Pontypool Local Government Board* (1878), 9 Ch. D. 677; *Hopkins* v. *Smethwick Local Board of Health* (1890), 24 Q. B. D. 712, C. A.; *A.-G.* v. *Hooper*, [1893] 3 Ch. 483. As to the sufficiency of such a notice, see *Dickenson* v. *Forsyth* (1903), 68 J. P. 170.

(*a*) *Jagger* v. *Doncaster Union Rural Sanitary Authority* (1890), 54 J. P. 438.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 158.

(*c*) The six months' period of limitation will run from the date of a demand (*Labalmondiere* v. *Addison* (1858), 1 E. & E. 41; *Eddleston* v. *Francis* (1860), 3 L. T. 270; *Grece* v. *Hunt* (1877), 2 Q. B. D. 389; *Corbett* v. *Badger*, [1901] 2 K. B. 278).

(*d*) In the opinion of the Local Government Board (which has to confirm the bye-laws) there is no power to provide by them that the approval of new street plans shall be inoperative unless the work is commenced within a specified period.

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the Public Health Acts Amendment Act, 1907 (*e*), s. 15, or a similar provision under a local Act (*f*), is in force, the authority may declare the deposit to be of no effect if the work is not commenced within three years from such deposit; or, if the plans were deposited before the date when the section came into force in the district, within three years from that date (*g*); and the authority must give notice of the enactment to every person depositing plans and sections for a new street, whether the deposit was made before or after it came into force.

Retention of plans.

In districts in which the Public Health Acts Amendment Act, 1907 (*h*), s. 16, is in force the authority may retain any plans or other documents deposited with and approved by it under any statute or bye-law in force in the district.

Level and width of streets.

457. Where there is in force a local Act incorporating the Towns Improvement Clauses Act, 1847 (*i*), every person intending to make a new street must give notice to the authority, which may within six weeks fix a level for such street, subject to an appeal to quarter sessions. If it fails to do so, the work may be carried out, and it must make and pay for any necessary change of level and defray any damage sustained by any person in consequence. A person who lays out a street in contravention of this provision is liable for the expense of a subsequent alteration of level.

Minimum width.

In certain cases (*j*) the minimum width of new streets, unless otherwise prescribed by the incorporating Act, must be 30 feet for carriage roads and 20 feet for other roads (*k*).

SUB-SECT. 6.—*Building Line in Streets.*

Regulation of building line.

458. A rural authority, unless invested with the necessary urban powers, cannot regulate the line of buildings in a street.

In places where the Public Health (Buildings in Streets) Act, 1888 (*l*), is in force (*m*), it is illegal (*n*), without the written

(*e*) 7 Edw. 7, c. 53. It may be put in force by order of the Local Government Board in any district.

(*f*) *Harrogate Corporation* v. *Dickinson* [1904], 1 K. B. 468, C. A.

(*g*) *I.e.*, the date at which the section is declared by order of the Local Government Board to be in force (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13).

(*h*) 7 Edw. 7, c. 53; see note (*e*), *supra*. An authority may provide by a bye-law for the retention by it of plans, although disapproved (*Gooding* v. *Ealing Local Board of Health* (1884), 1 T. L. R. 62).

(*i*) 10 & 11 Vict. c. 34, ss. 57—60, 84—86.

(*j*) *I.e.*, where s. 63 (*ibid.*) is incorporated.

(*k*) This requirement is imperative, and cannot be relaxed or waived; and where a mere roadway has been previously laid out, the authority may intervene as soon as building operations begin, or its width is definitely fixed (*A.-G.* v. *Folkestone Corporation*, [1873] W. N. 127).

(*l*) 51 & 52 Vict. c. 52; in this division of the title referred to as "this Act."

(*m*) *I.e.*, all urban districts, and rural districts and contributory places where it has been applied by an order of the Local Government Board.

(*n*) Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), s. 3, which creates a single compound offence consisting of building without consent and continuing after notice (*Mullis* v. *Hubbard*, [1903] 2 Ch. 431).

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consent (*o*) of the authority, to erect or bring forward (*p*) any house or building (*q*), or part of a house or building, other than a building belonging to the Crown (*r*), or to a railway company and used for the purposes of the railway under any Act of Parliament (*s*), in any street (*t*), beyond the front main

(*o*) An approval in writing by the council of plans showing an infringement of the building line is sufficient consent, even though the attention of the council was not specifically directed to the projections, and approval by a building committee, subsequently ratified by the council, is equally effective (*Merrett* v. *Charlton Kings Urban District Council* (1903), 67 J. P. 419; *Mullis* v. *Hubbard*, [1903] 2 Ch. 431); but reliance cannot be placed on the fact that a council's surveyor informally expresses satisfaction with the plans (*A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34). Compare *Kerr* v. *Preston Corporation* (1877), 6 Ch. D. 463. Where a council in good faith disapproves building plans, unobjectionable in themselves, on the ground that they will infringe this provision as to building line, the court will not review its decision on questions of fact on an application for a mandamus (*R.* v. *Eastbourne Corporation* (1900), 64 J. P. 724, C. A.); see further p. 241, *ante*.

(*p*) The provision applies to new buildings; the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 156, which it supersedes, did not (*Williams* v. *Wallasey Local Board* (1886), 16 Q. B. D. 718); and this enactment was passed to supply the deficiency, see *Warren* v. *Mustard* (1891), 56 J. P. 502. Nevertheless, its wording is not wide enough to enable an authority to fix any building line for the first house built in a street (*R.* v. *Middlesbrough Corporation* (1890), *Times*, 7th July). It would seem that the word "erect" must be regarded as applying only to new buildings on a site hitherto unoccupied, and the words "bring forward" to old buildings pulled down for re-erection; in other words, that if a projecting building is pulled down for re-erection it may be rebuilt up to the same line without contravening this provision, and that the authority must pay compensation under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 155 (see p. 246, *post*), if it requires it to be set back; see *Auckland* (*Lord*) v. *Westminster Local Board of Works* (1872), 7 Ch. App. 597; *Worley* v. *St. Mary Abbotts, Kensington, Vestry*, [1892] 2 Ch. 404.

(*q*) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, as amended by the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 107, and Sched. VI., the term "house" includes schools and factories and other buildings in which persons are employed. As to the meaning of the words "house" and "building," see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. See also title FACTORIES AND SHOPS, Vol. XIV., p. 485. A building erected by a water company, under a special Act prior to 1875 which incorporates the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), is within the prohibition (*Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1898), 67 L. J. (Q. B.) 903); and indeed the same would appear to be the case, whatever the date of the special Act (*Uckfield Rural Council* v. *Crowborough District Water Co.*, [1899] 2 Q. B. 664); compare *London County Council* v. *Wandsworth and Putney Gas Co.* (1900), 64 J. P. 500.

(*r*) *Gorton Local Board* v. *Prison Commissioners* (1887) [1904] 2 K. B. 165, n.; *Hornsey Urban Council* v. *Hennell*, [1902] 2 K. B. 73.

(*s*) As to railway buildings, see note (*p*), p. 246, *post*. The exemption appears to apply to the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), s. 3, which has been substituted for the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 156.

(*t*) It has never been expressly decided whether in the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52) s. 3, the word "street" has its popular meaning or the extended meaning given to it by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4 (see p. 16, *ante*). The Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), s. 2, may be said to favour the latter view, but there is a *dictum* to the effect that the word is here used in its popular sense (see *A.-G.* v. *Siddall* (1898), *Times*, 24th June, C. A.; compare also *R.* v. *Ormesby Local Board of Health* (1894), 43 W. R. 96), and it has been held to be so used in other "building line" sections, *e.g.*, in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 66 (see *R.* v. *Platts* (1880), 49

wall (*u*) of the house or building on either side (*v*) thereof in the same street, or to build any addition to any house or building beyond the front main wall of the house or building on either side of the same. For the purposes of this Act (*x*) a house at the corner of two streets may be "in" both of them (*y*); but the fact that a house or building fronts towards a street does not necessarily make it a house or building "in" the street (or "in" the same street), and it ought not to be so regarded if it has a substantial piece of ground between it and the street (*a*). A house or building cannot be said to be "on the side" of another, unless it be within reasonable proximity (*b*), and this is a question of fact (*c*).

Penalty on summary conviction.

A person offending against this Act (*d*) is liable on summary conviction (*e*) to a penalty not exceeding 40*s*. a day after written notice (*f*) from the authority; but a person who did not

L. J. (Q. B.) 848), and in the Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), s. 28 (now repealed), corresponding to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 156 (*R.* v. *Fullford* (1864), Le. & Ca. 403); compare also *Thomas* v. *Roberts* (1878), 43 J. P. 574.

(*u*) The adjoining building must be looked at as a whole, and a particular wing or projection cannot be regarded as the front main wall (*A.-G.* v. *Edwards*, [1891] 1 Ch. 194). As to what amounts to a "front main wall," when a building is only just commenced, see *Ravensthorpe Local Board* v. *Hinchcliffe* (1889), 24 Q. B. D. 168.

(*v*) The Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), s. 3, applies to a house having another building only on one side of it (*Leyton Local Board* v. *Causton* (1893), 57 J. P. 135). If there are buildings on each side, the line of the least prominent one must prevail (*Anderson* v. *Richards* (1906), 70 J. P. 231).

(*x*) See note (*l*), p. 243, *ante*.

(*y*) *Warren* v. *Mustard* (1891), 56 J. P. 502; *Gilbart* v. *Wandsworth District Board* (1888), 53 J. P. 229. Compare also *London County Council* v. *Lawrance & Sons*, [1893] 2 Q. B. 228; *Barlow* v. *St. Mary Abbotts, Kensington, Vestry* (1886), 11 App. Cas. 257.

(*a*) *A.-G.* v. *Edwards*, [1891] 1 Ch. 194. A house standing back 62 feet was held not to be in the street (*R.* v. *Fulwood Local Board* (1895), 59 J. P. 311), *secus* a house within 30 feet of the street (*A.-G.* v. *Siddall* (1898), *Times*, 24th June, C. A.).

(*b*) Eight hundred feet have been held to be too far (*R.* v. *Middlesbrough Corporation* (1890), *Times*, 7th July); so, too, 300 feet (*Ravensthorpe Local Board* v. *Hinchcliffe*, *supra*); so, too, 90 feet (*R.* v. *Ormesby Local Board of Health* (1894), 43 W. R. 96), and even 60 feet, where an asylum was separated from the newly-erected house by gardens and a private road (*A.-G.* v. *Edwards*, *supra*). In *Warren* v. *Mustard*, *supra*, the distance was 62 feet, and a conviction was upheld, though unwillingly; see also *R.* v. *Fulwood Local Board*, *Ex parte Livesey* (1895), 59 J. P. 311.

(*c*) *I.e.*, for the justices (*Warren* v. *Mustard*, *supra*).

(*d*) See note (*l*), p. 243, *ante*.

(*e*) A person threatened with summary proceedings cannot raise the question by an action for an injunction to restrain such proceedings (*Kerr* v. *Preston Corporation* (1876), 6 Ch. D. 463; *Grand Junction Waterworks Co.* v. *Hampton Urban Council*, [1898] 2 Ch. 331). A penalty may be imposed time after time, so long as the offending building is continued (*A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34).

(*f*) The notice is a condition precedent to a prosecution; but it is no answer to a charge that the building was completed before receipt of notice (*Rumball* v. *Schmidt* (1882), 8 Q. B. D. 603), and if a summons has been dismissed because service of the notice was not proved, a notice may be served and fresh proceedings taken (*Jenkins* v. *Merthyr Tydfil Urban District Council* (1899), 80 L. T. 600).

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erect the building cannot be convicted merely because on becoming the owner thereof he has maintained it as he found it (*g*).

The authority is not empowered (*h*) to demolish an offending building; nor can a private individual whose adjoining property has been prejudiced by the erection of a building in contravention of this Act (*i*) maintain an action for damages or an injunction against the builder, nor can the builder be indicted (*j*); but the Attorney-General may maintain an action for an injunction and an order directing the demolition of the building, although the builder may have been previously convicted and fined (*k*).

Action by Attorney-General.

Building line when house rebuilt.

459. In urban districts and in rural places where the Public Health Act, 1875 (*l*), s. 155, is in force (*m*), when any house or building (*n*), other than buildings belonging to the Crown (*o*), or to a railway company and used for the purposes of the railway under any Act of Parliament (*p*), situated in any street (*q*), or the front thereof, has been taken down (*r*) in order to be rebuilt or altered, the

(*g*) *Blackpool Corporation* v. *Johnson*, [1902] 1 K. B. 646.

(*h*) By the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52).

(*i*) *Ibid.*; and see note (*l*), p. 243, *ante*.

(*j*) *Mullis* v. *Hubbard*, [1903] 2 Ch. 431; compare *Brooks* v. *Terry* (1888), 4 T. L. R. 678.

(*k*) *A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34.

(*l*) 38 & 39 Vict. c. 55; compare the very similar terms of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 6; and see p. 247, *post*.

(*m*) *I.e.*, by order of the Local Government Board under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276.

(*n*) As to the meaning of the words "house" and "building," see note (*q*), p. 244, *ante*. As to buildings erected under the Waterworks Clauses Acts, see cases in the same note, which appear to be equally applicable to the Public Health Act, 1875 (38 & 39 Vict. c. 55).

(*o*) As to Crown property, see note (*r*), p. 244, *ante*.

(*p*) Such buildings are exempted by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157. Cottages built for railway servants are not used "for the purposes of the railway" within the meaning of the proviso (*Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Barnsley Union* (1892), 56 J. P. 679); nor, apparently, is a building erected by a railway company and let to tenants who use it only for their own business purposes (*Coole* v. *Lovegrove*, [1893] 2 Q. B. 44); but an office in a railway company's coal-yard may be used "for the purposes of or in connection with the traffic of" the railway, though occupied by coal merchants and their clerks, if its existence and the work done there facilitate the speedy clearing of trucks from the company's line (*Elliott* v. *London County Council*, [1899] 2 Q. B. 277). See also *Re Badger* (1858), 8 E. & B. 728 (railway arches used as stables by tenants); *London and Blackwall Rail. Co.* v. *Limehouse District Board of Works* (1856), 3 K. & J. 123.

(*q*) As to the meaning of the terms "street" and "houses 'in' a street," see notes (*a*), (*b*), p. 245, *ante*.

(*r*) This means "substantially taken down," and there is no power to fix a line if in the case of a large building the front of the two lower storeys only is taken down in order to turn those two storeys into one lofty shop (*A.-G.* v. *Hatch*, [1893] 3 Ch. 36, C. A.); nor, *semble*, if a workman without instructions unnecessarily removes part of the front wall (*Yabbicomb* v. *Bristol Brewery, Ltd.* (1903), 67 J. P. 261). If a house front falls, or is burnt down, it would appear that the Public Health Act, 1875 (38 & 39 Vict. c. 53), s. 155, does not apply. If a house is taken down with no intention of rebuilding (as to which lapse of time will be evidence), *semble*, the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 155, will not apply to a new building erected on the site at some distant date, and the case will fall within the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), see p. 243, *ante*, and compare *Worley* v. *St. Mary Abbotts, Kensington, Vestry*, [1892] 2 Ch. 404.

authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation, shall be erected.

Authority's requirements, how signified.

The line must in general be prescribed (*s*), or at least some objection indicating an intention to prescribe it (*t*) must be expressed, before the rebuilding is commenced; but, though rebuilding has commenced, a line may yet be prescribed for distinct portions of the new building not begun, unless their projection beyond the line is necessarily involved in the work already done (*t*). Where an owner has deposited plans, and they have been approved, and in reliance on such approval he has pulled down his existing building, it is too late for an authority to require him to set back his new one (*a*).

Compensation.

The authority must tender compensation to the owner or other person immediately interested in such house or building for any damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation, in case of dispute, to be settled by arbitration (*b*). Compliance with the authority's requirements may be enforced by an action for an injunction at the suit of the Attorney-General, but there is no summary remedy for a breach of it (*c*).

Towns Improvement Clauses Act, 1847, s. 68.

460. In urban districts (*d*), and in rural places where the Towns Improvement Clauses Act, 1847 (*e*), s. 68, is in force (*f*), when any house or building, any part of which projects beyond the regular line (*g*) of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be rebuilt or altered, the authority may require it to be set backwards, or towards the line of the street or the line of the adjoining houses or buildings, in such manner as it directs, for the improvement of

(*s*) *Folkestone Corporation* v. *Woodward* (1872), L. R. 15 Eq. 159; *A.-G.* v. *Hatch*, [1893] 3 Ch. 36, C. A.

(*t*) *Newhaven Local Board* v. *Newhaven School Board* (1885), 30 Ch. D. 350, C. A.

(*a*) *Slee* v. *Bradford Corporation* (1863), 27 J. P. 612; *Masters* v. *Pontypool Local Government Board* (1878), 9 Ch. D. 677.

(*b*) *I.e.*, in manner provided by the Public Health Act (38 & 39 Vict. c. 55), s. 179. See title LOCAL GOVERNMENT.

(*c*) *Sutton Local Board* v. *Hoare* (1894), 10 T. L. R. 586. The Attorney-General should be a party to the action (*Brooks* v. *Terry* (1888), 4 T. L. R. 678; *Devonport Corporation* v. *Tozer*, [1903] 1 Ch. 759, C. A.; *A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; *Mullis* v. *Hubbard*, [1903] 2 Ch. 431).

(*d*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 68, incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 160 thereof.

(*e*) 10 & 11 Vict. c. 34.

(*f*) Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276.

(*g*) This does not mean mathematically regular, but substantially regular (*Tear* v. *Freebody* (1858), 4 C. B. (N. S.) 228; *Simpson* v. *Smith* (1871), L. R. 6 C. P. 87, *per* WILLES, J.). And in determining the general line, regard must be had to the line of buildings which have been pulled down and may be rebuilt (*Auckland (Lord)* v. *Westminster Local Board of Works* (1872), 7 Ch. App. 597). In many cases there cannot be said to be any general line (*Ecclesiastical Commissioners for England* v. *St. James and St. John, Clerkenwell, Vestry* (1861), 7 Jur. (N. S.) 326). "Street" appears to be here used in the popular sense; see *R.* v. *Platts* (1880), 43 L. T. 159, and the use of the term "adjoining houses."

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such street; but it must make full compensation to the owner. Compliance with such a requirement may be enforced by an action for an injunction at the suit of the Attorney-General; but an adjoining owner who is specially damnified cannot apparently maintain an action (*h*).

Towns Improvement Clauses Act, 1847, s. 66.

461. In urban districts and in rural places where the Towns Improvement Clauses Act, 1847 (*i*), s. 66, is in force the authority may allow, upon terms, any building to be set forward for improving the line of the street (*j*) in which it, or any building adjacent thereto, is situated (*k*).

SUB-SECT. 7.—*Projections in Streets.*

Projections.

462. In urban districts (*l*), and in rural places where the Towns Improvement Clauses Act, 1847 (*m*), ss. 69, 70, are in force (*n*), the authority may give notice (*o*) to the owner or occupier (*p*) of any house or building to remove or alter any projection (*q*) placed, after the date when that enactment came into operation in the district, against or in front of such house or building (*r*) which obstructs (*s*) the safe and convenient passage along any street. An occupier or owner receiving such a notice must, within fourteen days, remove or alter the obstruction as directed by the authority, and in default is liable to a maximum penalty of 40*s*. The authority may also remove the obstruction and recover the expense from the person in default.

(*h*) See cases cited in note (*c*), p. 247, *ante*. For a form of notice, see Encyclopædia of Forms and Precedents, Vol. XI., p. 94.

(*i*) 10 & 11 Vict. c. 34. The section is incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 160 thereof. For a form of licence, see Encyclopædia of Forms and Precedents, Vol. XI., p. 93.

(*j*) "Street" is here used in its popular sense. Where the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 66, is applicable the authority may apparently give a valid sanction to an encroachment on the highway (*R.* v. *Platts* (1880), 43 L. T. 159).

(*k*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 66.

(*l*) The relevant sections being incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 160 thereof.

(*m*) 10 & 11 Vict. c. 34.

(*n*) Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276.

(*o*) For a form, see Encyclopædia of Forms and Precedents, Vol. XI., p. 95. Before issuing its notice or before proceeding under it, the authority ought to give the person concerned an opportunity of being heard (*A.-G.* v. *Hooper*, [1893] 3 Ch. 483).

(*p*) Or both of them, Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 160.

(*q*) Including any porch, shed, projecting window, step, cellar, cellar door, or window, sign, sign post, sign iron, show board, window shutter, wall, gate, or fence (*ibid.*, s. 69).

(*r*) A garden wall has been held to be erected "against or in front of" a house (*Bagshaw* v. *Buxton Local Board of Health* (1875), 1 Ch. D. 220), but the words do not extend to an erection on undedicated land separated from a house by a public pavement (*Le Neve* v. *Mile End Old Town Vestry* (1858), 8 E. & B. 1054).

(*s*) Whether it is an obstruction is a question of fact; and if there is a substantial projection over the pavement near the ground, evidence that persons were or were not obstructed is immaterial (*Gabriel* v. *St. James, Westminster, Vestry* (1859), 23 J. P. 372; *Read* v. *Perrett* (1876), 1 Ex. D. 349). The provision will not apply to projections above the heads of passengers; see *Goldstraw* v. *Duckworth* (1880), 5 Q. B. D. 275; and, *semble*, even at a lower level the maxim *de minimis non curat lex* may be applied; see *M'Millan* v. *Bennett* (1895), 22 Rettie (Justiciary Cases), 23.

If such expense is recovered from an occupier, he may deduct so much thereof from the rent of the premises where the work is done as is allowed in the case of private improvement rates under the Public Health Act, 1875 (*t*). Obstructions erected before the date referred to may be removed or altered by the authority, but it must give thirty days' notice to the occupier or owner (or both) of the house or building against or in front of which the obstructions are erected; and if they were lawfully erected the authority must compensate every person damaged by the removal or alteration.

Rounding off corners.

463. In districts (*u*) where the Public Health Acts Amendment Act, 1907 (*v*), s. 22, is in force the authority may require (*w*) the corner of any building (*x*) intended to be erected at the corner of two streets to be rounded or splayed off, but must pay compensation (*a*) for any loss sustained thereby.

SUB-SECT. 8.—*Doors and Gates opening outwards on to Streets.*

Doors and gates opening outwards.

464. In urban districts (*b*), and in rural places where the Towns Improvement Clauses Act, 1847 (*c*), ss. 71, 72, are in force (*d*), doors, gates, and bars put up after the date when that enactment came into operation, and opening upon a street, must not open outwards, except (by leave of the authority) in the case of public buildings; and doors, gates, or bars not complying with this provision must be altered by their occupier or owner within eight days after notice from the authority (*e*). In case of default, the authority may make the alteration, and recover the expenses from the defaulter, who is also liable to a maximum penalty of 40*s*. Expenses so recovered from an occupier may be deducted from his rent (*f*) to the extent allowed in the case of private improvement rates under the Public Health Act, 1875 (*g*). The authority may at its own expense alter doors, gates, or bars constructed before the date in question so as to prevent them from projecting over a public way when open.

SUB-SECT. 9.—*Water Spouts to Houses.*

Water spouts.

465. In urban districts, and in rural places where the Towns

(*t*) 38 & 39 Vict. c. 55; and see note (*m*), p. 224, *ante*.
(*u*) It may be put in force in any district by order of the Local Government Board.
(*v*) 7 Edw. 7, c. 53.
(*w*) An aggrieved owner may appeal to quarter sessions (*ibid.*, s. 7).
(*x*) Certain buildings of railway companies and similar bodies are exempted (*ibid.*, s. 33), as to which see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.
(*a*) To be ascertained in manner provided by the Public Health Acts (Public Health Act, 1907 (7 Edw. 7, c. 53), s. 10); see title LOCAL GOVERNMENT.
(*b*) The relevant sections being incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 160 thereof.
(*c*) 10 & 11 Vict. c. 34.
(*d*) Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276.
(*e*) For a form of notice, see Encyclopædia of Forms and Precedents, Vol. XI., p. 96.
(*f*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 72; and see note (*m*), p. 224, *ante*.
(*g*) 38 & 39 Vict. c. 55.

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Improvement Clauses Act, 1847 (*h*), s. 74, is in force (*i*) the occupier or owner of every house or building in, adjoining, or near to any street must, within seven days after service of an order of the authority, put up and maintain a shoot or trough along the whole length of such house or building, and connect it either with the adjoining house, or with a pipe from the roof to the ground, so as to carry off the water and prevent it from falling upon passers by, or flowing over the footpath, under a maximum penalty of 40*s.* a day.

SUB-SECT. 10.—*Vaults, Cellars and Arches under Streets.*

Construction of vaults etc.

466. In urban districts, and in rural places where the Public Health Act, 1875 (*j*), s. 26, is in force, no person may construct any vault, arch or cellar under the carriage way of a street without the written consent of the authority, under a penalty not exceeding £5, and a further penalty of 40*s.* a day after written notice from the authority. The authority may alter, pull down, or otherwise deal with the vault, arch or cellar (*k*), and recover the cost from the offender summarily.

Cellar entrances.

467. In urban districts, and in rural places where the Towns Improvement Clauses Act, 1847 (*l*), s. 73, is in force, when any opening is made in a pavement or footpath (*m*) as an entrance to a vault or cellar, the occupier or owner (*n*) must make and maintain (*o*) a proper door or covering according to the directions of the authority, and in default is liable to a penalty not exceeding £5.

(*h*) 10 & 11 Vict. c. 34, being incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 160 thereof. For a form of notice, see Encyclopædia of Forms and Precedents, Vol. XI., p. 99.

(*i*) Under the Public Health Act, 1875 (38 & 39 Vict. c. 55); s. 276.

(*j*) 38 & 39 Vict. c. 55, s. 26 (2). The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 37), s. 31, which is in force where incorporated in a local Act, contains practically identical provisions. The prohibition (which is limited to vaults etc. under carriage ways) is intended to prevent interference with sewers. At common law the owner of the soil may tunnel beneath any highway so long as he does not interfere with or let down the surface; and see p. 56, *ante*. Where, however, vaults or cellars exist beneath streets, an authority may on paying compensation carry sewers through them under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 16, or (if incorporated in a local Act) under the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 24. As to this see title SEWERS AND DRAINS.

(*k*) But in removing the vault etc. the authority must not interfere with anything not forming part of it, *e.g.*, wires laid under it in the subsoil (*Walker Urban District Council* v. *Wigham, Richardson & Co., Ltd.* (1901), 85 L. T. 579).

(*l*) 10 & 11 Vict. c. 34, s. 73, incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 160 thereof.

(*m*) The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 73, appears to contemplate that even after a pavement has been dedicated as a highway a house owner may, at any rate with the authority's consent, make an opening in it. See *R.* v. *Longton Gas Co.* (1860), 3 E. & E. 651.

(*n*) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 160, enables the authority to give directions either to the occupier (as originally enacted by the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 73) or to the owner; but *semble*, the occupier alone can be held liable for subsequent repairs. For a form of notice, see Encyclopædia of Forms and Precedents, Vol. XI., p. 97.

(*o*) At common law, if a highway is dedicated subject to the existence of a cellar, the owner (or occupier) is not liable to repair the cellar roof or fixed gratings if the public traffic wears them out (*Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221, and see p. 103, *ante*), but he is responsible for the safe condition of

Fencing of vaults etc.

468. In urban districts, and in rural places where the Towns Police Clauses Act, 1847 (*p*), s. 28, is in force, any person who in any street, to the obstruction, annoyance, or danger of the residents or passengers, leaves open any vault, cellar, or underground room without a sufficient fence or handrail, or leaves its door or covering defective (*q*), or who does not sufficiently fence or light after sunset any open pit or sewer, is liable to a penalty not exceeding 40*s.* or fourteen days' imprisonment.

Repair of vaults etc.

469. In places where the Public Health Acts Amendment Act, 1890 (*r*), s. 35, is in force, all vaults, arches and cellars under any street, and all openings into the same, cellar-heads, gratings, lights, and coal holes in the surface of any street, and all landings, flags or stones supporting the same, must be kept in repair by the owners or occupiers of the same, or of the houses or buildings to which they belong (*s*). In default, the authority may, after twenty-four hours' notice, do the repairs and recover the cost summarily (*t*).

SUB-SECT. 11.—*Hoardings* (*a*), *Fences and Refuges* (*b*).

Hoardings during building operations.

470. In districts (*c*) where the Public Health Acts Amendment Act, 1890 (*d*), s. 34, is in force, every person intending to build or take down any building in any street or court, or to alter

movable flaps or plates, the wear and tear of which is attributable to his use of them (*Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221). See *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401; *Hamilton* v. *St. George, Hanover Square* (1873), L. R. 9 Q. B. 42. As to the liability of owner and occupier *inter se*, see title LANDLORD AND TENANT.

(*p*) 10 & 11 Vict. c. 89, s. 28, incorporated with the Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 171 thereof.

(*q*) As to civil liability for leaving such a door unfastened, see *Braithwaite* v. *Watson* (1889), 5 T. L. R. 331; *Whiteley* v. *Pepper* (1876), 2 Q. B. D. 276.

(*r*) 53 & 54 Vict. c. 59. This provision is in force in urban districts in which Part III. of the Act has been adopted; and may be put in force by order of the Local Government Board in a rural district or contributory place.

(*s*) Apart from this provision the owner or occupier is not liable to repair his cellar roof if worn away by traffic on the pavement (*Hamilton* v. *St. George, Hanover Square, supra*). See also note (*o*), on p. 250, *ante*.

(*t*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 6. An appeal lies to quarter sessions (*ibid.*, s. 7). For a form of notice, see Encyclopædia of Forms and Precedents, Vol. XI., p. 104.

(*a*) As to the rating of hoardings and other advertising stations, see title RATES AND RATING. Apart from statute the temporary obstruction of a highway by the erection and maintenance for a reasonable time of a hoarding to protect passengers during building operations is justifiable (*R.* v. *Ward* (1836), 4 Ad. & El. 384, 405; *Bradbee* v. *Christ's Hospital* (1842), 4 Man. & G. 714); indeed, a person whose operations cause danger to users of the adjoining highway will fail to protect them at his peril (see note (*s*), p. 155, *ante*). In some places a licence from the authority is required under local Acts before a hoarding may be erected; see *R.* v. *City of London Sewers Commissioners, Ex parte Brass* (1870), 22 L. T. 582. A person erecting a hoarding will be liable for injuries due to any negligence in its construction (*Hoare* v. *Kearsley* (1885), 1 T. L. R. 426).

(*b*) For penalties for injuring or removing fences, posts etc., see also p. 214, *ante*.

(*c*) *I.e.*, in urban districts in which the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., has been adopted, and in rural districts in which the particular section has been put in force by order of the Local Government Board.

(*d*) 53 & 54 Vict. c. 59.

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or repair the outer part thereof, must before beginning the same (unless the authority otherwise consents in writing) put up close-boarded hoards or fences to the authority's satisfaction, in order to separate the building from the street or court; and must, if the authority so require, make, maintain and light a convenient covered footway and handrail for passengers outside such hoards or fences; and must remove the same (*e*) when required by the authority (*f*). Persons in default are liable (*e*) to a penalty not exceeding £5 and a daily penalty (*g*) not exceeding 40*s*. In urban districts in which the above enactment is not in force (*h*), and in some rural districts (*i*), practically identical provisions are made by the Towns Improvement Clauses Act, 1847 (*k*).

Towns Improvement Clauses Act, 1847, s. 80.

Fixing of hoardings.

In districts where the Public Health Acts Amendment Act, 1907 (*l*), s. 32, is in force, no person may use any hoarding or similar structure which is in, or abuts on, or adjoins any street for any purpose (*m*) unless it is securely fixed to the satisfaction of the local authority, under a penalty not exceeding £5 and a daily penalty not exceeding £1 (*n*).

Fencing dangerous premises.

471. In urban districts, and in rural places (*o*) where the Towns Improvement Clauses Act, 1847 (*p*), ss. 75—78, are in force, if any building or wall, or anything fixed thereon, is deemed by the surveyor to the authority to be ruinous and dangerous to passengers or to the occupiers of the neighbouring buildings, he must immediately put up a hoarding or fence for the protection of passengers, and give to the owner (if known and resident within the district), and to the occupier, notice in writing to take down, secure or repair the building or wall forthwith (*q*). The notice to the occupier may be given by

(*e*) There is an appeal to quarter sessions (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 7).

(*f*) For forms of notice of the requirements of the authority, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 101—103.

(*g*) By the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 11 (3), a "daily penalty" means a penalty for each day on which any offence is continued after conviction therefor.

(*h*) The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 80, would naturally be in force in every urban district (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 160); but the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 34, whenever it comes in force, repeals it.

(*i*) The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 80, may by order of the Local Government Board be put in force in a rural district; but there, too, it would be repealed by the subsequent putting in force of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 34.

(*k*) 10 & 11 Vict. c. 34, s. 80.

(*l*) 7 Edw. 7, c. 53. *I.e.*, where put in force in an urban or rural district by order of the Local Government Board.

(*m*) This provision, which supplements the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 34, or the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 80 (as the case may be), is not restricted to hoardings protecting building operations.

(*n*) A "daily penalty" means a penalty for each day on which an offence is continued after conviction therefor (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13).

(*o*) These provisions are applied to all urban districts by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 160. In rural districts they may be put in force by order of the Local Government Board (*ibid.*, s. 276).

(*p*) 10 & 11 Vict. c. 34.

(*q*) For a form, see Encyclopædia of Forms and Precedents, Vol. XI., p. 99; Vol. XVI., p. 532.

putting it on a door or other conspicuous part of the premises. If the work is not begun within three days after the notice, and completed as quickly as possible, two justices may order the owner, or, on his default, the occupier, to do so, to the surveyor's satisfaction, within a fixed time. In default, or if no owner or occupier can be found upon whom to serve the order, the authority must with all convenient speed do the work itself, and may recover the expense from the owner (*r*).

Precautions during repair of streets.

472. In urban districts, and in rural places (*s*) where the Towns Improvement Clauses Act, 1847 (*t*), s. 79, is in force, the authority must, during the construction or repair of any of the streets vested in it, or of any sewers or drains, take proper precautions against accidents, by shoring up and protecting the adjoining houses, and fixing bars or chains across or in the streets (*u*) to stop wheeled traffic, and lighting and guarding the works at night; and every person who takes down, alters, or removes any of the bars or chains, or extinguishes a light, without the consent of the authority is liable to a penalty not exceeding £5.

Protecting dangerous places.

473. In urban districts, and in rural places (*v*) where the Towns Improvement Clauses Act, 1847 (*w*), s. 83, is in force, if any building, hole or other place (*x*) near a street is, for want of sufficient repair, protection or inclosure, dangerous to passengers, the authority must repair, protect or inclose the same, so as to prevent danger therefrom; and may recover the expense of so doing from the owner.

Fencing.

474. In districts (*a*) where the Public Health Acts Amendment Act, 1907 (*b*), s. 30, is in force, if in any situation fronting, adjoining, or abutting on any street or public footpath, any building (*c*), wall, fence, steps, structure or other thing, or any well, excavation, reservoir, pond, stream, dam or bank is, for want of sufficient

(*r*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 75. See further, as to *ibid.*, ss. 76—78 (mode of recovery, sale of materials etc.), title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*s*) See note (*o*), p. 252, *ante*.

(*t*) 10 & 11 Vict. c. 34.

(*u*) This does not mean that the street is to be absolutely closed for traffic, so long as the dangerous places are protected (*Woodall* v. *Nuttall* (1891), 56 J. P. 150, C. A.). Where there is in force a local Act incorporating the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 32, the authority is expressly authorised to stop up any street and prevent all persons from passing along and using the same for a reasonable time during the construction, alteration, repair, or demolition of any sewer or drain in or under such street.

(*v*) See note (*o*), p. 252, *ante*.

(*w*) 10 & 11 Vict. c. 34.

(*x*) The "holes" and "places" referred to are holes and similar places arising or exposed during the construction and repair of sewers, streets and houses, and they do not extend, *e.g.*, to a goit running by the side of a footpath (*Wilson* v. *Halifax Corporation* (1868), L. R. 3 Exch. 114).

(*a*) It may be put in force in any district by order of the Local Government Board.

(*b*) 7 Edw. 7, c. 53. The section applies to excavations not actually abutting on the highway (*Carshalton Urban District Council* v. *Burrage* (1911), 27 T. L. R. 280).

(*c*) Buildings (other than dwelling-houses) belonging to railway companies and certain other bodies are exempt. See further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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repair, protection, or inclosure dangerous to persons lawfully using the street or footpath, the authority may require the owner to repair, remove, protect, or inclose the same within a specified time so as to prevent danger therefrom. In default, the authority may do the necessary work itself, and recover the expense from the owner as a civil debt (*d*).

Fencing off adjoining land.

475. In districts where the Public Health Acts Amendment Act, 1907 (*e*), s. 31, is in force, if any land, not forming part of a common, adjoining any street is allowed to remain unfenced or with fences out of repair (*f*), and such land is, from that cause, a source of danger to passengers, or is used for any immoral or indecent purpose, or for any purpose causing inconvenience or annoyance to the public, the Local Government Board may by order (*g*) empower the authority to require the owner or occupier of such land, by notice in writing, to fence the same, or repair the fences, within fourteen days, and, in default, to do the necessary work itself and recover the expenses from the owner or occupier as a civil debt (*h*).

Protection of foot passengers.

476. In urban districts, and in rural places where the Public Health Act, 1875 (*i*), s. 149, is in force, the authority may place and maintain in streets which are vested in it thereunder, fences and posts for the safety of foot passengers; and any person who wilfully displaces, takes up or injures them is liable to a penalty not exceeding £5.

Street refuges etc.

477. In places where the Public Health Acts Amendment Act, 1890 (*k*), s. 39, is in force (*l*), the authority may place, maintain, alter and remove in streets which are highways repairable by the inhabitants at large raised pavings or places of refuge, with pillars, rails, or other fences, for the purpose of protecting passengers and traffic, and making the crossing of the street less dangerous to passengers.

In places where the Towns Improvement Clauses Act, 1847 (*m*), s. 52, is in force the authority must place and maintain such fences and posts on the side of the footways of public highways as may be needed for the protection of passengers; and may place posts in the carriage ways of public highways so as to make the crossing thereof less dangerous for foot passengers; and may remove such fences and posts as it thinks fit.

(*d*) Apparently he may appeal to quarter sessions or to the Local Government Board (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 7).

(*e*) *Ibid.* Any section of the Act may be put in force by order of the Local Government Board.

(*f*) *Semble*, this provision will have no application where the existing fence ought to be repaired by the highway authority; see *Rotherham Corporation* v. *Fullerton* (1884), 50 L. T. 364.

(*g*) *I.e.*, a second order as to the particular piece of land.

(*h*) The owner or occupier will have a right of appeal to the Local Government Board.

(*i*) 38 & 39 Vict. c. 55.

(*k*) 53 & 54 Vict. c. 59.

(*l*) *Ibid.*, s. 5. It is in force in urban districts where Part III. (*ibid.*) has been adopted, and in rural districts if applied by order of the Local Government Board (*ibid.*, ss. 3, 5).

(*m*) 10 & 11 Vict. c. 34. It is in force if incorporated in a local Act.

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Fencing and lighting of excavations, building materials, rubbish etc.

478. In urban districts and in rural places (*n*) where the Towns Improvement Clauses Act, 1847 (*o*), ss. 81, 82, are in force, every person who causes any building materials, rubbish, or other things to be laid, or any hole made, in a street (whether by order of the authority or not), must at his own expense fence the same and fix lights on or near the same from sunset to sunrise (*p*); and such building materials or other things must not be allowed to remain for an unnecessary time (*q*). The penalty for breach of these provisions is a fine not exceeding £5, and a further fine not exceeding 40*s.* a day during default; and the burden of proof as to the necessary time is upon the person responsible.

In districts (*r*) where the Public Health Acts Amendment Act, 1907 (*s*), s. 29, is in force, no person may, without the written consent of the authority, lay any building materials, rubbish, or other things, or make any excavation, on or in any street repairable by the inhabitants at large; and if any building materials, rubbish, or other things are laid, or excavation made, in any street with such consent, the person responsible must, at his own expense, fence them and fix lights on or near the same from sunset to sunrise, and must fill up or remove them when required by the authority, under a penalty not exceeding £5 and a daily penalty not exceeding 40*s.*; and the authority may remove any such materials, rubbish, or things, or fill up such excavation, and recover the expenses from the offender summarily as a civil debt (*t*).

SUB-SECT. 12.—*Numbering of Houses and Naming of Streets.*

Numbering of houses. Naming of streets.

479. In urban districts and in rural places where the Towns Improvement Clauses Act, 1847 (*u*), ss. 64, 65, are in force (*v*), it is the duty of the sanitary authority to cause the houses or buildings in the streets to be marked with numbers; and to cause the name of every street to be put up or painted in a conspicuous place at or near each end, corner, or entrance thereof (*w*). Any person who destroys, pulls down, or defaces any number or name, or puts up any number or name different from the number or name put up by the authority, is liable to a penalty not exceeding 40*s.* (*x*). The occupiers of houses and

(*n*) These provisions are applied to all urban districts by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 160, in rural district they may be put in force by order of the Local Government Board (*ibid.*, s. 276).

(*o*) 10 & 11 Vict. c. 34.

(*p*) *Ibid.*, s. 81. It would seem that a servant of the authority may be convicted under this section (*Fearnley* v. *Ormsby* (1879), 4 C. P. D. 136).

(*q*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 82.

(*r*) It may be put in force in any district by order of the Local Government Board.

(*s*) 7 Edw. 7, c. 53.

(*t*) He will have a right of appeal to the Local Government Board (*ibid.*, s. 7).

(*u*) 10 & 11 Vict. c. 34.

(*v*) See note (*n*), *supra*.

(*w*) Although an authority has approved plans for a new street, giving it a name, it may change the name when it is finished; at any rate, the owner will be liable to the penalty if he pulls down the name board, and he must enforce his remedy, if any, by an action (*Collins* v. *Hornsey Urban Council*, [1901] 2 K. B. 180). But it would seem that under this section the authority cannot change the name of an old street (*Anderson* v. *Dublin Corporation* (1885), 15 L. R. Ir. 410).

(*x*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 64; Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 160, 316.

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other buildings must mark them with such numbers as the authority approves, and renew the numbers when necessary (*a*); and every occupier who fails to do so within a week after notice from the authority is liable to a penalty not exceeding 40*s.*; and the authority must mark or renew the numbers and may recover the expenses summarily (*b*) from the occupier (*c*).

Altering name of street.

In districts (*d*) where the Public Health Acts Amendment Act, 1907 (*e*), s. 21, is in force, the local authority may alter the name of any street or part of a street with the consent of two-thirds in number or value of the ratepayers therein; and it is given powers, similar to those mentioned in the preceding paragraph, as to marking up the names of streets.

SUB-SECT. 13.—*Miscellaneous.*

Cleansing and watering of streets.

480. Every urban authority (*f*) and any rural authority having the requisite powers (*g*) may, and when required by the Local Government Board must, undertake, or contract for, the cleansing (*h*) of streets (*i*), and may undertake, or contract for, the watering (*k*) of streets (*i*) for the whole or part of its district.

Bye-laws.

Where the local authority does not itself undertake, or contract for, the cleansing of footways and pavements, it may make bye-laws imposing the duty of such cleansing on the occupiers of the adjoining premises (*l*).

Snow, ashes etc.

481. An urban authority (or a rural authority with the necessary urban powers) may make bye-laws for the prevention of nuisances arising from snow, filth, dust, ashes and rubbish (*m*).

(*a*) For a form of notice to renew a number, see Encyclopædia of Forms and Precedents, Vol. XI., p. 92.

(*b*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 210.

(*c*) *Ibid.*, s. 65.

(*d*) It may be put in force in any district by order of the Local Government Board.

(*e*) 7 Edw. 7, c. 53.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 42. Apart from this provision, a highway authority may cleanse or water highways so far as may be reasonably necessary to maintain the roadway, but not upon sanitary grounds.

(*g*) Under the Public Health Act, 1875 (38 & 39 Vict. c. 53), s. 276.

(*h*) Any refuse collected may be sold or otherwise disposed of, and any profits must be applied in reduction of the expenses (*ibid.*, s. 42). Receptacles for the temporary deposit of refuse collected may be provided in proper and convenient situations (*ibid.*, s. 45).

(*i*) The authority is not restricted to streets which are highways repairable by the inhabitants at large; but where individuals, or the county, are liable for the repair of a road or bridge, the authority may ask for payment in consideration of its cleansing and watering it; see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 148; and p. 96, *ante*. As to the scavenging and cleansing of courts and passages, see the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 27, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) As to the duty of a water company under the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 37, 38, 43, to supply water for this purpose, see title WATER SUPPLY.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 44.

(*m*) *Ibid.*; bye-laws may be made, apparently, as to any one or more of these matters; see *Stainland Industrial Corn and Provision Society* v. *Stainland Urban Council*, [1906] 1 K. B. 233.

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Where there is in force a local Act incorporating the Towns Improvement Clauses Act, 1847, ss. 87—98 (*n*), the authority must cause all streets and foot pavements to be properly swept, cleansed and watered, and all dust and filth of every sort to be removed therefrom (*o*); and it may place in the streets receptacles for dust and refuse (*p*), and may sell sweepings or collected refuse (*q*), and purchase land on which to deposit them (*r*). Occupiers of buildings and lands adjoining the streets must sweep and clean the footways and pavements in front or at the side of such buildings and lands daily, except Sundays, before 8 a.m. (*s*), unless they compound with the authority (*t*). For the above purposes the authority may provide pipes and hydrants, purchase or erect buildings, horses, carts and implements, employ scavengers, or contract with other persons for doing the work (*a*). Penalties are incurred by persons obstructing scavengers (*b*) or themselves removing street refuse (*c*).

Cleansing and watering of streets.

482. In places where the Public Health Acts Amendment Act, 1890 (*d*), Part III. or s. 26 (1), or the Towns Improvement Clauses Act, 1847, s. 98 (*e*), is in force, the authority may prescribe times for the removal or carriage through the streets of fæcal, offensive, or noxious matter; and may provide that the vessels or carts used therefor shall be constructed and covered so as to prevent the escape of such matter; and may compel the cleansing of any place whereon such matter shall have been dropped in such removal or carriage.

Removal of offensive matter etc.

483. In urban districts and in rural places where the Public Health Act, 1875 (*f*), ss. 39, 45, are in force, the authority may provide and maintain in convenient situations, even in a highway (*g*), urinals, closets, and ashpits for public accommodation, and also receptacles for the temporary deposit and collection of dust, ashes, and rubbish.

Public conveniences.

(*n*) 10 & 11 Vict. c. 34.
(*o*) *Ibid.*, ss. 87, 94.
(*p*) *Ibid.*, s. 92.
(*q*) *Ibid.*, s. 90.
(*r*) *Ibid.*, s. 91.
(*s*) *Ibid.*, s. 88. Penalty not exceeding 5*s*. In the case of houses let in separate apartments the liability is on the person letting such apartments (*ibid.*).
(*t*) *Ibid.*, s. 89.
(*a*) *Ibid.*, ss. 91, 94, 95. Contractors failing to do the work incur liability to a fine.
(*b*) *Ibid.*, s. 96.
(*c*) *Ibid.*, s. 97.
(*d*) 53 & 54 Vict. c. 59. It is in force in urban districts if Part III. (*ibid.*) has been adopted, and may be applied to rural districts by order of the Local Government Board.
(*e*) 10 & 11 Vict. c. 34. It is in force if incorporated in a local act.
(*f*) 38 & 39 Vict. c. 55. Where there is in force a local Act incorporating the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 93, the authority has similar powers to erect urinals and to compensate persons injured by such erection.
(*g*) *Vernon* v. *St. James, Westminster, Vestry* (1880), 16 Ch. D. 449, C. A., *per* LUSH, L.J. But the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 39, does not authorise the authority to construct conveniences underneath a highway,

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Where the Public Health Acts Amendment Act, 1907 (*h*), s. 47, is in force, the authority may provide and maintain in convenient situations in or under (*i*) any street repairable by the inhabitants at large sanitary conveniences (*k*) and lavatories for the use of the public.

Sanitary conveniences and lavatories.

484. In general, the owner of the soil of a street not yet dedicated to the public may erect conveniences in it (*l*), and a person may erect on his own land conveniences opening on to a highway; but in places where the Public Health Acts Amendment Act, 1890 (*m*), s. 20, is in force, no public sanitary convenience may in future be erected in or be accessible from any street without the written consent of the authority, which may make terms as to the use or future removal thereof. And in districts where the Public Health Acts Amendment Act, 1907 (*a*), s. 43, is in force, the authority may require the removal of any urinal or sanitary convenience opening on any street, whenever erected, if it is a nuisance or offensive to public decency.

Planting trees.

485. In places where the Public Health Acts Amendment Act, 1890 (*b*), s. 43, is in force, the authority may plant trees in any highway repairable by the inhabitants at large, and erect guards or fences for their protection; but it must not thereby hinder the reasonable use of the highway (*c*), nor cause a nuisance or injury to any adjacent owner or occupier (*d*).

although it be a street vested in it (*Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434). See, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*h*) 7 Edw. 7, c. 53. This provision may be put in force by order of the Local Government Board in any district or contributory place.

(*i*) The subsoil of the street is not by the statute vested in the authority for the purpose, as it is by the similar statutory provision in London; it may be, therefore, that an authority must pay compensation for the use of the subsoil; see *Tunbridge Wells Corporation* v. *Baird*, *supra*. An authority which *bonâ fide* thinks it desirable to construct conveniences under a street may provide an access from each pavement, although persons may use the subway without desiring to use the conveniences (*Westminster Corporation* v. *London and North Western Railway*, [1905] A. C. 426).

(*k*) Defined in the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 11, as including urinals, water closets, earth closets, privies, ashpits, and any similar convenience.

(*l*) Even if so dedicated he might in certain cases construct underground conveniences; see p. 56, *ante*.

(*m*) 53 & 54 Vict. c. 59. It is in force in urban districts if Part III. (*ibid.*) has been adopted, or in rural districts if applied by order of the Local Government Board. See, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*a*) 7 Edw. 7, c. 53.

(*b*) 53 & 54 Vict. c. 59. It is in force in urban districts where Part III. (*ibid.*) is adopted, and in rural districts if applied by order of the Local Government Board. Apart from statutory authority, it is an indictable nuisance to plant trees in any highway (*R.* v. *Lewes Corporation* (1886), *Times*, 9th March); but see *Surbiton Improvement Commissioners* v. *Metcalf* (1889), *Local Government Chronicle*, 216. Trees planted under the authority of this provision will be the property of the council; as to penalties for injuring them, see p. 214, *ante*. As to trees existing in a highway at the date of dedication, see pp. 56, 58, *ante*.

(*c*) *Semble*, notwithstanding the decision in *Tregellas* v. *London County Council* (1897), 14 T. L. R. 55, the effect of this proviso is to render the authority liable to an action if a passenger is injured by low-growing boughs.

(*d*) As to the right of an adjoining owner to lop boughs overhanging his premises, see *Lemmon* v. *Webb*, [1895] A. C. 1; and as to his right to sue for damages, see *Smith* v. *Giddy*, [1904] 2 K. B. 448.

Statues and monuments.

486. In places where the Public Health Acts Amendment Act, 1890 (*e*), s. 42, is in force, the authority may authorise the erection of statues or monuments in any street or public place, and may maintain any statue or monument erected within the district at any time, and may remove any statue or monument the erection of which has been authorised by them.

Fire plugs and hydrants.

487. In urban districts, and in rural districts where the Public Health Act, 1875 (*f*), s. 66, is in force, the authority must cause fire-plugs and all necessary works for securing an efficient supply of water to be provided and maintained in streets or elsewhere within their district. Apart from this provision, if a rural authority provide a water supply for any part of its district, it may fix fire hydrants in the mains (*g*).

Cabmen's shelters.

488. In districts where the Public Health Acts Amendment Act, 1890 (*h*), s. 40, is in force, the authority may provide, maintain, and remove, in or near any street, erections for the convenience and shelter of cabmen and such other persons as the authority may permit; and it may make regulations (*i*) as to the terms and conditions and the fees (if any) for their use, and may make bye-laws (*i*) regulating the conduct of persons using the same.

Telegraph wires etc.

Exemptions.

489. An urban authority which has adopted the Public Health Acts Amendment Act, 1890 (*k*), Part II., has certain powers for preventing danger from telegraph and other similar wires and apparatus (*l*). These provisions do not apply to the property of the Postmaster-General (*m*), nor to the works of undertakers within the meaning of the Electric Lighting Acts, 1882—1888, to which the

(*e*) 53 & 54 Vict. c. 59. It is in force in urban districts where Part III. (*ibid.*) is adopted, and in rural districts if applied by order of the Local Government Board. Although in *Squire* v. *Campbell* (1836), 1 My. & Cr. 459, an injunction was refused at the suit of individuals who objected to the erection of a statue in a public street, it seems clear that apart from statutory authority the erection would be an indictable nuisance. The question was raised, but not decided, as to a drinking fountain in *Hildreth* v. *Adamson* (1860), 8 C. B. (N. S.) 587. As to accidents due to stones falling from a monument, or water flowing from a fountain and freezing, see *McLoughlin* v. *Warrington Corporation* (1910), 75 J. P. 57, C. A.; *O'Keefe* v. *Edinburgh Corporation*, [1911] S. C. 18.

(*f*) 38 & 39 Vict. c. 55. As to the liability of an authority under this provision, see *Dawson* v. *Bingley Urban District Council* (1911), 27 T. L. R. 308; the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 124, is in similar terms. As to the liability of a highway authority for accidents caused by fire plugs in streets, see p. 135, *ante*; see also title WATER SUPPLY.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 51.

(*h*) 53 & 54 Vict. c. 59. It is in force in urban districts where Part III. (*ibid.*) has been adopted, and in rural places if applied by order of the Local Government Board. Apart from statutory authority, such a shelter erected in a highway would be an indictable nuisance.

(*i*) As to the making of bye-laws and regulations, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) 53 & 54 Vict. c. 59; or a rural authority to whose district it has been applied by order of the Local Government Board; see, further, title TELEGRAPHS AND TELEPHONES.

(*l*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 13, 14, 15.

(*m*) *Ibid.*, s. 15 (1) (a),

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provisions of those Acts apply (*n*); and they are not to interfere with the working of mines or minerals, and the owner, lessee, or occupier of such minerals is not to be liable for damage caused in the ordinary course of working (*o*).

Power to make bye-laws.

Subject to the foregoing limitations, the urban authorities referred to may make, alter, and repeal bye-laws for the prevention of danger or obstruction to the public from posts, wires, or other apparatus placed along or across any street (whether before or after the adoption of the enactment) for the purpose of any telegraph, telephone, lighting, railway signalling, or other purposes (*p*), and such bye-laws may provide for inspection by the authority (*q*).

Penalties.

The maximum penalties for breach of the bye-laws are a fine of £5 for each offence, and a daily penalty of 40*s*., and the court may also order the removal of any apparatus erected in contravention thereof (*a*).

Confirmation by Board of Trade.

No bye-law, and no alteration or repeal thereof, is to take effect until it has been confirmed by the Board of Trade, who may disallow or amend it (*b*). Reasonable notice of the intended submission for confirmation must be given by advertisement in a local newspaper, and by circular letter to any company or person owning or leasing any apparatus to which the bye-law is intended to apply and such company or person may raise objections before the Board of Trade. All costs incurred in reference to the application or objection are in the discretion of the Board of Trade (*c*).

Exemptions.

The Board of Trade may exempt for a maximum period of five years any apparatus, erected either before the confirmation of a new bye-law, or in accordance with an old bye-law which has been altered or repealed (*d*).

Railway and canal companies.

Any apparatus belonging to a railway or canal company, or used by it in connection with its business, is also exempt, provided that it does not project beyond the railway or towing-path over any street, and is not placed over any street crossing over such railway, except at a level crossing (*e*).

Apparatus in dangerous position.

If in the opinion of the surveyor of the authority any apparatus so exempted is in such a state or position that immediate danger to any person is to be apprehended, the owner or lessee thereof, or other person interested therein, may be summoned before a court of summary jurisdiction, who may direct the source of danger to be removed or remedied by the defendant or by the surveyor at his expense, or make any other necessary order (*f*).

(*n*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 15 (1) (b); and see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 549, 551, 552.
(*o*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 15 (2).
(*p*) *Ibid.*, s. 13 (1).
(*q*) *Ibid.*, s. 13 (2).
(*a*) *Ibid.*, s. 13 (3).
(*b*) *Ibid.*, s. 13 (4).
(*c*) *Ibid.*, s. 13 (5).
(*d*) *Ibid.*, s. 13 (6).
(*e*) *Ibid.*, s. 13 (7).
(*f*) *Ibid.*, s. 14 (1), (2). As to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES.

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See BAILMENT.

HIRE-PURCHASE.

See BAILMENT; BILLS OF SALE.

HOLDER IN DUE COURSE.

See BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS

HOLIDAYS.

See FACTORIES AND SHOPS; MASTER AND SERVANT; TIME.

HOLY ORDERS.

See ECCLESIASTICAL LAW.

HOMAGE.

See CONSTITUTIONAL LAW; COPYHOLDS.

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HOMICIDE.

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HOPS.

See AGRICULTURE; FOOD AND DRUGS.

HORSE FLESH.

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HORSE RACING.

See GAMING AND WAGERING; THEATRES AND OTHER PLACES OF ENTERTAINMENT.

HORSE, WARRANTY OF.

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HOSIERY MANUFACTURE.

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HOUSE AGENT.

See AGENCY; LANDLORD AND TENANT; REVENUE; SALE OF LAND; VALUERS AND APPRAISERS.

HOUSE DUTY.

See INHABITED HOUSE DUTY.

HOUSE OF COMMONS.

See CONSTITUTIONAL LAW; COURTS; PARLIAMENT.

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See CONSTITUTIONAL LAW; COURTS; PARLIAMENT; PEERAGES AND DIGNITIES.

HOUSEBREAKING.

See CRIMINAL LAW AND PROCEDURE.

HOUSING OF THE WORKING CLASSES.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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HUSBAND AND WIFE.

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Part I.—Contracts to Marry.

SECT. 1. Form, Construction and Validity.

SECT. 1.—*Form, Construction and Validity.*

Definition.

490. A contract to marry may be defined as a contract between a man and woman by which they mutually promise to marry one another, the promise of each being the consideration for the promise of the other (*a*).

Form.

491. It is not necessary that the contract should be evidenced by writing (*b*), nor even that the mutual promises should be made by express words. The conduct of the parties, and particularly their behaviour towards each other, may be such as to justify an inference that they have mutually promised to marry (*c*), and in the case of the woman it is sufficient to show that she acted in such a way as to indicate her consent to and approval of the man's promise (*d*). But stronger evidence of a promise on the part of the man is required than of a corresponding promise on the part of the woman (*e*).

A declaration of intention to a third person is not a promise on which an action can be founded unless it is communicated to the other party by the authority of the declarant (*f*).

General promise.

492. A general promise of marriage is construed as a promise to marry within a reasonable time on request (*g*), and it is therefore necessary, as a general rule, in an action for breach of such a promise, for the plaintiff to give evidence of a request on his or her part, and a refusal by the defendant to perform the contract (*h*).

But it is not necessary to allege or prove any request on the part of the plaintiff if the defendant has married somebody else, and so rendered the performance of the contract impossible (*i*). In such case it is sufficient if it appears that the plaintiff was ready and willing to marry the defendant (*i*).

Conditional promise.

493. Where the promise is to marry at or after a certain time, or is conditional, no action for breach thereof can be maintained until

(*a*) *Veneall* v. *Veness* (1865), 4 F. & F. 344 (there must be mutual promises).

(*b*) A contract to marry is not a contract in consideration of marriage within the meaning of the Statute of Frauds (29 Car. 2, c. 3), s. 4; *Cork* v. *Baker* (1717), 1 Stra. 34; *Harrison* v. *Cage* (1698), 1 Ld. Raym. 386; and see title CONTRACT, Vol. VII., pp. 361, 364.

(*c*) *Bessela* v. *Stern* (1877), 2 C. P. D. 265, C. A.; *Harvey* v. *Johnston* (1848), 6 C. B. 295; and see title EVIDENCE, Vol. XIII., p. 459.

(*d*) *Hutton* v. *Mansell* (1704), 3 Salk. 16; *Daniel* v. *Bowles* (1826), 2 C. & P. 553 (as by receiving his visits in the capacity of a suitor).

(*e*) See *Bessela* v. *Stern*, *supra*. As to the necessity for corroboration, see p. 274, *post*.

(*f*) *Cole* v. *Cottingham* (1837), 8 C. & P. 75.

(*g*) *Potter* v. *Deboos* (1815), 1 Stark. 82; *Harrison* v. *Cage*, *supra*.

(*h*) *Gough* v. *Farr* (1827), 2 C. & P. 631. In this case the father of the plaintiff had asked the defendant if he intended to fulfil his promise; he had replied, "Certainly not," which was held to be sufficient evidence of a request and refusal.

(*i*) *Short* v. *Stone* (1846), 8 Q. B. 358; *Caines* v. *Smith* (1846), 15 M. & W. 189; *Harrison* v. *Cage*, *supra*.

the time has elapsed, or the condition been fulfilled (*k*), unless the breach relied upon is a renunciation of the contract by the defendant. But a declaration of an intention not to fulfil the contract is in itself a breach for which an action will lie (*l*).

Promise by infant.

494. A contract to marry made by an infant is voidable at his or her option. The infant may sue on it (*m*), but may not be sued (*n*), even if he or she has ratified the contract after coming of age (*o*).

But a mere ratification of a promise made during infancy, on which no action will lie, must be distinguished from a new promise of marriage after attaining majority (*p*). The fact that the new promise is little or nothing more than a repetition of the original one does not render it voidable; and when there is any evidence of a promise having been made after majority, it is a question of fact for the jury whether it was a new promise or merely a ratification of the old (*p*).

Promise by person already married.

495. If one of the parties to a contract to marry is, to the knowledge of the other party, already married, the contract is void as being contrary to public policy, and will not support an action for damages, at the suit of either party, for not fulfilling the contract even after the death of the existing wife or husband (*q*).

But an action will lie for breach of promise of marriage by a married man or woman, if he or she was not known to be married, by the other contracting party at the time of the promise, the remaining unmarried until the receipt of notice of that fact being sufficient consideration to support the action (*r*).

(*k*) *Cole* v. *Cottingham* (1837), 8 C. & P. 75.

(*l*) *Frost* v. *Knight* (1872), L. R. 7 Exch. 111, Ex. Ch. (promise by the defendant to marry the plaintiff after the death of the defendant's father, and declaration by the defendant during his father's life of an intention never to marry the plaintiff); *Donoghue* v. *Marshall* (1875), 32 L. T. 310.

(*m*) *Holt* v. *Ward Clarencieux* (1732), 2 Stra. 937.

(*n*) *Hale* v. *Ruthven* (1869), 20 L. T. 404.

(*o*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2; *Coxhead* v. *Mullis* (1878), 3 C. P. D. 439. As to ratification of contracts by infants generally, see title INFANTS AND CHILDREN.

(*p*) *Ditcham* v. *Worrall* (1880), 5 C. P. D. 410, where the defendant, after coming of age, asked the plaintiff in the presence of her father to fix the wedding day, and assented to the day fixed by the plaintiff, and it was held that there was evidence from which the jury ought to infer a new promise; *Holmes* v. *Brierley* (1888), 36 W. R. 795, where the plaintiff's father, having become insolvent, offered to release the defendant, who had attained his majority, from the engagement, and the defendant refused to be released and said he was willing to marry the plaintiff, asking her if she thought they were old enough, and it was held that there was evidence for the jury of a new promise; *Northcote* v. *Doughty* (1879), 4 C. P. D. 385, where the defendant, after coming of age, told the plaintiff that he had explained all to his father, who had assented to the engagement, and then said, "Now, I will marry you as soon as I can," and it was held that it was a question for the jury whether it was a new promise or merely a ratification. In *Coxhead* v. *Mullis*, *supra*, the defendant had merely recognised, without repeating, the original promise.

(*q*) *Wilson* v. *Carnley*, [1908] 1 K. B. 729, C. A. (promise by a married man to marry the plaintiff after the death of his wife, who was seriously ill at the time); and see *Prevost* v. *Wood* (1905), 21 T. L. R. 684; *Spiers* v. *Hunt*, [1908] 1 K. B. 720; and title CONTRACT, Vol. VII., p. 400.

(*r*) *Wild* v. *Harris* (1849), 7 C. B. 999; *Millward* v. *Littlewood* (1850), 5

SECT. 1. Form, Construction and Validity.

496. A promise of marriage made in consideration of the promisee permitting the promisor to have carnal intercourse with her or him is void (*s*).

SECT. 2.—*Remedy for Breach.*

Promise in consideration of unlawful intercourse.

Remedy for breach.

497. The only remedy for breach of a contract to marry is an action for damages (*t*). The remedy is mutual, that is to say, either the man or woman may sue for the breach (*a*).

Jurisdiction: promise made abroad.

498. The High Court has jurisdiction to entertain an action for breach of a contract to marry made abroad if the defendant is personally served with the writ within the jurisdiction, or if he or she is domiciled or ordinarily resident within the jurisdiction, wherever the breach may have been committed (*b*); or, although the defendant is not served nor domiciled nor ordinarily resident within the jurisdiction if the contract according to its terms ought to have been performed, and the breach occurred, within the jurisdiction, except where the defendant is domiciled or ordinarily resident in Scotland or Ireland (*c*); or, if the defendant appears in the action (*d*).

County court.

499. The county court has no jurisdiction in actions for breach of promise of marriage (*e*), except by consent (*f*).

Corroboration.

500. In order to maintain such an action it is necessary that the testimony of the plaintiff should be corroborated by other material evidence in support of the defendant's promise (*g*).

What constitutes material evidence in corroboration is a question of law for the court (*h*), and its sufficiency is a question of fact for

Exch. 775. In both these cases, as also in the cases cited in the preceding note, married men were defendants, but the principles obviously apply equally to promises by married women.

(*s*) See *Morton* v. *Fenn* (1783), 3 Doug. (K. B.) 211; and see title CONTRACT, Vol. VII., p. 400.

(*t*) Suits in the Ecclesiastical Courts for specific performance of such contracts by celebration of the marriage *in facie ecclesiæ* were abolished in 1753 by Lord Hardwicke's Act, stat. (1753) 26 Geo. 2, c. 33; and see note (*o*), p. 279, *post*. This statute was repealed by the Marriage Act, 1823 (4 Geo. 4, c. 76), and the provision that no suit should lie to compel the celebration of any marriage by reason of any precontract was re-enacted by s. 27 (*ibid.*).

(*a*) *Harrison* v. *Cage* (1698), 1 Ld. Raym. 386.

(*b*) R. S. C., Ord. 11, r. 1 (c); *Hadad* v. *Bruce* (1892), 8 T. L. R. 409.

(*c*) R. S. C., Ord. 11, r. 1 (e); *Cooper* v. *Knight* (1901), 17 T. L. R. 299, C. A. (leave to serve writ abroad given where the agreement was to marry in England); *Durham* v. *Spence* (1870), L. R. 6 Exch. 46 (breach in England of promise made abroad, both parties having come to England); *Hansen* v. *Dixon* (1907), 96 L. T. 32; compare *Cherry* v. *Thompson* (1872), L. R. 7 Q. B. 573; *Holland* v. *Bennett*, [1902] 1 K. B. 867, C. A. On an application for leave to serve the writ out of the jurisdiction it is not necessary to give evidence in corroboration of the promise (*Franklyn* v. *Chaplin* (1900), 17 T. L. R. 84, C. A.).

(*d*) A person without the jurisdiction may appoint a person within the jurisdiction to accept service, and acceptance by the latter is a proper acceptance (*Tharsis Sulphur and Copper Co.* v. *La Société des Métaux* (1889), 58 L. J. (Q. B.) 435).

(*e*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56.

(*f*) *Ibid.*, s. 64. As to actions which cannot be remitted, see title COUNTY COURTS, Vol. VIII., p. 439.

(*g*) Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s 2.

(*h*) *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534, C. A. See also title EVIDENCE, Vol. XIII., p. 603.

the jury (*i*). The circumstance that the defendant, on being charged in the presence of a third person with having promised the plaintiff marriage, does not deny it or returns an evasive answer (*k*) is evidence in corroboration to go to the jury (*l*); and the corroborative evidence may relate to circumstances which occurred before the alleged promise (*m*).

On the other hand, the mere fact that the defendant returned no answers to letters from the plaintiff, in which the latter stated that the defendant had promised to marry him or her, is not material evidence in corroboration to submit to the jury, unless there are special circumstances making the defendant's omission to answer evidence in the particular case (*n*).

Actio personalis moritur cum personâ.

501. The right of action for breach of a contract to marry does not survive to the executors or administrators of a deceased promisee, except so far as they may be able to prove special damage to the personal estate of the deceased during his or her lifetime (*o*); nor does it survive against the executors or administrators of a deceased promisor, except to the extent of any special damage caused by the breach to the estate of the plaintiff, which was in the contemplation of the parties at the time of the promise (*p*).

SECT. 3.—*Defences to Action for Breach.*

Fraud and misrepresentation.

502. It is a good defence to an action for breach of promise of marriage that the defendant was induced to make the promise, or to continue the engagement, by misrepresentation or wilful suppression by the plaintiff of the real circumstances of his or her family and previous life (*q*).

(*i*) *Wilcox* v. *Gotfrey* (1872), 26 L. T. 481.

(*k*) *Bessela* v. *Stern* (1877), 2 C. P. D. 265, C. A.

(*l*) See also *Hansen* v. *Dixon* (1906), 96 L. T. 32, where a letter from defendant to plaintiff saying, "If I were well, would you marry me, little girl? Do tell me all now," was held sufficient corroborative evidence; *Hickey* v. *Campion* (1872), 6 I. R. C. L. 557, where the defendant, who was being nursed by the plaintiff during a sudden attack of illness, said in the presence of a third person, "Who has a better right to take care of me than my wife?" As to discovery and inspection in actions for breach of promise of marriage, see *Pape* v. *Lister* (1871), L. R. 6 Q. B. 242; *Stone* v. *Strange* (1865), 3 H. & C. 541; and, generally, title DISCOVERY, INSPECTION AND INTERROGATORIES, Vol. XI., pp. 35 *et seq.*

(*m*) *Wilcox* v. *Gotfrey*, *supra*.

(*n*) *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534, C. A. Nor is the mere fact that the plaintiff has possession of the defendant's signet ring material corroboration (*ibid.*). And see *Spooner* v. *Godfrey* (1908), *Times*, 16th October, C. A.

(*o*) *Chamberlain* v. *Williamson* (1814), 2 M. & S. 408.

(*p*) *Finlay* v. *Chirney* (1888), 20 Q. B. D. 494, C. A. Special damage to the person of the promisee is not sufficient. It must be damage to property. See also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 225, 305, 312.

(*q*) *Wharton* v. *Lewis* (1824), 1 C. & P. 529; *Foote* v. *Hayne* (1824), 1 C. & P. 545, 546. In the latter case the misrepresentations were made by the father of the plaintiff (female), and as she knew that he wrote to the defendant about her, she was held bound by them in a general way, though not answerable for particular expressions, there being no evidence that she was aware of the exact contents of the letters.

SECT. 3. Defences to Action for Breach.

But the mere fact that at the time of the contract of marriage the plaintiff was already engaged to be married to somebody else, of which the defendant was ignorant, is no defence in the absence of fraud, even if it is found that the defendant would not have made the promise had he or she been aware of the circumstances (*r*).

Unchastity.

503. When the plaintiff is a woman, the fact of her having been unchaste, whether before or after the making of the contract, constitutes a good defence, provided, in the case of previous unchastity, that the defendant was not aware of it at the time of his promise (*s*). If the defence of unchastity is set up, evidence of the plaintiff's reputation in the neighbourhood in which she lives is admissible (*a*).

Bad character.

504. A woman is justified in breaking off an engagement with a man who turns out on inquiry to be of bad character, and proof of the charges made against him constitutes a good defence to an action by him for damages (*b*).

Mental or bodily infirmity.

505. It is no defence to an action for breach of promise of marriage that, previously to the promise, the plaintiff, without the defendant being aware of it, had been insane and confined in a lunatic asylum (*c*); but supervening insanity of either the plaintiff or defendant, such as to incapacitate him or her from performing the contract, constitutes a good defence (*d*).

A bodily infirmity of the plaintiff arising after the making of the contract, though not such as to incapacitate him or her from marriage (*e*), may be a sufficient justification for the defendant's having broken off the match (*f*); but no disease or infirmity, short of absolute incapacity (*e*) on the part of the defendant, will avail him or her, even if it is proved that the performance of conjugal duties would endanger his or her life (*g*).

Mutual release.

506. It is a good defence to the action that the plaintiff exonerated and discharged the defendant from performance of the contract before any breach thereof (*h*); and a mutual release and discharge may be inferred from the fact that, the defendant having

(*r*) *Beachey* v. *Brown* (1860), E. B. & E. 796. Such a fact could no doubt be urged in mitigation of damages.

(*s*) *Young* v. *Murphy* (1836), 3 Bing (N. C.) 54; *Irving* v. *Greenwood* (1824), 1 C. & P. 350. In *Bench* v. *Merrick* (1844) 1 Car. & Kir. 463, the fact that the plaintiff, unknown to the defendant, had had an illegitimate child ten years before the promise was held a good defence, although her conduct since that time had been irreproachable.

(*a*) *Foulkes* v. *Sellway* (1800), 3 Esp. 236.

(*b*) *Baddeley* v. *Mortlock* (1816), Holt (N. P.), 151. If the charges cannot be proved, but are merely matter of suspicion, they only go in mitigation of damages (*ibid.*). See also *Leeds* v. *Cook* (1803), 4 Esp. 256.

(*c*) *Baker* v. *Cartwright* (1861), 10 C. B. (N. S.) 124.

(*d*) See *Liddell* v. *Easton's Trustees*, [1907] S. C. 154; and pp. 282, 379, *post*.

(*e*) As to incapacity, see pp. 281—283, *post*.

(*f*) *Atchinson* v. *Baker* (1796), Peake, Add. Cas. 103, where the plaintiff, a man, who was apparently in good health at the time of the contract, was subsequently discovered to be afflicted with an abscess in the breast, and it was held that the defendant was justified in breaking off the engagement.

(*g*) *Hall* v. *Wright* (1858), E. B. & E. 746.

(*h*) *King* v *Gillett* (1840), 7 M. & W. 55.

expressed a desire to terminate the engagement, no correspondence or other communications took place between the parties for some years, even though the plaintiff may have refused to return the defendant's letters (*i*).

Offer of performance.

507. An offer by the defendant to perform the contract by marrying the plaintiff, if it was made before the issue of the writ and was refused by the plaintiff, is a good defence to the action (*k*).

SECT. 4.—*Damages.*

Measure of damages.

508. The damages in an action for breach of promise of marriage are not measurable by any fixed standard, and are almost entirely in the discretion of the jury (*l*).

The injury to the affections of the plaintiff, the prejudice to his or her future life and prospects of marriage, the rank and condition of the parties, and the defendant's means, are all matters to be taken into consideration (*m*).

The damages may be aggravated by the fact of the defendant having seduced a woman, she having relied on the promise of marriage (*n*), or having infected her with disease (*o*).

Mitigation of damages.

509. On the other hand, the defendant may prove, in mitigation of damages, that his or her relatives disapprove of the match (*p*), or, in the case of the plaintiff being a man, that he is of a brutal or violent temper (*q*), or that he has a bad reputation (*r*).

New trial.

510. On an application for a new trial on the ground that the damages are excessive, the Court of Appeal will not interfere unless it appears clearly that the jury have acted under a misconception with regard to the matters which they ought to take into consideration, or have been influenced by improper motives (*s*).

(*i*) *Davis* v. *Bomford* (1861), 6 H. & N. 245. And see *Smith* v. *Jenkins* (1873), 28 L. T. 562, as to the validity of a plea of accord and satisfaction by a new promise to marry.

(*k*) *Dennis* v. *McKenzie* (1871), 24 L. T. 363. The offer in this case was made to the plaintiff's attorney, and as it had not been communicated by him to the plaintiff, was held ineffective. As to the defences of infancy and illegality, see p. 273, *ante*.

(*l*) *Berry* v. *Da Costa* (1866), L. R. 1 C. P. 331, 335; *Smith* v. *Woodfine* (1857), 1 C. B. (N. S.) 660; *Gough* v. *Farr* (1827), 1 Y. & J. 477; *Wood* v. *Hurd* (1835), 2 Bing (N. C.) 166. See also title DAMAGES, Vol. X., p. 323, and note (*s*), *infra*.

(*m*) *Horam* v. *Humfreys* (1771), Lofft, 80; *Berry* v. *Da Costa*, *supra*; *Kerfoot* v. *Marsden* (1860), 2 F. & F. 160.

(*n*) *Berry* v. *Da Costa*, *supra*.

(*o*) *Millington* v. *Loring* (1880), 6 Q. B. D. 190, C. A.

(*p*) *Irving* v. *Greenwood* (1824), 1 C. & P. 350.

(*q*) *Leeds* v. *Cook* (1803), 4 Esp. 256.

(*r*) *Baddeley* v. *Mortlock* (1816), Holt (N. P.), 151.

(*s*) *Berry* v. *Da Costa*, *supra*; *Wood* v. *Hurd*, *supra*; *Smith* v. *Woodfine*, *supra* *Gough* v. *Farr*, *supra*.

Part II.—Marriage.

SECT. 1. Nature and Requisites of a Valid Marriage.

SECT. 1.—*Nature and Requisites of a Valid Marriage.*

Nature and Requisites of a Valid Marriage.

511. The only kind of marriage which the English law recognises is one which is essentially "the voluntary union for life of one man with one woman to the exclusion of all others" (*t*).

Definition.

Requisites of valid marriage.

512. The requisites of a valid marriage according to English law are:—

(1) That each of the parties should as regards age, mental capacity, and otherwise, be capable of contracting marriage (*a*);

(2) That they should not by reason of kindred or affinity be prohibited from marrying one another (*b*);

(3) That there should not be a valid subsisting marriage of either of the parties with any other person (*c*);

(4) That the parties, understanding the nature of the contract, should freely consent to marry one another (*d*); and

(5) That certain forms and ceremonies should be observed (*e*).

Consent: mistake.

513. It is necessary for a valid marriage that the parties should consent to marry one another. If, therefore, there is a mistake in the person with whom the contract is made, as where A. goes through a ceremony of marriage with B., thinking he is marrying C., or in the case of a marriage in masquerade, where one party has no knowledge who the other may be, the marriage is void (*f*). But no other kind of mistake will affect the validity of a marriage (*g*).

Fraud and duress.

514. Fraudulent misrepresentation or concealment does not, apart from duress or imbecility of mind amounting to insanity (*h*), affect the validity of a marriage to which the parties freely consented

(*t*) See title CONFLICT OF LAWS, Vol. VI., pp. 252, 253, and *Re Ullee, The Nawab Nazim of Bengal's Infants* (1885), 53 L. T. 711; affirmed, 54 L. T. 286, C. A.; *Ardaseer Cursetjee* v. *Perozeboye* (1856), 10 Moo. P. C. C. 375.

(*a*) See pp. 281 *et seq.*, *post*.

(*b*) See pp. 283—286, *post*.

(*c*) It is immaterial that there may be good faith and an honest belief in the death of the existing wife or husband, and that the circumstances may be such as would not sustain an indictment for bigamy. A marriage during the lifetime of an existing wife or husband must necessarily be void. As to absence of one of the spouses for seven years and the presumption thus raised, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 533.

(*d*) As to the consent of parents or guardians in the case of minors, see p. 296, *post*. The absence of such consent does not now affect the validity of the marriage.

(*e*) See p. 286, *post*.

(*f*) *R.* v. *Millis* (1844), 10 Cl. & Fin. 534, H. L., *per* Lord CAMPBELL, at p. 785.

(*g*) Even if a man is the victim of a plot to procure a marriage by him with a person in all respects unworthy, the validity of the marriage is not affected, provided he consents, and any mistake as to the character or condition of the person he is marrying is immaterial (*Sullivan* v. *Sullivan* (1818), 2 Hag. Con. 238, *per* Sir W. SCOTT, at p. 246).

(*h*) See *Portsmouth* (*Countess*) v. *Portsmouth* (*Earl*) (1828), 1 Hag. Ecc. 355, and note (*l*), p. 381, *post*.

with a knowledge of the nature of the contract (*i*). But if a person is induced to go through a ceremony of marriage by threats or duress (*k*), or in a state of intoxication (*l*), or in an erroneous belief as to the nature of the ceremony (*m*), and without any real consent to the marriage, it is invalid. In all such cases the test of validity is whether there was any real consent to the marriage (*n*).

Forms and ceremonies.

515. The validity of a marriage in England, as regards forms and ceremonies, now almost entirely depends on the observance of statutory provisions (*o*), but marriages according to the usages

(*i*) *Moss* v. *Moss*, [1897] P. 263, where the wife, who was pregnant by another man at the time of the marriage, deliberately deceived the husband as to her condition and previous conduct, and it was held that that was no ground for questioning the validity of the marriage; *Templeton* v. *Tyree* (1872), L. R. 2 P. & D. 420; *Field's Marriage Annulling Bill* (1848), 2 H. L. Cas. 48; *Sullivan* v. *Sullivan* (1818), 2 Hag. Con. 238.

(*k*) *Bartlett* (*falsely called Rice*) v. *Rice* (1894), 72 L. T. 122 (petitioner, a girl of sixteen, having rejected the advances of respondent, he threatened to blow out her brains unless she consented to marry him, and pointed a pistol at her. She thereupon consented to marry him on condition that he would put away the pistol, and a few days later was intercepted by him on a railway journey and, on the pretence that they were going to see her mother, taken to a registry office, where the marriage ceremony was performed, during which she fainted. The marriage was not consummated. Nullity decreed); *Scott* v. *Sebright* (1886), 12 P. D. 21 (petitioner, an heiress, twenty-two years of age, was induced by the respondent, to whom she was engaged, to accept bills to the amount of some thousands of pounds. The discounters of the bills issued writs and threatened bankruptcy proceedings, and the respondent told her the only way to avoid bankruptcy and exposure was to marry him, and threatened to ruin her. Just before the marriage ceremony, which took place at a registry office, he threatened to shoot her if she showed that she was not acting of her free will. The parties separated immediately after the ceremony, and the marriage was never consummated. Nullity decreed); *Harford* v. *Morris* (1776), 2 Hag. Con. 423 (marriage of guardian with his ward, a girl of twelve, declared void on the ground of custody and duress); compare *Cooper* v. *Crane*, [1891] P. 369, where there was a threat by the respondent to blow his own brains out if the petitioner, his cousin, would not marry him, and the licence for the marriage was obtained by a false declaration, the parties separating immediately after the ceremony, and the marriage never being consummated, but it was held that the evidence was insufficient to rebut the presumption of consent from the petitioner having gone through the marriage ceremony and signed the register.

(*l*) *Sullivan* v. *Sullivan*, *supra*, at p. 246.

(*m*) *Ford* v. *Stier*, [1896] P. 1 (petitioner, a girl of seventeen, was induced by her mother, who had great influence over her, and who was acting in concert with the respondent, to go through a marriage ceremony with respondent, who had never spoken to her of marriage, and had obtained a licence by a false declaration as to her father having consented, the petitioner being persuaded by her mother that it was merely a ceremony of betrothal. The marriage was never consummated, the parties separating immediately after the ceremony. Nullity decreed); *Hall* (*otherwise Barrar*) v. *Hall* (1908), 24 T. L. R. 756 (similar case).

(*n*) See cases cited in notes (*k*), (*l*) and (*m*), *supra*.

(*o*) At common law it was necessary that the parties should take each other for husband and wife in the presence of an episcopally ordained clergyman, before the reformation a priest, and after the reformation a priest or deacon (*R.* v. *Millis* (1844), 10 Cl. & Fin. 534, H. L.), who must be a third person (*Beamish* v. *Beamish* (1861), 9 H. L. Cas. 274, where a marriage ceremony performed by a clergyman of the Church of England between himself and a woman was held void). If this condition was satisfied the marriage was valid. The decree of the Council of Trent of 1563, that no marriage should be valid unless duly celebrated

SECT. 1. Nature and Requisites of a Valid Marriage.

of Jews and Quakers are to a large extent exempt from the provisions (*p*).

If a person professing the Jewish religion marries in Christian form, all the forms and ceremonies prescribed by English law for the marriages of Christians must be observed (*q*).

Jews and Quakers.

Embassy marriages.

The only English marriages altogether outside the scope of these provisions are those celebrated at foreign embassies between parties, one of whom at least is a subject of the sovereign represented by the ambassador, which, by the fiction of exterritoriality, are regarded as being celebrated in the dominions of the sovereign so represented (*r*).

Provisions of Marriage Acts.

516. The Marriage Acts (*s*) require that every marriage should be by banns, licence, or superintendent registrar's certificate or certificate and licence, or naval officer's certificate (*t*), and except in the case of a marriage according to the usages of the Jews or Quakers and a marriage by special licence, that it should be solemnised in a church or chapel of the Church of England in which marriages may lawfully be solemnised (*u*), or in a superintendent registrar's office, or in a nonconformist church or building duly registered for the solemnisation of marriages (*a*).

If any persons knowingly and wilfully intermarry in any other place, or without due publication of banns, or licence, or superintendent registrar's certificate or naval officer's certificate, or knowingly and wilfully consent to or acquiesce in the solemnisation of a marriage in a church or chapel of the Church of England by a person not in holy orders, the marriage is void for all purposes (*b*).

in facie ecclesiæ, being subsequent to the breach between Henry VIII. and the Pope, never had any force in England, and clandestine marriages were common until the passing of Lord Hardwicke's Act in 1753 (26 Geo. 2, c. 33). This Act, which put an end to clandestine and irregular marriages by requiring that all marriages should be solemnised in the parish church or a public chapel of the Church of England, either by licence or after due proclamation of banns, was repealed and superseded by the Marriage Act, 1823 (4 Geo. 4, c. 76). No marriage may now lawfully be solemnised in England (other than an embassy marriage) except in accordance with the provisions of that and subsequent statutes; see pp. 286 *et seq.*, *post*.

(*p*) See pp. 304, 305, *post*.

(*q*) *Jones* (*falsely called Robinson*) v. *Robinson* (1815), 2 Phillim. 285.

(*r*) *Ruding* v. *Smith* (1821), 1 State Tr. (N. S.) 1053, 1066; *Pertreis* v. *Tondear* (1790), 1 Hag. Con. 136. In *Bailet* v. *Bailet* (1901), 84 L. T. 272, a marriage between domiciled French citizens at the French Consulate in London according to the forms required by French law was treated as valid, but it does not appear from the report that the matter was argued, or on what grounds the decision was based, and as the fiction of exterritoriality has no application to consulates, the case can hardly be regarded as a satisfactory authority that such marriages are outside the scope of English law.

(*s*) As to these Acts, see note (*b*), *infra*.

(*t*) See pp. 286 *et seq.*, *post*.

(*u*) See p. 299, *post*.

(*a*) See pp. 299—301, *post*.

(*b*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 22; Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 42, Naval Marriages Act, 1908 (8 Edw. 7, c. 26), as to which see p. 296, *post*. As to the criminal liability for solemnising a marriage under pretence of holy orders, or at an unauthorised place, or without due publication of banns or licence etc., see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 535, 536. In order to invalidate the marriage, both parties must be aware of the illegality (see pp. 287 *et seq.*, *post*.

SECT. 1. Nature and Requisites of a Valid Marriage.

517. If a marriage is celebrated in England between parties of full age and capacity, with the forms and ceremonies required by English law, its validity in England is not affected by the fact that the law of the domicil of either of the parties, being a foreigner, is not complied with as regards the consent of the parents or the observance of any formalities required by that law, nor by the fact that the parties came to England to be married in order to evade the law of their own country and domicil. It follows that a marriage may be valid in this country and void by the law of the domicil of both or either of the parties (*c*).

Marriage with foreigner.

Where satisfactory arrangements have been made with any foreign country for the issue, in the case of persons, subject to the marriage law of that country, proposing to marry British subjects in the United Kingdom, of certificates that after proper notices have been given no impediment according to the law of that country has been shown to exist to the marriage, His Majesty may by Order in Council make regulations requiring any person subject to the marriage law of that country, who is to be married to a British subject in the United Kingdom, to give notice of the fact that he is subject to such law to the person by or in the presence of whom the marriage is to be solemnised, and forbidding any person to whom notice is so given to solemnise the marriage or allow it to be solemnised until such a certificate is produced to him (*d*).

Any person knowingly acting in contravention of, or failing to comply with, any such regulation, is guilty of a misdemeanour, and liable to a fine not exceeding £100, or imprisonment for not exceeding one year (*e*).

Jews.

These provisions do not apply to marriages between two persons professing the Jewish religion solemnised according to the usages of the Jews in the presence of a secretary of a synagogue duly authorised to register such marriages (*f*), or of a deputy appointed by such secretary by writing under his hand, and approved by the president for the time being of the London Committee of Deputies of the British Jews by writing under his hand (*g*).

SECT. 2.—*Who may Marry.*

SUB-SECT. 1.—*Capacity to Marry.*

Age.

518. The age at which a person is capable of giving the necessary consent, and therefore of marrying, is fourteen in the case of males and twelve in the case of females (*h*).

(*c*) See title CONFLICT OF LAWS, Vol. VI., pp. 254 *et seq.*

(*d*) Marriage with Foreigners Act, 1906 (6 Edw. 7, c. 40), s. 2 (1). No regulations have as yet been made under the Act.

(*e*) *Ibid.*, s. 2 (2).

(*f*) *I.e.*, authorised in pursuance of the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), or the Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119). See p. 305, *post*, and title REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

(*g*) Marriage with Foreigners Act, 1906 (6 Edw. 7, c. 40), s. 2 (3).

(*h*) A marriage under the age of consent is not absolutely void, but only voidable by either party on the person under age reaching the age of consent. If the girl was under twelve, either party may disaffirm the marriage on her

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Lunatics so found.

519. A person who has been found lunatic by inquisition, or whose person and estate have been committed to the care and custody of trustees under any statute, is incapable of marrying until the commission has been superseded, or he or she has been declared of sane mind by the court or by the committee (*i*). The marriage of such a person is absolutely void, even if it takes place during a lucid interval (*k*).

Persons of unsound mind.

520. The question whether a person of unsound mind to whom the provision above mentioned does not apply is capable of contracting marriage depends upon whether, at the time of the marriage, he or she was capable of understanding the nature of the contract, and the duties and responsibilities thereby created, and was free from the influence of insane delusions on the subject (*l*), that is to say, whether the marriage took place during a lucid interval (*m*).

Mere dulness of intellect is not of itself sufficient to incapacitate a person from marrying (*n*), but a marriage brought about by fraudulent circumvention, and the exercise of undue influence over a person of considerable mental weakness, is voidable at his or her instance, as having been contracted without any real consent on his or her part (*o*).

Burden of proof.

521. The burden of proving the existence of such a degree of insanity at the time of the marriage as to invalidate it, is in all cases on the person impugning the validity of the marriage (*p*); but if permanent insanity is proved, the burden of showing that the marriage took place during a lucid interval lies on the person seeking to uphold its validity (*q*). The subsequent recovery of a

attaining that age, and similarly in the case of a boy under fourteen. If at the age of consent the marriage is affirmed by the parties, it becomes a valid marriage and cannot afterwards be questioned by either, and cohabitation after the age of consent is reached amounts to an affirmation of the contract: Com. Dig., tit. Baron and Feme, B. 5. As to the necessary consents in the case of minors, see p. 296, *post*.

(*i*) Marriage of Lunatics Act, 1811 (51 Geo. 3, c. 37).

(*k*) *Ibid.*; *Turner* v. *Meyers* (*falsely called Turner*) (1808), 1 Hag. Con. 414.

(*l*) *Durham* v. *Durham* (1885), 10 P. D. 80; *Jackson* v. *Jackson*, [1908] P. 308; *Hunter* v. *Edney, otherwise Hunter* (1881), 10 P. D. 93; *Browning* v. *Reane* (1812), 2 Phillim. 69, 70; *Turner* v. *Meyers* (*falsely called Turner*), *supra*; *Portsmouth* (*Countess*) v. *Portsmouth* (*Earl*) (1828), 1 Hag. Ecc. 355; *Hancock* v. *Peaty* (1867), L. R. 1 P. & D. 335; *Parker* v. *Parker* (1757), 2 Lee, 382. With regard to the validity of a marriage of a person while in a state of intoxication, see *Sullivan* v. *Sullivan* (1818), 2 Hag. Con. 238, 246.

(*m*) *Turner* v. *Meyers* (*falsely called Turner*), *supra*; *Parker* v. *Parker*, *supra*. As to the capacity of such persons in general, see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*n*) *Harrod* v. *Harrod* (1854), 1 K. & J. 4; *Parker* v. *Parker*, *supra*.

(*o*) *Portsmouth* (*Countess*) v. *Portsmouth* (*Earl*), *supra* (clandestine marriage between the Earl of Portsmouth, who was of a weak and deranged mind, and the daughter of his trustee and solicitor, who had great influence over him).

(*p*) *Cannon* v. *Smalley, otherwise Cannon* (1885), 10 P. D. 96; *Parker* v. *Parker*, *supra*; *Durham* v. *Durham*, *supra*; *Browning* v. *Reane*, *supra*.

(*q*) *Turner* v. *Meyers* (*falsely called Turner*), *supra*, at p. 419.

person who was insane at the time of the marriage does not affect the question of its invalidity (*r*).

Deaf and dumb.

522. The deaf and dumb are competent to marry, and may show their consent by signs, provided they sufficiently understand the nature of the contract (*s*).

Physical incapacity.

523. In order that a person may contract a valid marriage it is necessary that he should be physically capable of consummating the marriage (*a*).

Disabilities of religious or penal character.

524. The English law will not recognise a disability to marry imposed by foreign law of a religious (*b*) or penal (*c*) character. Subject to this, questions of capacity to marry are determined by the law of the domicil of the parties (*d*).

SUB-SECT. 2.—*Consanguinity and Affinity.*

Marriage within prohibited degrees void.

525. A marriage between persons within the prohibited degrees of consanguinity or affinity is absolutely null and void for all purposes whatsoever (*e*).

What are prohibited degrees.

526. The prohibited degrees, which have received statutory recognition (*f*), were expressed in a table set forth by authority in 1563 (*g*).

(*r*) *Turner* v. *Meyers* (*falsely called Turner*) (1808), 1 Hag. Con. 414.

(*s*) *Harrod* v. *Harrod* (1854), 1 K. & J. 4. It is sufficient if they understand that they have agreed to cohabit together during their joint lives, and not to cohabit with any other person (*ibid.*).

(*a*) *I.e.*, he or she must not be impotent, as distinguished from being merely sterile. Impotence does not render a marriage void, but merely voidable at the instance of the competent party. See further, pp. 470 *et seq.*, *post*.

(*b*) The marriage of monks and nuns in England would be regarded as legal, if valid in other respects. In England the disabilities of the clergy were taken away by stat. (1548) 2 & 3 Edw. 6, c. 21, and stat. (1551) 5 & 6 Edw. 6, c. 12. And see *Chetti* v. *Chetti*, [1909] P. 67, where it was held that a Hindu domiciled in India could not set up a personal disqualification for marriage outside his caste and religion in order to impeach the validity of a marriage with an Englishwoman in England according to English law.

(*c*) *Scott* v. *A.-G.* (1886), 11 P. D. 128 (prohibition imposed by Roman-Dutch law on the remarriage of the guilty party after a divorce for adultery, until the innocent party has married again, not recognised). Compare *Warter* v. *Warter* (1890), 15 P. D. 152, where the prohibition contained in the Indian Divorce Act (Act No. IV. of 1869), s. 57, against the re-marriage of either of the parties within six months of the final decree, was held to be an integral part of the proceedings, and a condition which must be fulfilled before either could re-marry. The distinction is, that in this case the prohibition is not confined to the guilty party, and is therefore not of a penal nature. As to the re-marriage in England of divorced persons generally, see p. 594, *post*.

(*d*) See title CONFLICT OF LAWS, Vol. VI., pp. 234, 254 *et seq.*

(*e*) Marriage Act, 1835 (5 & 6 Will. 4, c. 54), s. 2; *Re Wood, Ex parte Naden* (1874), 9 Ch. App. 670. Formerly such a marriage was only voidable by sentence of the Ecclesiastical Court during the lifetime of the parties (*Elliott* v. *Gurr* (1812), 2 Phillim. 16).

(*f*) See stat. (1536) 28 Hen. 8, c. 7, ss. 7, 11; stat. (1536) 28 Hen. 8, c. 16, s. 2; stat. (1540) 32 Hen. 8, c. 38; stat. (1558) 1 Eliz. c. 1, s. 3. The two former statutes, though repealed by stat. (1554) 1 & 2 Ph. & M. c. 8, may be referred to as explaining the stat. (1540) 32 Hen. 8, c. 38, which was confirmed by stat. (1558) 1 Eliz. c. 1, s. 3; see *R.* v. *Chadwick* (1847), 11 Q. B. 173, *per* COLERIDGE, J., at p. 237; *Brook* v. *Brook* (1861), 9 H. L. Cas. 193.

(*g*) The prohibited degrees according to the table are as follows:—A man

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In reference to the prohibited degrees, relationship by the half blood is a bar to marriage equally with relationship by the whole blood (*h*), and illegitimate equally with legitimate relationship (*i*); but carnal connection without an actual and legal marriage does not constitute affinity (*k*).

A husband is of affinity to his wife's kindred, and a wife of affinity to her husband's kindred, but the kindred of a husband are not of affinity to the kindred of his wife, and therefore two brothers, for instance, may marry two sisters.

Subject to the exception of a deceased wife's sister, intermarriage between persons within the third degree of consanguinity, counting the degrees according to the civil law, is prohibited, and also intermarriage with the wife or husband of any person so related (*l*), but first cousins and any more distant relatives may lawfully intermarry (*m*).

Deceased wife's sister.

527. Before the 28th August, 1907, a marriage with a deceased wife's sister or half-sister was void as being within the prohibited degrees of affinity (*n*). It is now provided that no such marriage, whether contracted before or after that date, within the realm or without (*o*), shall be deemed to have been or shall be void or

may not marry his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, father's brother's wife, mother's brother's wife, wife's father's sister, wife's mother's sister, mother, stepmother, wife's mother, daughter, wife's daughter, son's wife, sister, wife's sister, brother's wife, son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter, brother's son's wife, sister's son's wife, wife's brother's daughter, wife's sister's daughter.

A woman may not marry her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father's sister's husband, mother's sister's husband, husband's father's brother, husband's mother's brother, father, stepfather, husband's father, son, husband's son, daughter's husband, brother, husband's brother, sister's husband, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's son, sister's son, brother's daughter's husband, sister's daughter's husband, husband's brother's son, husband's sister's son. This table is annexed to the Book of Common Prayer, and the only change which has been made is that in reference to marriage with a deceased wife's sister; see *infra*. It may be noted that marriage with the daughter of a deceased wife has not been legalised, nor has marriage with a deceased husband's brother.

(*h*) *R.* v. *Brighton* (*Inhabitants*) (1861), 1 B. & S. 447 (marriage with daughter of half-sister of deceased wife); *In the Goods of Mette*, *Mette* v. *Mette* (1859), 28 L. J. (P. & M.) 117 (half-sister of deceased wife).

(*i*) *R.* v. *Brighton* (*Inhabitants*), *supra*; *Blackmore* v. *Brider* (1816), 2 Phillim. 359; *R.* v. *Chadwick* (1847), 11 Q. B. 173, 205; *R.* v. *St.-Giles-in-the-Fields* (*Inhabitants*) (1847), 11 Q. B. 173, approved in *Brook* v. *Brook* (1861), 9 H. L. Cas. 193.

(*k*) *Wing* v. *Taylor* (1861), 30 L. J. (P. M. & A.) 258. In this respect stat. (1540) 32 Hen. 8, c. 38, s. 2, is inconsistent with the repealed stat. (1536) 28 Hen. 8, c. 7, s. 12, which therefore ceased to be law.

(*l*) See note (*g*), p. 283, *ante*.

(*m*) Stat. (1540) 32 Hen. 8, c. 38, confirmed by stat. (1558) 1 Eliz. c. 1, s. 3. Previously dispensations from the Church of Rome were necessary for marriages between first cousins, and this is still the law in some countries.

(*n*) See note (*g*), p. 283, *ante*.

(*o*) With regard to marriages in the colonies with a deceased's wife's sister, the rule was that if each of the parties was, at the date of the marriage,

voidable as a civil contract by reason only of such affinity, provided that in case any such marriage was, before the 28th August, 1907, annulled, or that either party thereto, after the marriage and during the life of the other party, did before that date lawfully marry another person, it is to be deemed to have become void upon and after the day on which it was so annulled, or on which either party so lawfully married another person (*p*).

Saving of rights.

528. No right, title, estate or interest, whether in possession or expectancy, and whether vested or contingent, on the 28th August, 1907, in respect of any dignity, title of honour, or property, and nothing lawfully done or omitted, nor any claim by the Crown in respect of death duties due and payable, before that date is prejudicially affected, nor is any will deemed to have been revoked, by reason of any such marriage contracted before that date having been rendered valid (*q*). Nor is the devolution or distribution of the real or personal estate of any intestate, not a party to the marriage, who on that date was, and until his death continues to be, a lunatic so found by inquisition, thereby affected (*r*).

Domicil.

529. The English law with respect to the prohibited degrees of consanguinity and affinity affects all persons domiciled in England, including Jews and Quakers (*s*), wherever the marriage may take

domiciled in a place where such a marriage was legal, it would be recognised as legal in England, and the issue of the marriage as legitimate for all purposes except the right of inheriting real property or a title or dignity in the United Kingdom (see *Brook* v. *Brook* (1861), 9 H. L. Cas. 193, and title CONFLICT OF LAWS, Vol. VI., pp. 234, 254 *et seq.*). By the Colonial Marriages (Deceased Wife's Sister) Act, 1906 (6 Edw. 7, c. 30), it is declared, with a saving of rights and interests existing on 4th August, 1906, that where at the date of such a marriage, whether before or after the passing of the Act, each of the parties was domiciled in a part of the British possessions in which at that date such a marriage was legal, the marriages, if legal in other respects, shall be deemed to be, and to have always been, legal for all purposes, including the right of succession to real property, and to honours and dignities, in the United Kingdom, unless either party has subsequently, during the life of the other, and before 4th August, 1906, lawfully married another person. The last-mentioned exception seems to refer to the case of a re-marriage after a divorce, because, on the assumption that the marriage was valid according to the law of the domicil of the parties, neither of them could lawfully marry another during its subsistence.

(*p*) Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), s. 1. The word "sister" includes a sister of the half-blood (*ibid.*, s. 5), but the Act does not legalise a marriage with the sister of a divorced wife, or of a wife who has divorced her husband, during the lifetime of such wife (*ibid.*, s. 3 (2)). Nothing in the Act relieves any clergyman of the Church of England who marries or has married his deceased wife's sister, from liability to ecclesiastical censure therefor (*ibid.*, s. 4).

(*q*) *Ibid.*, s. 2. In *Re Whitfield, deceased, Hill* v. *Mathie*, [1911] 1 Ch. 310, where the income of property was given in trust for a widow until her second marriage, and she married the husband of her deceased sister in 1904, it was held that the effect of this section was that the income continued to be payable to her notwithstanding the marriage.

(*r*) Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), s. 2. As to the position of the clergy with regard to such marriages, see title ECCLESIASTICAL LAW, Vol. XI., p. 694; and *R.* v. *Dibdin*, [1910] P. 57, C. A.

(*s*) *Re De Wilton, De Wilton* v. *Montefiore*, [1900] 2 Ch. 481 (a Jew and his niece, both domiciled in England, went through a form of civil marriage and afterwards a marriage according to the usages of the Jews, at Wiesbaden, and

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place (*t*); and on the other hand, if the law of the domicil of each of the parties is complied with in this respect, the marriage will be recognised as valid, although it may be within the prohibited degrees according to English law (*u*).

SECT. 3.—*Preliminaries to Celebration in England.*

SUB-SECT. 1.—*Banns.*

How published.

530. The banns must be published in an audible manner according to the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer (*x*) on three Sundays preceding the solemnisation of the marriage, during morning service, or when there is no morning service on a Sunday on which the banns are published, then during the evening service, immediately after the second lesson (*y*).

Where published.

The banns must be published in the parish church, or in a public chapel in which banns may lawfully be published, of or belonging to the parish or chapelry in which the persons to be married reside, and if they reside in different parishes or chapelries, then the banns must be published in the church or chapel of each such parish or chapelry (*z*).

Naval marriages.

531. Where one of the parties to the intended marriage is an officer, seaman, or marine, borne on the books of one of His Majesty's ships at sea, the banns may be published on three successive Sundays at morning service on board that ship by the chaplain, or, if there is no chaplain, by the captain or other officer commanding the ship (*a*).

also subsequently at Paris, and it was held that the marriage was void, although it would have been valid according to the local law and also according to Jewish law). The Marriage Act, 1835 (5 & 6 Will. 4, c. 54), applies to Jews and Quakers (*ibid.*). The usages of the Jews permit marriages between a man and his deceased wife's sister, or deceased wife's niece, or niece, or deceased nephew's wife.

(*t*) *Re De Wilton, De Wilton* v. *Montefiore*, [1900] 2 Ch. 481; *Brook* v. *Brook* (1861), 9 H. L. Cas. 193 (marriage with deceased wife's sister in Denmark); *Fenton* v. *Livingstone* (1859), 3 Macq. 497; and see title CONFLICT OF LAWS, Vol. VI., p. 254.

(*u*) *Re Bozzelli's Settlement, Husey-Hunt* v. *Bozzelli*, [1902] 1 Ch. 751; and see title CONFLICT OF LAWS, Vol. VI., pp. 254—256.

(*x*) The form of words prescribed by the rubric is as follows:—"I publish the banns of marriage between M. of , and N. of . If any of you know cause, or just impediment, why these two persons should not be joined together in holy matrimony, ye are to declare it. This is the first [second *or* third] time of asking." This form need not be followed precisely, the statute in this respect being merely directory; it is sufficient if the form is followed substantially (*Standen* v. *Standen* (1791), Peake, 32 [45]).

(*y*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 2.

(*z*) *Ibid.* As to the publication of banns in general, see title ECCLESIASTICAL LAW, Vol. XI., pp. 694 *et seq.* As to the duty of the clergy to make inquiries as to the residence of persons applying to be married by banns, see *Priestley* v. *Lamb* (1801), 6 Ves. 421.

(*a*) Naval Marriages Act, 1908 (8 Edw. 7, c. 26), s. 1. Where banns have been so published, and have not been forbidden on any of the grounds on which banns may be forbidden (see title ECCLESIASTICAL LAW, Vol. XI., p. 700), the person publishing them must give a certificate of publication in such form as may be prescribed by the Admiralty, and such a certificate has the like force and

Residence in Scotland or Ireland.

532. Where one of the parties to be married is resident in England and the other in Scotland, the banns may be published according to the requirements of English law in the place in England in which the party resides, and according to the law or custom prevailing in Scotland in the place in which the other party resides, for the purpose of a marriage in a church or chapel in England in which the banns are published (*b*).

Where one of the parties is resident in England and the other in Ireland, the banns may be published in England and Ireland respectively according to the law or custom prevailing in their respective places of residence, for the purpose of a marriage in a church or chapel either in England or Ireland (*c*).

Notice before publication.

533. No clergyman (*d*) is obliged to publish banns between any persons unless, seven days at least before the time for the first publication, the persons to be married deliver to the clergyman a notice in writing of their true christian names and surnames, and residences within the parish or chapelry, and of the time during which they have resided at the addresses given respectively (*e*).

False name, address, or description.

534. It is not necessary that the status of the parties should be correctly described (*f*), and even if a party is described by a false name or address, and the banns are consequently incorrectly published, the marriage is not necessarily invalidated. If a wrong christian name or surname is given by mistake or inadvertence, without any intention of concealment (*g*), or if the name given is one which has been acquired by adoption or reputation (*h*), the inaccuracy is immaterial; and even if false names and addresses are given by one of the parties fraudulently, with the object of avoiding a due publication of the banns, the marriage is not invalidated unless the other party marries with a knowledge of the undue publication (*i*). But a publication in a false name to the knowledge of both parties, and with the intention of concealment, renders the marriage void (*i*).

effect as a certificate of publication of banns in a place of worship in which banns may be lawfully published (Naval Marriages Act, 1908 (8 Edw. 7, c. 26), ss. 1, 3).

(*b*) Marriages Validity Act, 1886 (49 & 50 Vict. c. 3), s. 1. As to marriage by registrar's certificate without licence, when one of the parties is resident in Scotland, see p. 294, *post*.

(*c*) Marriages Validity Act, 1899 (62 & 63 Vict. c. 27), s. 1.

(*d*) "Parson, vicar, minister, or curate."

(*e*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 7. As to publication of banns, generally, see title ECCLESIASTICAL LAW, Vol. XI., p. 698.

(*f*) *Mayhew* v. *Mayhew* (1812), 3 M. & S. 266 (false description of the woman as a widow held immaterial).

(*g*) *R.* v. *Billingshurst* (*Inhabitants*) (1814), 3 M. & S. 250; *Diddear* v. *Faucit* (1821), 3 Phillim. 580. *R.* v. *Tibshelf* (*Inhabitants*) (1830), 1 B. & Ad. 190, decided under the repealed stat. (1753) 26 Geo. 2, c. 33, is not now to be relied on as an authority; see *R.* v. *Wroxton* (*Inhabitants*) (1833), 4 B. & Ad. 640.

(*h*) *R.* v. *St. Faith's, Newton* (*Inhabitants*) (1823), 3 Dow. & Ry. (K. B.) 348 (marriage by widow in her maiden name, which she had assumed on the death of her husband, and by which she had been known for some years); *Frankland* v. *Nicholson* (1805), 3 M. & S. 259, n.; *Wyatt* v. *Henry* (1817), 2 Hag. Con. 215.

(*i*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 22; *R.* v. *Wroxton* (*Inhabitants*), *supra* (false christian name and surname of the woman given by the man,

SECT. 3. Preliminaries to Celebration in England.

Divorced wife.

535. A divorced wife is properly described by her marriage name, though she may after the divorce have usually been known by her maiden name, unless the maiden name has so far become her name by repute as entirely to supersede her marriage name (*k*).

SUB-SECT. 2.—*Special Licence.*

Special licence.

536. A special licence to marry at any convenient time and place may be granted by the Archbishop of Canterbury or his proper officers (*l*).

SUB-SECT. 3.—*Common Licence.*

Common licence.

537. A common licence for a marriage according to the rites of the Church of England, dispensing with the necessity for the publication of banns, may be granted in each diocese by the bishop as ordinary, through the chancellor and his surrogates, or by the Archbishop of Canterbury through his Vicar-general, both in the province of Canterbury and the province of York (*m*).

SUB-SECT. 4.—*Superintendent Registrar's Certificate or Certificate and Licence.*

Power of superintendent registrar to issue certificates.

538. The superintendent registrar of marriages (*n*) may issue certificates for marriages without the publication of banns, either according to the rites of the Church of England, the certificate standing in the place of the publication of banns (*o*), or according to the usages of the Jews or of the Society of Friends (commonly

who procured the banns to be published, the woman being unaware of the fraud until after the solemnisation of the marriage, which was held valid); *Wormald* v. *Neale and Wormald* (1868), 19 L. T. 93 (clandestine marriage, both parties being aware that the surname of the woman was false, held void); *Brealy* v. *Reed* (1841), 2 Curt. 833 (banns of Charles Robert Reed, usually called Charles, published as Robert Reed, both parties intending to conceal the marriage from his father, held void); *Templeton* v. *Tyree* (1872), L. R. 2 P. & D. 420 (banns caused to be published by the man without the knowledge of the woman, a minor, her christian name being wrongly stated, and the ages and residences of both being falsely described, for the purpose of concealment, held valid, the woman being unaware of the irregularities); *Gompertz* v. *Kensit* (1872), L. R. 13 Eq. 369 (similar case); *Tongue* v. *Tongue* (1836), 1 Moo. P. C. C. 90; *Midgley* (*falsely called Wood*) v. *Wood* (1860), 30 L. J. (P. M. & A.) 57 (christian name of man misdescribed to the knowledge of both, the woman consenting to the misdescription on the faith of a statement by him that it would not invalidate the marriage, held void); *Mather* v. *Ney* (1807), 3 M. & S. 265; *Meddowcroft* v. *Gregory* (1816), 2 Phillim. 365; *Stanhope* v. *Baldwin* (1822), 1 Add. 93; *Green* v. *Dalton* (1822), 1 Add. 289; *Wright* v. *Elwood* (1837), 1 Curt. 662; *Fellowes* v. *Stewart* (1814), 2 Phillim. 238; *Pouget* v. *Tomkins* (1812), 2 Hag. Con. 142; *Tooth* v. *Barrow* (1854), 1 Ecc. & Ad. 371; *Wormald* v. *Neale and Wormald, supra;* see also title ECCLESIASTICAL LAW, Vol. XI., p. 699, note (*a*).

(*k*) *Fendall* v. *Goldsmid* (1877), 2 P. D. 263, where a divorced wife remarried her divorced husband, and it was held that the banns were rightly published in her marriage name, though she had in the meantime usually passed by her maiden name.

(*l*) See, generally, title ECCLESIASTICAL LAW, Vol. XI., pp. 701 *et seq.*

(*m*) *Ibid.*

(*n*) See title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.

(*o*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 1; Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 36.

called Quakers) (*p*); or for marriages of nonconformists in buildings duly registered for the solemnisation of marriages (*q*), or for purely civil marriages, without religious ceremony, in the superintendent registrar's office (*r*). A marriage under the superintendent registrar's certificate may be by licence, which he has authority to grant, or without a licence (*s*); but no licence may be granted by the superintendent registrar for a marriage in any church or chapel in which marriages may be solemnised according to the rites of the Church of England (*t*). A minister of the Church of England is not obliged to accept the superintendent registrar's certificate in the place of the publication of banns, nor may a marriage be solemnised in pursuance of such certificate in any church or chapel of the Church of England without the consent of the minister thereof, nor by any other than a duly qualified clergyman of that church, nor with any other forms or ceremonies than those of the Church of England (*a*).

Marriage may be with or without licence.

539. When a marriage is intended to be solemnised under such certificate, notice must be given by one of the parties to the intended marriage in the prescribed form (*b*), or to the like effect, to the superintendent registrar of the district within which the parties have dwelt for not less than the preceding seven days (*c*), stating the name and profession or condition and dwelling place of each of the parties intending marriage, and the time during which each has dwelt in the district, and the church or other building in which the marriage is to be solemnised; if either party has dwelt in the place stated in the notice for more than one calendar month, it is sufficient to state that he or she has dwelt there for one month and upwards (*d*).

Notice of marriage.

540. Where the parties dwell in the districts of different superintendent registrars (*c*) and the marriage is to be without a licence, the notice must be given to the superintendent registrar of each district, but in the case of a marriage intended to be solemnised by licence it is sufficient if the notice is given to the superintendent registrar of the district in which one of the parties resides, and in such case it is not necessary to state how long each of the parties has resided in his or her dwelling place (*c*), but only how long the

Residence in different districts.

(*p*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 2; and see p. 304, *post*. As to Quakers generally, see title ECCLESIASTICAL LAW, Vol. XI., pp. 822 *et seq.*

(*q*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 20; Marriage Act, 1840 (3 & 4 Vict. c. 72); see p. 299, *post*.

(*r*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 21; see p. 305, *post*.

(*s*) See p. 291, *post*.

(*t*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 11.

(*a*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 11.

(*b*) For form of notice, see Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), Sched. A.

(*c*) The fact that the parties have not dwelt within the district for the requisite time does not affect the validity of the marriage (Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 17).

(*d*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 4; Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 1; Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 3.

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party residing in the district in which the notice is given has so resided (*e*).

Notice requiring presence of registrar.

541. If the parties desire to be married in a registered building, in the presence of a registrar of marriages (*f*), notice must be given to the superintendent registrar at the time when the notice of marriage is given, requiring the attendance of a registrar (*g*).

Want of due notice.

542. A marriage solemnised under a superintendent registrar's certificate without due notice of marriage having been given is void, if both parties have knowledge of the irregularity, but not otherwise (*h*).

Misdescription in notice.

A misdescription in the notice of marriage of the name, age, condition, or residence of both or either of the parties does not affect the validity of the marriage, even if both parties were aware of the irregularity (*i*).

Declaration to accompany notice of marriage.

543. The notice of marriage must be accompanied by a declaration by the party giving the same that he or she believes that there is no impediment of kindred or alliance nor other lawful hindrance to the marriage, and that the parties, in case the marriage is to be had without licence, have for seven days preceding the giving of the notice resided within the district or districts of the superintendent registrar or superintendent registrars to whom the notice or notices are given, or, in the case of a marriage intended to be had by licence, that one of the parties has for fifteen days immediately preceding resided in the district of the superintendent registrar to whom the notice is given; and when either of the parties, not being a widower or widow, is under the age of twenty-one years, that the consent of the person or persons whose consent is required by law (*k*) has been given, or that there is no person whose consent is so required. The declaration must be signed in the presence of the superintendent registrar or his deputy, or of a registrar of marriages or his deputy, for the district in which the party giving notice resides, who must attest the same by adding his name, description, and residence (*l*). Any person knowingly and wilfully making or signing or subscribing any false declaration, or signing

(*e*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 4; Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 6.

(*f*) See pp. 301, 304, *post*.

(*g*) Marriage Act, 1898 (61 & 62 Vict. c. 58), ss. 5, 10.

(*h*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 42; *R.* v. *Rea* (1872), L. R. 1 C. C. R. 365.

(*i*) *Re Rutter, Donaldson* v. *Rutter*, [1907] 2 Ch. 592 (a widow, being liable to forfeit property on a remarriage, her surname, and the condition and residence of both parties, were misdescribed in the notice of marriage, and it was held that the irregularities did not affect the validity of the marriage); *Prowse* v. *Spurway and Bowley* (1877), 46 L. J. (P.) 49 (first christian name of one party intentionally omitted, and false assertion that both parties were over twenty-one); and see *R.* v. *Smith* (1867), 4 F. & F. 1099. In this respect there is no analogy between a marriage by banns and a marriage under the superintendent registrar's certificate (*Holmes* v. *Simmons* (1868), L. R. 1 P. & D. 523); see p. 287, *ante*.

(*k*) See p. 296, *post*.

(*l*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 2.

any false notice of marriage, is liable to the penalties of perjury (*m*), and proceedings may be taken for the forfeiture of any property accruing to the offending party in relation to the marriage (*n*).

Entry in marriage notice book.

544. All notices of marriage must be filed by the superintendent registrar and kept with the records of his office, and copies of all such notices must be entered in the marriage notice book, which is open to public inspection at all reasonable times without fee (*o*). For every such entry the superintendent registrar is entitled to a fee of 1*s*. (*o*).

Publication of notice.

545. When the marriage is intended to be solemnised without licence, the superintendent registrar must suspend in a conspicuous place in his office the notice of marriage, or an exact copy thereof as entered in the marriage notice book, for twenty-one successive days next after the entry of the notice, before the marriage may be solemnised (*p*). When it is intended that the marriage shall be solemnised by licence, it is not necessary that the notice of marriage should be so suspended, but in such case the party giving the notice must state therein that the marriage is intended to be celebrated by licence (*q*).

Issue of certificate without licence.

546. In the case of a certificate without licence, after the expiration of twenty-one days from the entry of the notice in the marriage notice book, the superintendent registrar must issue, on the request of the party giving the notice of marriage, a certificate in the prescribed form (*r*), provided that in the meantime no lawful impediment has been shown to the satisfaction of the superintendent registrar, and that the issue of the certificate has not been forbidden by any person authorised in that behalf (*s*). The certificate must state the particulars set forth in the notice of marriage, the day on which the notice was entered, and that its issue has not been forbidden by any person authorised in that behalf (*t*). The superintendent registrar is entitled on the issue of the certificate to a fee of 1*s*. (*a*).

Certificate with licence.

547. In the case of a notice of marriage intended to be solemnised by licence, the certificate, together with a licence to marry (*b*), will be issued after the expiration of one whole day from

(*m*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), ss. 2, 18. If a new surname has been acquired by repute, the use of such reputed name in a notice of marriage will not support an indictment under the statute (*R.* v. *Smith* (1867), 4 F. & F. 1099). As to perjury, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 490 *et seq.*, 536.

(*n*) See p. 297, *post*.

(*o*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 5; Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 3; Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 9.

(*p*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 4.

(*q*) *Ibid.*, s. 5.

(*r*) For form of certificate, see Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 8, and Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), Sched. B.

(*s*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 4: As to forbidding the issue of the certificate, see p. 294, *post*.

(*t*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 4.

(*a*) *Ibid.*; Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 9.

(*b*) For the form of licence, see Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), Sched. C.

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the day of entry of the notice of marriage, provided that in the meantime no lawful impediment has been shown to the satisfaction of the superintendent registrar, and the issue of the certificate has not been forbidden (*c*). The stamp duty on the licence is 10*s*. (*d*) in addition to which the superintendent registrar is entitled to a fee of 30*s*. for the licence and 1*s*. for the certificate (*e*).

Certificate for marriage in registered building without the presence of a registrar.

548. If, in the case of a marriage intended to be solemnised in a registered building, the superintendent registrar does not receive notice, at the time when the notice of marriage is given to him, that the parties require a registrar to be present at the marriage, the certificate, whether with or without a licence, must be in a special form containing printed instructions for the due solemnisation of the marriage (*f*).

Marriage out of district.

549. The superintendent registrar has no power to grant a certificate when it is proposed that the marriage shall take place at a building outside his district, even if the portion of the parish in which the parties are resident is within his district (*g*), nor may a certificate be granted for marriage in a building which is not within the district in which one of the parties has resided for the requisite period before the notice of marriage (*h*), except in the case of marriages according to the usages of the Jews or of the Society of Friends (*i*), or where there is no building within the district in which the parties may lawfully marry according to the rites or ceremonies they desire to adopt (*k*), or where the marriage is intended to be solemnised at a registered building which is the usual place of worship of one of the parties, and is situated not more than two miles beyond the limits of the district in which the notice of marriage is given (*l*).

No building available within the district.

550. When it is desired to marry outside the district on the ground that there is no building within the district in which the parties may lawfully marry according to the rites or ceremonies they wish to adopt, the party giving the notice of marriage must declare by indorsement thereon (*m*) the religious appellation of the body of Christians to which he or she professes to belong, and the form, rite, or ceremony which the parties desire to adopt in

(*c*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 9. As to the duty of the superintendent registrar when issuing licences to young persons professing to be of full age in circumstances suggesting inquiry, see *Norsworthy* v. *Norsworthy* (1908), 26 T. L. R. 9.

(*d*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, and Schedule.

(*e*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), ss. 9, 10.

(*f*) Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 5; Statutory Rules and Orders Revised, Vol. VIII., Marriage, pp. 26, 30. As to marriages in registered buildings, see pp. 299, 301, *post*.

(*g*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 11; *Ex parte Brady* (1840), 8 Dowl. 332.

(*h*) Marriage Act, 1840 (3 & 4 Vict. c. 72), s. 1.

(*i*) *Ibid.*, s. 5.

(*k*) *Ibid.*, s. 2.

(*l*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 14.

(*m*) For form of declaration, see Marriage Act, 1840 (3 & 4 Vict. c. 72), s. 3, and Schedule.

solemnising their marriage, and that, to the best of his or her knowledge and belief, there is not within the district in which one of the parties dwells any registered building in which marriages are so solemnised, and the registered building in the district nearest to the residence of that party in which it is intended to solemnise the marriage, and thereupon, after the expiration of twenty-one days in the case of a marriage intended to be without licence, or one clear day in the case of a marriage by licence, the superintendent registrar may issue his certificate (*n*), or certificate and licence (*o*), for a marriage in the registered building named in the notice of marriage; and every such certificate and licence is as valid and effectual as if it had been granted by the superintendent registrar of the district in which the building is situated (*o*).

False declaration.

551. A false declaration does not affect the validity of any marriage solemnised in pursuance of such a certificate, or certificate and licence (*p*), but if it is made knowingly and wilfully the party making it is liable to the penalties of perjury (*q*).

Marriage at usual place of worship.

552. When the marriage is intended to be solemnised in the usual place of worship of the parties or one of them, and such place of worship is a registered building (*r*) situated out of the district of their, his, or her residence, but not more than two miles beyond its limits, the superintendent registrar or superintendent registrars to whom the notice of marriage has been given may grant a certificate, or certificate and licence, for marriage in that registered building, provided the party giving the notice of marriage has stated therein, in addition to the description of the building, that it is the usual place of worship of one of the parties, and also the name of the party whose usual place of worship it is (*s*).

One party resident in Ireland.

553. Where one of the parties intending marriage by the superintendent registrar's certificate without licence resides in Ireland, notice may be given by that party in the form there in use to the registrar of the district in Ireland in which he has resided for not less than seven days preceding, stating the name, condition, age and residence of each of the parties, and the time, not being less than seven days, during which each party shall have dwelt therein, and the church or building in which the marriage is intended to be solemnised, and after the expiration of twenty-one days from the entry of the notice the registrar may issue a certificate which is as valid and effectual for authorising the marriage as the certificate of a superintendent registrar of a district in England would be if the party giving the notice had been resident in such

(*n*) Marriage Act, 1840 (3 & 4 Vict. c. 72), s. 2; Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), ss. 3, 9.
(*o*) *Ibid.*, s. 13.
(*p*) Marriage Act, 1840 (3 & 4 Vict. c. 72), s. 2.
(*q*) *Ibid.*, s. 4. But no prosecution may take place after the expiration of eighteen calendar months from the solemnisation of the marriage (*ibid.*). As to perjury, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 490 *et seq.*, 536.
(*r*) See p. 299, *post*.
(*s*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 14.

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district, and the other party had resided within the district of another superintending registrar in England (*t*).

One party resident in Scotland.

554. When one of the parties intending marriage by the superintendent registrar's certificate without licence is resident in Scotland, a certificate of proclamation of banns in Scotland under the hand of the session clerk of the parish in which the proclamation has been made is as valid and effectual for authorising the marriage as the certificate of a superintendent registrar of a district in England would be in reference to a party resident in such district (*u*).

Forbidding issue of certificate.

555. Any person whose consent to a marriage by licence is required by law (*a*) may forbid the issue of a superintendent registrar's certificate, whether the marriage is intended to be by licence or without licence (*b*), by writing at any time before the issue of the certificate the word "forbidden" opposite to the entry of the notice of marriage in the marriage notice book, and subscribing his or her name and residence, and his or her character, in respect of either of the persons to be married, by reason of which he or she is authorised to forbid the issue of the certificate; and where the issue of the certificate has been so forbidden, the notice of marriage and all proceedings thereon are void (*c*).

Caveat.

556. Any person, on payment of a fee of 5*s*., may enter a caveat with the superintendent registrar against the grant of a certificate or licence for the marriage of any person named therein; and, if any caveat is so entered, signed by or on behalf of the person entering it, with his or her residence, and the ground of objection on which the caveat is founded, no certificate or licence may be granted until the superintendent registrar has examined into the matter, and is satisfied that it ought not to obstruct the grant thereof, or until the caveat is withdrawn (*d*). In cases of doubt, the superintendent registrar may refer the matter of any caveat to the Registrar-General for decision; and in the case of the superintendent registrar refusing the grant of the certificate or licence, the party applying for it may appeal to the Registrar-General, who will, in either case, either direct the grant of the certificate or licence or confirm the superintendent registrar's refusal (*d*). If a caveat is entered on grounds as to which the Registrar-General declares that they are frivolous, and ought not to obstruct the grant of the certificate or licence, the person entering the caveat is liable for the costs of the proceedings, and

(*t*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 7.
(*u*) *Ibid.*, s. 8.
(*a*) As to the consents required, see p. 296, *post*.
(*b*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 10.
(*c*) *Ibid.*, s. 9. Any person forbidding the issue of a certificate by falsely representing himself or herself to be a person whose consent to the marriage is required by law, knowing the representation to be false, is liable to the penalties of perjury (Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 18); and see CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 490 *et seq.*, 536.
(*d*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 13.

for damages, at the suit of the party against whose marriage the caveat was entered (*e*).

Jews and Quakers.

557. Notice of marriage must be duly given to the superintendent registrar, and his certificate issued, as in other cases, to authorise the solemnisation of a marriage according to the usages of the Jews or of the Society of Friends (*f*), but it is not necessary that the building or place in which the marriage is to be solemnised should be situated within the district or either of the districts in which the parties respectively reside (*g*). Where both parties are members of the Society of Friends or persons professing the Jewish religion, a marriage according to their usages may be solemnised by licence of the superintendent registrar, upon due notice of the marriage being given, with a statement that it is intended to be celebrated by licence, accompanied by a declaration, as in other cases (*h*).

Declaration in case of Quakers.

In the case of a marriage to be solemnised according to the usages of the Society of Friends, the party giving the notice of marriage must declare, either verbally or, if required, in writing, that both the parties to the intended marriage are members of the Society or are in profession with or of the persuasion of it, or must produce a certificate to the superintendent registrar purporting to be signed by a registering officer of the Society to the effect that the party by whom or on whose behalf the notice is given, or that each such party (as the case may be), is duly authorised to proceed to the accomplishment of the marriage according to the usages of the Society in pursuance of the general rules of the Society (*i*).

Marriage of Jews or Quakers without due notice.

A marriage celebrated according to the usages of the Jews or of the Society of Friends without the requisite notice having been given is not for that reason invalid unless both of the parties to the marriage were aware of the non-compliance with the statutory requirements (*k*).

Duration of certificate or licence.

558. If the marriage does not take place within three calendar months after the entry of the notice of marriage by the superintendent registrar, the notice and certificate, and any licence granted

(*e*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 37. In any action to recover such costs or damages a copy of the declaration of the Registrar-General, purporting to be sealed with the seal of the General Register Office, is evidence that the Registrar-General has declared the caveat to have been entered on frivolous grounds, which ought not to obstruct the grant of the certificate or licence (Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 5).

(*f*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 2.

(*g*) Marriage Act, 1840 (3 & 4 Vict. c. 72), s. 5; and see the Marriage (Society of Friends) Acts, 1860 and 1872 (23 & 24 Vict. c. 18 and 35 & 36 Vict. c. 10), and p. 305, *post*.

(*h*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 21. The forms of certificate and licence, and the fees payable therefor, and stamp duties, are the same as in other cases.

(*i*) Marriage (Society of Friends) Act, 1872 (35 & 36 Vict. c. 10), s. 1. Such a certificate is for all purposes conclusive evidence that the parties are duly authorised to marry according to the usages of the Society; and the register of the marriage, or a duly certified copy thereof, is conclusive evidence of the due production of the certificate to the superintendent registrar (*ibid.*). As to the Society of Friends generally, see title ECCLESIASTICAL LAW, Vol. XI., pp. 822 *et seq.*

(*k*) *Nathan* v. *Woolf* (1899), 15 T. L. R. 250, a case of a Jewish marriage; Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s 42.

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thereon, are void, and the marriage may not be solemnised until a new notice has been given, and entry made, and certificate issued (*l*).

SUB-SECT. 5.—*Naval Officer's Certificate.*

Issue.

559. Where one of the parties to a marriage intended to be solemnised or contracted in England otherwise than by banns or licence is an officer, seaman, or marine borne on the books of one of His Majesty's ships at sea, he may give notice of his intention to the captain or other officer commanding the ship, together with the name and address of the other party to the marriage, and such other information as is necessary to enable the officer to fill up a certificate, and at the same time make and sign such a declaration as is required on giving notice of marriage to a superintendent registrar (*m*), and the officer may attest the declaration and thereupon issue a certificate to the officer, seaman, or marine giving the notice (*n*).

Form.

The certificate must be in such form as may be prescribed by the Admiralty, and has the like force and effect as a superintendent registrar's certificate (*o*); and all statutory provisions (including penal provisions) relating to notices and declarations for obtaining certificates from superintendent registrars, and to such certificates, and all rules required to be observed in reference thereto, apply in the case of any such marriages, subject to such adaptations as may be made by Order in Council (*p*).

SUB-SECT. 6.—*Consents in Case of Minors.*

Whose consent required.

560. Where a person, not being a widower nor widow, is under the age of twenty-one years, the father, if living, or, if he is dead, the guardian or guardians, or one of them, or if there is no guardian lawfully appointed (*q*), then the mother, if she has not remarried, has authority to consent to his or her marriage; and such consent is required except where there is no person having authority to give it (*r*).

No consent is necessary in the case of a bastard, except where a guardian has been appointed by the court (*s*).

Insanity, absence abroad.

561. When the father is *non compos mentis*, or the guardian or mother whose consent is required is either *non compos mentis* or

(*l*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 15; Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), ss. 4, 9.

(*m*) See pp. 289, 290, *ante*.

(*n*) Naval Marriages Act, 1908 (8 Edw. 7, c. 26), s. 2.

(*o*) See pp. 288, 291, 292, *ante*.

(*p*) Naval Marriages Act, 1908 (8 Edw. 7, c. 26), s. 3.

(*q*) As to the guardianship of infants, see title INFANTS AND CHILDREN.

(*r*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 16; Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 10. The English law as to consents is entirely statutory, the *patria potestas* of the civil law as regards marriage having been abolished by the canon law; see *Sherwood* v. *Ray* (1837), 1 Moo. P. C. C. 353. As to the marriage of wards in Chancery, see title INFANTS AND CHILDREN; and as to the forbidding of licences and certificates by persons whose consent is required, see p. 294, *ante*; and as to forbidding of banns, see title ECCLESIASTICAL LAW, Vol. XI., p. 700.

(*s*) See *R.* v. *Hodnett* (*Inhabitants*) (1786), 1 Term Rep. 96; *Priestly* v. *Hughes* (1809), 11 East, 1; *Horner* v. *Liddiard or Horner* (1799), 1 Hag. Con. 337.

beyond the seas, or unreasonably or from undue motives refuses or withholds consent to a proper marriage, the Chancery Division, on petition by the person desirous of marrying, to be proceeded with in a summary way, may, in case the marriage proposed appears on examination to be proper, judicially declare it to be so; and such judicial declaration is as good and effectual as if the person whose consent is required had consented to the marriage (*t*).

Improper refusal of consent.

562. It is not necessary that the consent should be given in any particular manner, and it may be implied if the person whose consent is required has knowledge of the courtship and does not expressly dissent (*a*).

Consent, how given.

A consent may be retracted at any time before the actual solemnisation of the marriage (*b*), but when once given, the clearest proof of subsequent dissent is necessary to displace it (*c*); and where the father has given his consent, that is sufficient, though he may die before the solemnisation, or even before the preliminary arrangements for the marriage are settled (*d*).

Retractation of consent.

563. No minister of the Church of England solemnising a marriage after publication of banns is punishable by ecclesiastical censure or otherwise by reason of the absence of due consent, unless he had notice of the dissent of the parent or guardian as the case may be (*e*).

Solemnising marriage without consent.

564. The marriage of a minor without the requisite consent is not invalid, whether it is by banns or licence or superintendent registrar's certificate (*f*).

Absence of consent.

565. If, however, the marriage, being by licence, is procured by means of one of the parties wilfully and knowingly swearing falsely in reference to the requisite consent (*g*), or, being by banns, is procured by one of the parties knowingly causing or procuring the undue publication of banns, with the knowledge that the marriage is without the requisite consent (*h*), or, being by a superintendent

Forfeiture in case of false declaration etc.

(*t*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 17. This provision does not apply to the case of a father being beyond the seas or unreasonably withholding his consent, but only to the case of a guardian or mother. The section in the case of the father only applies where he is *non compos mentis* (*Ex parte I. C.* (1838), 3 My. & Cr. 471).

(*a*) *Smith* v. *Huson* (1811), 1 Phillim. 287; *Cresswell* v. *Cosins* (1815), 2 Phillim. 281; compare *Balfour* v. *Carpenter* (1811), 1 Phillim. 221.

(*b*) *Hodgkinson* v. *Wilkie* (1795), 1 Hag. Con. 262; *Yonge* v. *Furse* (1856), 26 L. J. (CH.) 117.

(*c*) *Hodgkinson* v. *Wilkie, supra.*

(*d*) *Yonge* v. *Furse, supra.*

(*e*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 8.

(*f*) *R.* v. *Birmingham* (*Inhabitants*) (1828), 8 B. & C. 29 (marriage by licence under the Marriage Act, 1823 (4 Geo. 4, c. 76); Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 17 (superintendent registrar's certificate or licence).

(*g*) An affidavit that the minor was of full age is equivalent to a false affidavit that the necessary consent had been obtained (*A.-G.* v. *Severne* (1844), 1 Coll. 313).

(*h*) See p. 287, *ante.*

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registrar's certificate, is procured by means of any wilfully false declaration, notice, or certificate as to any matter in which a solemn declaration, notice, or certificate is required (*i*), the Attorney-General, by information at the relation of the parent or guardian whose consent was required (*k*), may sue for a forfeiture of all the rights and interest in any property accruing to the party so offending by force of the marriage, and the court may declare such forfeiture accordingly, and order that the property shall be secured under the direction of the court for the benefit of the innocent party or of the issue of the marriage, or any of them, in such manner as seems fit, for the purpose of preventing the offending party from deriving any interest in real or personal property, or any pecuniary benefit, from the marriage; and if both the parties are guilty of the offence, the property or any part thereof may be secured immediately for the benefit of the issue of the marriage, subject to such provisions for the offending parties, by way of maintenance or otherwise, as is thought reasonable, regard being had to the issue of the parties respectively by any future marriage, or of the parties themselves, in case either survive the other (*l*).

Proceedings to enforce forfeiture.

566. The application to the Attorney-General must be made within three months of the discovery by the relator of the solemnisation of the marriage, and be supported by an affidavit of the relator showing to the satisfaction of the Attorney-General that the circumstances are such as to justify the information (*m*); and the information must be filed within a year after the solemnisation of the marriage, and must be prosecuted with due diligence (*n*).

If the relator dies pending the suit, another person may be appointed by the court to continue it (*n*).

Effect on agreements and settlements.

567. All agreements and settlements, ante-nuptial and post-nuptial, between the parties in consequence of or in relation to the marriage, so far as they are inconsistent with the provisions of the security and settlement made by or under the direction of the court in pursuance of such an information, are void (*o*).

Powers of court where husband alone is the offending party.

568. If the husband alone is the offending party, the court, on an information for a forfeiture, has no discretion to mitigate the penalty, but is bound to settle and secure all the property, present and future, of the wife for the benefit of herself and the issue of the marriage, and in such case there is no power to order any settlement of her property on her issue by any subsequent marriage (*p*).

(*i*) See pp. 290 *et seq.*, *ante*.

(*k*) See *A.-G.* v. *Willshire* (1875), 45 L. J. (CH.) 53; and as to procedure by information, see title CROWN PRACTICE, Vol. X., pp. 20 *et seq.*

(*l*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 23; Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 19. These provisions are rendered of much less importance by the Married Women's Property Acts. As to service when any party to the information absconds or is abroad, see the Marriage Act, 1823 (4 Geo. 4, c. 76), s. 25.

(*m*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 23.

(*n*) *Ibid.*, s. 25.

(*o*) *Ibid.*, s. 24.

(*p*) *A.-G.* v. *Mullay* (1828), 4 Russ. 329. As to the proper form of settlement, see *A.-G.* v. *Lucas* (1848), 2 Ph. 753 (the court refused to sanction

It is not necessary, in order to sustain the information, to show that the minor was entitled at the time of the marriage to any property, whether in possession or expectancy (*q*).

SECT. 4.—*Celebration in England.*

SUB-SECT. 1.—*According to the Rites of the Church of England.*

(i.) *Places in which Marriages may lawfully be Solemnised.*

Places for solemnisation.

569. A marriage may lawfully be solemnised according to the rites of the Church of England in any parish church, and in any church, chapel, or place duly authorised or licensed by the bishop of the diocese for the solemnisation of marriage (*r*).

(ii.) *Place of Solemnisation.*

Marriage by banns or common licence.

570. A marriage, after publication of banns, must be solemnised in the church or chapel or one of the churches or chapels in which the banns were published (*s*), and a marriage by common licence in the church or chapel specified in the licence (*t*). Solemnisation in the vestry belonging to, and within, the church, or chapel is lawful, the vestry being *primâ facie* part of the church or chapel (*a*).

Special licence.

A special licence may authorise the marriage to be solemnised in any place, as, for instance, in a private house (*b*).

Superintendent registrar's certificate.

571. A marriage may be solemnised according to the rites of the Church of England on production of a superintendent registrar's certificate (*c*).

SUB-SECT. 2.—*Nonconformists in Registered Buildings.*

(i.) *Registration of Buildings for Marriages.*

Application for registration.

572. Any proprietor or trustee of a separate building, certified according to law as a place of religious worship (*d*), may apply to

general power of appointment by will being given to the wife in case she should exercise it in favour of her husband to the prejudice of the children, but approved of such a power in the event of her surviving her husband, so that she might make provision for a second marriage); *A.-G.* v. *Read* (1871), L. R. 12 Eq. 38 (general power of appointment by will given to wife in default of children approved, without words excluding the husband); *A.-G.* v. *Teather* (1881), 43 L. T. 749. In *A.-G.* v. *Clements* (1871), L. R. 12 Eq. 32, where the amount of the fund was small, it was directed to be brought into court, and a declaration of trust of it was made, instead of a settlement being ordered.

(*q*) *A.-G.* v. *Severne* (1844), 1 Coll. 313. The offending party cannot be compelled in any such proceeding to make discovery (*A.-G.* v. *Lucas* (1843), 2 Hare 566).

(*r*) As to these, see title ECCLESIASTICAL LAW, Vol. XI., pp. 694 *et seq.*

(*s*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 2. As to the manner and time of solemnisation, see title ECCLESIASTICAL LAW, Vol. XI., pp. 704, 705.

(*t*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 10.

(*a*) *Wing* v. *Taylor* (1861), 30 L. J. (P. M. & A.) 258.

(*b*) See p. 288, *ante*.

(*c*) See p. 288, *ante*, and title ECCLESIASTICAL LAW, Vol. XI., p. 704.

(*d*) The Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), is the statute now in force providing for the certification of places of religious worship. They may be certified to the Registrar-General through the superintendent registrar of the district if the congregation so desire, but not otherwise. See

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the superintendent registrar of the district in order that the building may be registered for the solemnisation of marriages, and in such case must deliver a certificate, signed in duplicate by twenty householders at least, that the building has been used by them during one year at least as their usual place of public religious worship, and that they desire that it should be registered, and each of such certificates must be countersigned by the proprietor or trustee by whom it is delivered (*e*).

Registration of building.

573. The superintendent registrar must thereupon send both certificates to the Registrar-General, who must register the building accordingly in a book kept for the purpose at the General Register Office, and having indorsed the date of registry on both certificates, must keep one with the records of the General Register Office, and return the other to the superintendent registrar to be kept with the other records of his office (*f*). The superintendent registrar must then give a certificate of the registry, on parchment or vellum, to the proprietor or trustee by whom the certificates accompanying the application were countersigned, and give public notice by advertisement in a newspaper circulating within the county, and in the *London Gazette* (*f*). For every such entry, certificate and publication the superintendent registrar is entitled to receive a fee of £3 at the time of the delivery to him of the application and certificates (*f*).

Cancellation of registry.

574. If at any time subsequent to the registration of a building it is made to appear to the satisfaction of the Registrar-General that the building has been disused for the public religious worship of the congregation on whose behalf it was registered, he must cause the registry thereof to be cancelled; and after the cancellation no marriage may lawfully be solemnised therein (*g*).

Substitution of another building.

575. If on the cancellation of the registry of any building it appears to the satisfaction of the Registrar-General that the same congregation are using some other building for the purpose of public religious worship instead, he may substitute and register the new place of worship, though it may not have been used for such purpose during the preceding year (*h*).

further, title ECCLESIASTICAL LAW, Vol. XI., p. 817. The earlier provisions for the certification of places of worship, now repealed, were contained in stats. (1688) 1 Will. & Mar. c. 18; (1791) 31 Geo. 3, c. 32; (1812) 52 Geo. 3, c. 155; and (1852) 15 & 16 Vict. c. 36. Under the stat. (1852) 15 & 16 Vict. c. 36 returns of all places certified up to the time of the passing of that Act were made to the Registrar-General, and any person may search the returns so made, and is entitled to a certified copy thereof or extract therefrom with respect to any place of meeting for religious worship contained therein, sealed or stamped with the seal of the General Register Office, such certified copy or extract being evidence without further proof that the place of meeting was duly certified according to law. For every such search extending over not more than ten years the Registrar-General is entitled to a fee of 1*s.*, and for every additional ten years 6*d.*, and a further sum of 2*s.* 6*d.* for every certified copy or extract (Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 24).

(*e*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 18.

(*f*) *Ibid.*

(*g*) *Ibid.*, s. 19.

(*h*) *Ibid.*

Application for cancellation or substitution.

576. Every application for cancellation, or for the registry of a substituted building, must be made to the Registrar-General by or through the superintendent registrar of the district; and the cancellation or substitution, when made, must be made known to the superintendent registrar, who must enter the fact and date in the books provided for the registry of such buildings, and certify and publish the cancellation or substitution in the same manner as in the case of the original registration (*i*). For every such substitution the superintendent registrar is entitled to receive, at the time of the application and delivery of the certificate from the person requiring the substitution, a fee of £3 (*i*).

Roman Catholic chapels.

577. A building which has been licensed and used during one year next before registration for public religious worship as a Roman Catholic chapel exclusively is deemed to be a separate building for the purpose of being registered for the solemnisation of marriage, though it may be under the same roof with any other building, or form part only of a building (*j*).

List of registered buildings.

578. The Registrar-General must every year cause a list of all registered buildings to be printed, stating the county and registrar's district in which each building is situated, and send a copy of the list to each registrar and superintendent registrar of marriages (*k*).

Presumption that building duly certified.

579. It is not necessary in support of any marriage solemnised in a registered building to prove that the building was certified as a place of religious worship, or that it was the usual place of worship of either of the parties to the marriage, nor may any evidence to the contrary be given in any proceedings touching the validity of the marriage; and any marriage solemnised in a registered building, though it may not have been certified according to law, is as valid as if the building had been so certified (*l*).

(ii.) *Place, Time and Manner of Solemnisation.*

When and how marriage may be solemnised.

580. On production of the superintendent registrar's certificate, or, in the case of a marriage by licence, of the certificate and licence, after the expiration of twenty-one days or one clear day as the case may be (*m*), and within three months (*n*), after the entry of the notice of marriage (*o*), the marriage may be solemnised in the registered building stated in the notice of marriage, with the consent of the minister or of one of the trustees, owners, deacons, or managers thereof, or, in the case of the Church of Rome, of the officiating minister thereof (*p*).

(*i*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 19.
(*j*) Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 35.
(*k*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 34.
(*l*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 17.
(*m*) See p. 291, *ante*.
(*n*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 15.
(*o*) See p. 291, *ante*.
(*p*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 20; Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 11.

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Forms and ceremonies.

581. The marriage may be solemnised according to such forms and ceremonies as the parties think fit to adopt (*q*), provided that in some part of the ceremony each of the parties must make the following declaration:—"I do solemnly declare that I know not of any lawful impediment why I., A. B., may not be joined in matrimony to C. D.," and each party must say to the other, "I call upon these persons here present to witness that I., A. B., do take thee, C. D., to be my lawful wedded wife [*or* husband]" or in lieu thereof, "I., A. B., do take thee, C. D., to be my wedded wife [*or* husband]" (*r*).

Declaration and contracting words.

The declaration and form of contracting words must be spoken in the presence of the registrar or authorised person and of the witnesses (*s*), and in the case of a marriage in the presence of an authorised person, must be recited by the authorised person, or by a minister officiating at the marriage in conjunction with the authorised person, in order that the parties may repeat them (*t*). In the case of a Roman Catholic marriage the declaration and contracting words may be repeated in the sacristy or vestry, provided it is part of the registered building, and the registrar or authorised person and witnesses are present (*a*).

Open doors; marriage hours; presence of authorised person.

582. The marriage must be solemnised with open doors, between the hours of eight in the forenoon and three in the afternoon, in the presence of two or more witnesses (*b*), and in the presence either of a registrar of marriages of the district in which the registered building is situated (*c*), or of some person duly authorised in that behalf (*d*).

Appointment of authorised person.

583. The appointment of an authorised person to attend marriages (*e*) in a registered building which are not solemnised

(*q*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 20.

(*r*) *Ibid.*; Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 6; Statutory Rules and Orders Revised, Vol. VIII., Marriage, pp. 2, 8. The marriage is complete and the parties man and wife as soon as the declaration and contracting words are spoken. In places where the Welsh tongue is commonly used or preferred, a translation into that tongue of the declaration and contracting words, published by authority of the Registrar-General under the direction of a Secretary of State, may be used, the authorised translation being furnished to every registrar of marriages throughout Wales, and in all places where the Welsh tongue is commonly used (Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22), s. 23; Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 14).

(*s*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 20; Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 6.

(*t*) Statutory Rules and Orders Revised, Vol. VIII., Marriage, p. 9.

(*a*) *Ibid.*

(*b*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 20; Marriage Act, 1886 (49 & 50 Vict. c. 14).

(*c*) When the attendance of a registrar is requested at a marriage in a registered building for which an authorised person has been appointed, the registrar should require the parties to satisfy him that the minister, trustees, owner, deacons, or managers of the building will not object to the use of the building under those conditions (Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 11; Statutory Rules and Orders Revised, Vol. VIII., Marriage, pp. 26, 27).

(*d*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 20; Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 4; Statutory Rules and Orders Revised, Vol. VIII., Marriage, pp. 4—9.

(*e*) As to the duties of an authorised person attending a marriage, see

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in the presence of a registrar may be made by the trustees or governing body of the building, or in the case of Roman Catholic registered buildings, by the bishop or vicar-general of the diocese, who must certify every such appointment to the Registrar-General (*f*).

Procedure.

When it is desired to certify the appointment of an authorised person, the trustees or governing body, bishop or vicar-general, as the case may be, must apply to the Registrar-General for the proper appointment forms, which will be issued in triplicate. The name and postal address of the person proposed must be entered on each of the forms, which must be signed by the trustees or other persons making the appointment, and forwarded within a week to the Registrar-General, who will send one of them to the superintendent registrar for the district and one to the authorised person, and file the other in the General Register Office. No authorised person may act until his appointment has been certified to and acknowledged by the Registrar-General (*g*).

If more than one authorised person is appointed for the same building, the Registrar-General must be notified which of them is to be held responsible for carrying out the provisions of the Marriage Act, 1898 (*h*), and performing the other duties contingent thereon (*g*).

Registration of authorised persons.

The superintendent registrar must enter in a book supplied by the Registrar-General for the purpose the names and addresses of all authorised persons within his district, and the names of the registered buildings for which they are authorised to act (*i*).

Change of address.

If an authorised person changes his address, the new address must at once be communicated to the Registrar-General and the superintendent registrar of the district, and on the death, retirement, removal to another district, or deposition from office of an authorised person, the trustees or governing body, bishop or vicar-general, as the case may be, must at once inform the Registrar-General, in order that forms may be sent for the appointment of a successor, and at the same time it must be stated what arrangements will be made for marriages in the building pending the new appointment (*i*).

A person duly authorised to act for one registered building may officiate at any other registered building in the same registration district, but not in any other registration district (*k*).

Delivery of certificate etc. to registrar or authorised person.

584. The superintendent registrar's certificate, or certificate and licence, for the marriage must be delivered to the district registrar in the case of a marriage in his presence, and otherwise

Statutory Rules and Orders Revised, Vol. VIII., Marriage, pp. 4—9; and as to his duties as regards registration of marriages, see title REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

(*f*) Marriage Act, 1898 (61 & 62 Vict. c. 58), ss. 1, 6 (3), (4).

(*g*) Statutory Rules and Orders Revised, Vol. VIII., Marriage, pp. 3, 4, 28, 29.

(*h*) Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 11; see title REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

(*i*) Statutory Rules and Orders Revised, Vol. VIII., Marriage, pp. 3, 29.

(*k*) *Ibid.*; Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 6 (3).

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to the authorised person in whose presence the marriage is solemnised, and the registrar or authorised person must immediately after the solemnisation register the marriage (*l*). All certificates and licences delivered to an authorised person must be numbered with the numbers of the entries in the register book to which they relate, and be preserved in the iron safe belonging to the registered building until the end of each quarter, when they must be delivered to the superintendent registrar with the corresponding certified copies (*m*). The certificates and licences must be produced with the register books as and when required by the Registrar-General (*n*).

Registrar-General may require presence of registrar.

585. If the Registrar-General is not satisfied with respect to any registered building that sufficient security exists for the due registration of marriages and safe custody of the marriage register books, he may attach to the continuance on the register or to the registration of the building (*o*) a condition that no marriages shall be solemnised therein except in the presence of a registrar of marriages (*p*).

Fees of registrar.

586. For every marriage in his presence by licence the district registrar is entitled to a fee of 10*s*., and for a marriage by certificate without licence in his presence, to a fee of 5*s*. (*q*).

SUB-SECT. 3.—*Jews and Quakers.*

Marriages according to usages of Jews or Quakers.

587. On production of a superintendent registrar's certificate, or certificate and licence (*r*), as the case may be, a marriage may be solemnised according to the usages of the Jews (*s*), or of the Society of Friends, provided that the parties both profess the Jewish religion, or are both members of the Society of Friends (*t*).

(*l*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), ss. 16, 23; Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 7.

(*m*) Statutory Rules and Orders Revised, Vol. VIII., Marriage, p. 15. As to the register books and certified copies, see title REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

(*n*) Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 8.

(*o*) See pp. 299, 300, *ante*.

(*p*) Marriage Act, 1898 (61 & 62 Vict. c. 58), s. 7 (4).

(*q*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 22.

(*r*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 21.

(*s*) It appears that a written contract is necessary to constitute a valid marriage according to the usages of the Jews. The celebration of the religious ceremony without such a contract is not sufficient (*R.* v. *Althausen* (1893), 17 Cox, C. C. 630; *Horn* v. *Noel* (1807), 1 Camp. 61). And the marriage must be solemnised in the presence of witnesses who are not incompetent by reason of consanguinity to the parties (see *Goldsmid* v. *Bromer* (1798), 1 Hag. Con. 324). A marriage purporting to be according to the usages of the Jews is void unless the Jewish law is complied with (*ibid.*; *Lindo* v. *Belisario* (1795), 1 Hag. Con. 216).

(*t*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 2; Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 20. The provisions of the Marriage Act, 1823 (4 Geo. 4, c. 76) (see s. 31), and the Marriage Act, 1898 (61 & 62 Vict. c. 58) (see s. 13), have no application to such marriages (*Ruding* v. *Smith* (1821), 1 State Tr. (N. S.) 1053, 1065).

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How far statutory provisions apply.

588. It is not necessary that the building in which the marriage is celebrated should be registered (*a*), nor that it should be situated within the district or either of the districts in which the parties reside (*b*), and the provisions as to open doors, the presence of witnesses, and the hours during which the marriage may be solemnised (*c*) have no application in the case of marriages according to the usages of the Jews or of the Society of Friends (*d*); but the marriage must be solemnised within three calendar months of the entry of the notice of marriage (*e*).

Certificate etc. to be delivered to proper officer.

589. The superintendent registrar's certificate, or certificate and licence, must be delivered to the registering officer of the Society of Friends for the place where the marriage is solemnised, or to the officer of a synagogue by whom the marriage is registered (*f*), and it is his duty to satisfy himself that the marriage is solemnised according to the usages of persons professing the Jewish religion or of the Society of Friends (*g*), as the case may be.

Quaker marriages of non-Quakers.

590. A marriage may be solemnised according to the usages of the Society of Friends where only one or even neither of the parties is a member of the Society, provided they are authorised to be married according to such usages under the general rules of the Society (*h*).

SUB-SECT. 4.—*Civil Marriage at Superintendent Registrar's Office.*

Marriage at superintendent registrar's office.

591. A marriage may be solemnised in pursuance of a superintendent registrar's certificate, or certificate and licence, at the office and in the presence of the superintendent registrar and of a registrar of marriages of the district. It must be solemnised within three calendar months of the entry of the notice of marriage (*i*), with open doors, in the presence of two witnesses, and between the hours of eight in the forenoon and three in the afternoon, and the same declaration and form of words must be used as in the case

(*a*) The meeting-houses of the Society of Friends are not registered buildings, and a marriage according to the usages of the Jews may be celebrated either in a synagogue, which is not a registered building, or in a private house.

(*b*) Marriage Act, 1840 (3 & 4 Vict. c. 72), s. 5.

(*c*) See p. 302, *ante*.

(*d*) But the English law with respect to the prohibited degrees of consanguinity or affinity apply to such marriages if the parties are domiciled in England. The various statutory exceptions in favour of Jews and Quakers relate only to questions of form and ceremony, not to questions of capacity (*Re De Wilton, De Wilton* v. *Montefiore*, [1900] 2 Ch. 481; and see p. 285, *ante*).

(*e*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 15.

(*f*) *Ibid.*, s. 16.

(*g*) *Ibid.*, s. 31.

(*h*) Marriage (Society of Friends) Acts, 1860 (23 & 24 Vict. c. 18), s. 1, and 1872 (35 & 36 Vict. c. 10), s. 1. A copy of the general rules purporting to be signed by the recording clerk for the time being of the Society in London is admissible as evidence of such general rules in all proceedings touching the validity of a marriage (Marriage (Society of Friends) Act, 1860 (23 & 24 Vict. c. 18), s. 1). As to the production of a certificate to the superintendent registrar on giving notice of marriage in such cases, see p. 295, *ante*.

(*i*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 15. As to entry of the notice of marriage, see pp. 291, 295, *ante*.

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of a marriage at a registered building (*k*), but no religious service may be used (*l*).

Delivery of certificate to district registrar.

592. The certificate, or certificate and licence, must be delivered to the district registrar who is present at the marriage (*m*), and it is his duty forthwith to register it (*n*). For every such marriage by licence he is entitled to a fee of 10*s*., and for a marriage by certificate without licence, to a fee of 5*s*. (*o*).

Addition of religious ceremony.

593. If the parties to any marriage contracted at the superintendent registrar's office desire to add the religious ceremony ordained or used by the church or persuasion of which they are members, they may present themselves, after notice of their intention to do so, to a clergyman or minister of that church or persuasion for that purpose, and he may, on production of the certificate of their marriage before the superintendent registrar, and on payment of the customary fees, himself or by some minister nominated by him, read or celebrate the marriage service of the church or persuasion to which he belongs in the church or chapel of which he is the regular minister; but nothing in the reading or celebration of the service can supersede or invalidate the marriage previously contracted, nor may such reading or celebration be registered as a marriage (*p*).

SECT. 5.—*Marriages out of England.*

SUB-SECT. 1.—*Foreign Marriages.*

According to *lex loci.*

594. Marriages solemnised in foreign countries with the forms and ceremonies required by the law of the place of solemnisation will, provided that law does not sanction polygamy, be recognised by English law as valid in point of form, and on the other hand, a foreign marriage will not, apart from legislation, be recognised as valid, unless the forms and ceremonies required by the law of the place of solemnisation are complied with (*q*).

By marriage officer.

595. Provisions are made for the solemnisation, in foreign countries and places abroad, of marriages between persons, one of whom at least is a British subject, by or before marriage officers (*r*).

(*k*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 21; Marriage Act, 1886 (49 & 50 Vict. c. 14). As to the declaration and form of words to be used, and the use of the Welsh tongue, see p. 302, *ante*.

(*l*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 12.

(*m*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 16.

(*n*) See title REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

(*o*) Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 22.

(*p*) Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 12. No clergyman or minister is under any obligation to perform the religious ceremony in such cases (*ibid.*, s. 11). This Act was passed on 29th July, 1856, the trial of the perpetual curate of Cowley for performing such a ceremony having resulted in an acquittal. See *Times*, 12th July, 1856.

(*q*) See title CONFLICT OF LAWS, Vol. VI., pp. 252, 253.

(*r*) See *ibid.*, pp. 257 *et seq.*

SECT. 5. Marriages out of England.

596. The forms and ceremonies required for marriages in India and the colonies are now prescribed, in most cases, by Indian and colonial legislation (*s*).

Forms required.

597. Statutes, both Imperial and local, have from time to time been passed for confirming the validity of marriages in British possessions abroad (*t*). As regards local Acts, it is provided that every law made or to be made by the legislature of any of His Majesty's possessions abroad for the purpose of establishing the validity of any marriage contracted in such possession shall have the same force and effect for that purpose within all parts of His Majesty's dominions as such law may have within the possession for which it was made, if, at the time of the marriage, the parties were, according to the law of England, competent to contract the same (*u*).

Statutory confirmation of marriages in British possessions.

598. Apart from legislation, the validity of a marriage as regards form in a colony in which the English common law prevails (*v*) depends upon whether or not it is solemnised in the presence of an episcopally ordained clergyman (*x*), provided that, in cases where it is impossible to procure the presence of such a clergyman, any form or ceremony showing an intention by the parties to marry one another is sufficient to constitute a valid marriage (*a*).

At common law.

(*s*) As to marriage in British possessions abroad under the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), see title CONFLICT OF LAWS, Vol. VI., pp. 257 *et seq.* In India several Acts have been passed since the Imperial Act, stat. (1851) 14 & 15 Vict. c. 40 (repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66)) by the Governor-General in Council, providing for the solemnisation and registration of marriages. The Act now in force in relation to Christian marriages in India is the Indian Christian Marriage Act, 1872 (Act No. XV. of 1872), partly repealed by the Repealing Act, 1874 (Act No. XVI. of 1874), and amended by the Births, Deaths and Marriages Registration Act, 1886 (Act No. VI. of 1886), s. 30, Act No. II. of 1891, and the Repealing and Amending Act, 1891 (Act No. XII. of 1891).

(*t*) For examples of Imperial Acts, see stat. (1824) 5 Geo. 4, c. 68 (Newfoundland); stat. (1864) 27 & 28 Vict. c. 77 (Ionian Islands); Fiji Marriage Act, 1878 (41 & 42 Vict. c. 61); Basutoland and British Bechuanaland Marriage Act, 1889 (52 & 53 Vict. c. 38). As to colonial marriages with a deceased wife's sister, see p. 285, *ante.*

(*u*) Colonial Marriages Act, 1865 (28 & 29 Vict. c. 64), s. 1. The Act applies to India (*ibid.*, s. 2).

(*v*) See title DEPENDENCIES AND COLONIES, Vol. X., pp. 565 *et seq.*

(*x*) *Limerick* (*Countess*) v. *Limerick* (*Earl*) (1863), 32 L. J. (P. M. & A.) 92 (marriage in Norfolk Island solemnised by clergyman of the Church of England according to the rules of the Church of England held valid); *James* v. *James and Smyth* (1882), 51 L. J. (P.) 24 (marriage of British subjects according to the rites of the Roman Catholic Church in a country subject to British dominion in which there was no established church, held valid); *R.* v. *Millis* (1844), 10 Cl. & Fin. 534, H. L. (the English common law requires the presence of an episcopally ordained clergyman, except where it is impossible to procure such a clergyman); *Catherwood* v. *Caslon* (1844), 13 M. & W. 261 (marriage according to rites of Church of England, but not in the presence of a clergyman in holy orders, held invalid); *Lautour* v. *Teesdale* (1816), 8 Taunt. 830.

(*a*) *R.* v. *Millis, supra,* at p. 786; *Beamish* v. *Beamish* (1861), 9 H. L. Cas. 274, 332, 353; *Lightbody* v. *West* (1902), 87 L. T. 138; *Catterall* v. *Catterall* (1847), 1 Rob. Eccl. 580 (marriage in New South Wales by Presbyterian

SECT. 5. Marriages out of England.

Lex loci.

In colonies in which the English common law does not prevail (*b*), the validity of a marriage depends upon the law by which the colony is governed (*c*).

The requirement of the English common law of the presence of an episcopally ordained clergyman has never been introduced into, and does not exist in, India (*d*).

SUB-SECT. 3.—*On Merchant Ships at Sea.*

Marriages at sea.

599. A marriage on board a ship at sea is valid according to the English common law if it is solemnised by or in the presence of an episcopally ordained clergyman of the Church of England or Church of Rome, though without proclamation of banns, or other public notification, or licence; and where there is no such clergyman on board, a marriage, though not in the presence of any minister, and whatever form or ceremony may be adopted, may be valid as a marriage of necessity, provided that it is clear that the parties freely consented and intended to marry one another (*e*).

The master of any ship for which an official log is required must enter in the official log-book particulars of every marriage taking place on board, with the names and ages of the parties (*f*).

SECT. 6.—*Confirmation of Invalid Marriages.*

Statutes confirming invalid marriages.

600. Numerous statutes, both public and private, have from time to time been passed for legalising marriages which were invalid (*g*), and confirming others of doubtful validity, by reason of their having been solemnised in a church or chapel or other place not duly licensed nor registered for the solemnisation of marriages, or without the presence of a duly ordained clergyman, or by reason of some other irregularity or informality (*h*).

minister held valid, notwithstanding non-compliance with a local Act, the Act not containing any nullifying provision). Settlers only take with them so much of the English common law as is applicable to their situation and condition (*Maclean* v. *Cristall* (1849), 7 Notes of Cases, Supplement, xvii., xxv.

(*b*) See title DEPENDENCIES AND COLONIES, Vol. X., pp. 565 *et seq.*

(*c*) See *Ruding* v. *Smith* (1821), 1 State Tr. (N. S.) 1053.

(*d*) *Maclean* v. *Cristall*, *supra*.

(*e*) *R.* v. *Millis* (1844), 10 Cl. & Fin. 534, 786, H. L.; *Beamish* v. *Beamish* (1861), 9 H. L. Cas. 274, 332, 353; *Lightbody* v. *West* (1902), 87 L. T. 138; *Du Moulin* v. *Druitt* (1860), 13 I. C. L. R. 212.

(*f*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 240 (6), 253 (1) (viii.)

(*g*) As to marriages with a deceased wife's sister in England and in British possessions abroad, see p. 284, *ante*.

(*h*) The following Public General Acts relate to England:—Stat. (1780) 21 Geo. 3, c. 53; Marriages Confirmation Act, 1804 (44 Geo. 3, c. 77); Marriages Confirmation Act, 1808 (48 Geo. 3, c. 127) (marriages before 1808); stat. (1822) 3 Geo. 4, c. 75 (marriages solemnised without consent of parent or guardian); stat. (1823) 4 Geo. 4, c. 5 (licences granted by unauthorised persons); Marriages Confirmation Act, 1825 (6 Geo. 4, c. 92) (churches erected since 1753); Marriage Confirmation Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 18) (marriages at certain churches and chapels); Church Building (Banns and Marriages) Act, 1844 (7 & 8 Vict. c. 56), s. 3 (marriages at certain district chapelries); stat. (1847) 10 & 11 Vict. c. 58 (Quakers and Jews); Church Building Act, 1851 (14 & 15 Vict. c. 97), s. 25 (marriages at certain churches); Places of Worship Registration Act, 1855 (18 & 19 Vict. c. 81), s. 13 (marriages at certain registered places

SECT. 6. Confirmation of Invalid Marriages.

601. A Secretary of State may, in the case of marriages in England which appear to him to be invalid or of doubtful validity by reason of some informality, remove the invalidity or doubt by provisional order (*i*).

Confirmation by provisional order.

The draft of every such order must be advertised in such manner as the Secretary of State thinks fit not less than one month before the order is made, and he must consider all objections sent to him in writing during that month, and may direct a local inquiry as to any such objections (*k*).

A provisional order is of no force until confirmed by Parliament, and a Bill for confirming any such order, which may be brought in by the Secretary of State, may be opposed as in the case of private Bills (*l*).

Greek marriages.

602. Marriages solemnised between 1836 and 1857 between members of the Greek Church, in conformity with its rites and ceremonies, and by a priest of that church, and duly entered in the register in the custody of the priest, in the belief that conformity with such rites and ceremonies constituted a compliance with English law, may be declared valid by a decree of the High Court on the petition of any person interested in the validity of the marriage, provided that no such marriage is valid if it has been declared invalid by any court of competent jurisdiction before the 3rd July, 1884, or if either of the parties has, during the life of the other, intermarried with any other person (*m*).

SECT. 7.—*Presumption and Proof of Marriage.*

SUB-SECT. 1.—*Presumption of Marriage.*

Presumption from cohabitation.

603. Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed, though there may be no positive evidence of any

of worship); stat. (1861) 24 & 25 Vict. c. 16), s. 4 (marriages at certain churches and chapels); stat. (1873) 36 & 37 Vict. cc. 1, 20, 25, 28 (marriages at certain chapels); Greek Marriages Act, 1884 (47 & 48 Vict. c. 20) (Greek marriages); Marriages Validation Act, 1888 (51 & 52 Vict. c. 28) (marriages solemnised by G. F. W. Ellis); Marriages Legalisation Act, 1901 (1 Edw. 7, c. 23) (marriages at various churches, chapels and places); Marriages Legalisation Act, 1903 (3 Edw. 7, c. 26) (marriages at various churches, chapels and places).

The following public general Acts relate to places out of England:—Stat. (1823) 4 Geo. 4, c. 67 (St. Petersburg); stat. (1824) 5 Geo. 4, c. 68 (Newfoundland); stat. (1833) 3 & 4 Will. 4, c. 45 (Hamburg); stat. (1854) 17 & 18 Vict. c. 88 (Mexico); stat. (1858) 21 & 22 Vict. c. 46 (Moscow, Ningpo and Tahiti); stat. (1859) 22 & 23 Vict. c. 64 (Lisbon); stat. (1864) 27 & 28 Vict. c. 77 (Ionian Islands before 1864); stat. (1867) 30 & 31 Vict. c. 2 (Odessa); stat. (1867) 30 & 31 Vict. c. 93 (Morro Velho); Fiji Marriage Act, 1878 (41 & 42 Vict. c. 61); Basutoland and British Bechuanaland Marriage Act, 1889 (52 & 53 Vict. c. 38).

For private Acts, see the Index to Local and Personal Acts, 1801—1899.

(*i*) Provisional Order (Marriages) Act, 1905 (5 Edw. 7, c. 23), s. 1 (1).

(*k*) *Ibid.*, s. 1 (2).

(*l*) *Ibid.*, s. 1 (3). As to private Bill procedure generally, see title PARLIAMENT.

(*m*) Greek Marriages Act, 1884 (47 & 48 Vict. c. 20), s. 1. See further, as to the procedure, and the effect of a decree under the Act, p. 315, *post*.

SECT. 7. Presumption and Proof of Marriage.

marriage having taken place, and the presumption can be rebutted only by strong and weighty evidence to the contrary (*n*).

Presumption of validity.

604. Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence (*o*).

(*n*) *Re Shephard, George* v. *Thyer*, [1904] 1 Ch. 456; *Lyle* v. *Ellwood* (1874), L. R. 19 Eq. 98; *Collins* v. *Bishop* (1878), 48 L. J. (CH.) 31; *Wigley* v. *Treasury Solicitor*, [1902] P. 233; *De Thoren* v. *A.-G.* (1876), 1 App. Cas. 686; *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (1881), 6 App. Cas. 364, P. C.; *Wilkinson* v. *Payne* (1791), 4 Term Rep. 468; *Doe* d. *Fleming* v. *Fleming* (1827), 4 Bing. 266; *Harrison* v. *Southampton Corporation* (1853), 4 De G. M. & G. 137, C. A.; *Re Birch* (1853), 17 Beav. 358; *Doe* d. *Egremont (Earl)* v. *Grazebrook* (1843), 3 Gal. & Dav. 334; *Fox* v. *Bearblock* (1881), 44 L. T. 508; *The Lauderdale Peerage* (1885), 10 App. Cas. 692; *Piers* v. *Piers* (1849), 2 H. L. Cas. 331; *Re Ivory, Chippendale* v. *Ivory* (1886), 2 T. L. R. 468; *Andrewes* v. *Uthwatt* (1886), 2 T. L. R. 895; *Elliott* v. *Totnes Union* (1892), 9 T. L. R. 35; *Re Green, Noyes* v. *Pitkin* (1909), 25 T. L. R. 222; *Patrickson* v. *Patrickson* (1865), L. R. 1 P. & D. 86; *Goodman* v. *Goodman* (1859), 28 L. J. (CH.) 745, C. A. (cohabitation of a Jew with a Christian woman for twenty-eight years: general reputation of marriage, but no evidence of solemnisation: children brought up as Christians, but baptised as the children of A. and B., his wife: affidavit in judicial proceedings describing the parties as A. and B., his wife: A.'s relations having never recognised any marriage. Held, that there was a presumption of marriage, the onus of rebutting which was on the persons denying it); *Re Haynes, Haynes* v. *Carter* (1906), 94 L. T. 431 (co-habitation of man and woman, with two children, from 1878 to 1893: generally reputed to be husband and wife, but some evidence dividing the repute: no evidence of any marriage having been solemnised: elder child born in 1873 in maternal grandmother's house, and registered by the mother in her maiden name: younger child born in 1879 and registered in father's name. Held, that a marriage must be presumed, but that only the younger child was legitimate); *Rooker* v. *Rooker and Newton* (1863), 33 L. J. (P.) 42 (co-habitation for five years in Virginia: by the law of Virginia no religious ceremony was necessary for the validity of a marriage, nor was there any registry of marriages, and in consequence of war, no record of any ceremony which might have taken place was obtainable. Held, that the marriage was sufficiently proved); *Re Thompson, Langham* v. *Thompson* (1904), 91 L. T. 680 (cohabitation as man and wife from 1856 to 1866: five children: reputed by friends and neighbours to be married: separation in 1866: marriage in 1874 of the man, during lifetime of the woman, to another woman. Held, that the presumption of marriage was established). The presumption is less strong where there is no issue and the invalidity of the marriage is alleged by the parties (*Re M'Loughlin's Estate* (1878), 1 L. R. Ir. 421).

(*o*) *Piers* v. *Piers*, *supra* (marriage solemnised by a regularly ordained clergyman of the Church of England in a private house as if by special licence: no such licence, nor entry of its having been granted, nor registration of the marriage itself, could be found: the bishop of the diocese, thirty years after the solemnisation of the marriage, testified that in his belief he had not granted the licence, but it might have been granted by his predecessor, who died a year and a half before the marriage. Held, that the grant of a special licence must be presumed); *Campbell* v. *Corley* (1856), 4 W. R. 675, P. C. (marriage in registrar's office in presence of registrar and deputy-registrar; compliance with all statutory requirements presumed); *R.* v. *Mainwaring* (1856), 7 Cox, C. C. 192, C. C. R. (on an indictment for bigamy a witness gave evidence that he was present at the first marriage, which was solemnised in a dissenting chapel in the presence of a registrar of marriages, that an entry of the marriage in the registrar's book was signed by him as a witness, and that the parties had cohabited for several years. Held, that it must be presumed that the chapel was duly

Presumption and Proof of Marriage.

Matters not necessary to be proved.

605. It is not necessary in support of a marriage solemnised after publication of banns (*p*) to give any proof of the actual dwelling of the parties in the respective parishes or chapelries in which the banns were published, nor, in support of a marriage by common licence (*q*), to give any proof that one of the parties was resident for the requisite fifteen days in the parish or chapelry where the marriage was solemnised, nor, in support of a marriage solemnised in pursuance of a superintendent registrar's certificate (*r*), to give any proof of the actual dwelling or period of dwelling of either of the parties previous to the marriage within the district stated in the notice of marriage to be that of his or her residence, or of the consent of any person whose consent was required, or that the registered building in which the marriage was solemnised had been duly certified or was the usual place of worship of either of the parties; nor may any evidence to the contrary in any of such cases be given in any proceedings touching the validity of the marriage (*s*).

Jewish marriage.

606. To prove a marriage according to the usages of the Jews, it is necessary to produce the written contract of marriage between the parties. The testimony of a witness present at the marriage ceremony is not sufficient (*t*). The validity of such a marriage is determined by the evidence of an expert in Jewish law, as in the case of foreign marriages (*u*).

Registers and certificates as evidence.

607. Registers of marriages in England, kept in pursuance of statutory provisions (*v*), and also certified copies of entries in such registers, are admissible as evidence of marriages, and of the particulars stated therein, without further or other proof, provided, in the case of certified copies from the General Register Office, that they purport to be sealed or stamped with the seal of that office (*w*), and, in the case of other copies, that they purport to

registered as a building where marriages might lawfully be solemnised, and that the marriage was sufficiently proved); *Sichel* v. *Lambert* (1864), 15 C. B. (N. S.) 781 (evidence of solemnisation in a Roman Catholic chapel according to the rites of the Church of Rome, followed by cohabitation. Held, that it must be presumed that the chapel was duly registered for the solemnisation of marriages, and that a registrar of marriages was present); *The Lauderdale Peerage* (1885), 10 App. Cas. 692; *Sastry Velaider Aroneyury* v. *Sembecutty Vaigalie* (1881), 6 App. Cas. 364, P. C.; *R.* v. *Allison* (1806), Russ. & Ry. 109, C. C. R. Where there has been a ceremony of marriage followed by cohabitation, the presumption of a valid marriage cannot be rebutted merely by showing that it could not be valid according to the *lex loci celebrationis* (*Re Shephard, George* v. *Thyer*, [1904] 1 Ch. 456); and see *Piers* v. *Tuite* (1838), 1 Dr. & Wal. 279, and title EVIDENCE, Vol. XIII., p. 504.

(*p*) See p. 286, *ante*.

(*q*) See p. 288, *ante*.

(*r*) *Ibid.*

(*s*) Marriage Act, 1823 (4 Geo. 4, c. 76), s. 26; Marriage Act, 1840 (3 & 4 Vict. c. 72), s. 2; Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 17.

(*t*) *R.* v. *Althausen* (1893), 17 Cox, C. C. 630; *Horn* v. *Noel* (1807), 1 Camp. 61.

(*u*) *Lindo* v. *Belisario* (1795), 1 Hag. Con. 216; and see title EVIDENCE, Vol. XIII., p. 488.

(*v*) See title REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

(*w*) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 38.

SECT. 7. Presumption and Proof of Marriage.

be signed and certified as true copies by the officer to whose custody the register is entrusted (*a*).

Non-parochial registers.

608. The non-parochial marriage registers and records deposited in the General Register Office in pursuance of statutory provisions (*b*), other than those of marriages at the Fleet and King's Bench prisons, at Mayfair, at the Mint in Southwark and elsewhere, which were deposited in the registry of the Bishop of London in 1820, are deemed to be in legal custody, and are receivable in evidence in all courts (*c*). The Fleet and other marriage registers and records which were deposited in the registry of the Bishop of London in 1820 are not admissible in evidence at all, although they have been deposited with the Registrar-General for safe custody (*d*).

Production of register.

609. Any such register or record which is admissible in evidence must be produced by the Registrar-General on *subpœna*, on payment of a reasonable sum for the loss of time and travelling and other expenses of the officer producing it (*e*); and the mere production in the custody of an officer of the Registrar-General is sufficient proof that the register or record is one deposited with the Registrar-General in pursuance of the statutory provisions (*f*).

(*a*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14; *Hubbard* v. *Lees and Purden* (1866), L.R. 1 Exch. 255 (on a question of pedigree, held that no proof of identity was necessary to render a certificate of marriage admissible, and that the question of identity was one of fact for the jury); *Doe* d. *Wollaston* v. *Barnes* (1834), 1 Mood. & R. 386 (held that a register was evidence of the time of the marriage, and of all facts stated therein which were necessarily within the knowledge of the person making the entry); *Birt* v. *Barlow* (1779), 1 Doug. (K. B.) 171. As to what a certificate of the Registrar-General proves, see title EVIDENCE, Vol. XIII., p. 534; as to foreign registers, see *ibid.*; and as to parish and other registers and records of marriages, see *ibid.*, pp. 536 *et seq.* In *Re Porter's Trust* (1856), 2 Jur. (N. S.) 349, it was held that the signature of a person describing himself as "curate" was sufficient without its being certified that he was the proper officer to have the custody of the register, disapproving the report of *Re Neddy Hall's Estate* (1852), in 2 De G. M. & G. 748, C. A., where the court is reported to have held that, though the signature of a person describing himself as a rector or vicar was sufficient without verification, the description "incumbent" or "curate" was not, and approving the report of that case in 17 Jur. 29. A register which is not in proper custody is not admissible in evidence (*Doe* d. *Arundel* (*Lord*) v. *Fowler* (1850), 14 Q. B. 700). As to the custody of marriage registers, see titles EVIDENCE, Vol. XIII., pp. 533 *et seq.*; REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

As to the admissibility in evidence of Irish marriage certificates, see *Whitton* v. *Whitton*, [1900] P. 178; *Wallace* v. *Wallace* (1896), 74 L. T. 253, and title EVIDENCE, Vol. XIII., p. 535.

(*b*) *I.e.*, the registers and records deposited in pursuance of the Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92), and the Births and Deaths Registration Act, 1858 (21 & 22 Vict. c. 25). See title REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

(*c*) Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92), s. 6, as extended by the Births and Deaths Registration Act, 1858 (21 & 22 Vict. c. 25), s. 3.

(*d*) Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92), s. 20; *Reed* v. *Passer* (1794), Peake, 303; *Lloyd* v. *Passingham* (1809), 16 Ves. 59; and see title EVIDENCE, Vol. XIII., p. 533.

(*e*) Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92), ss. 6, 10. As to writs of *subpœna*, see titles CROWN PRACTICE, Vol. X., pp. 9, 11; EVIDENCE, Vol. XIII., pp. 580 *et seq.*

(*f*) Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92), s. 10.

Certified extracts.

610. A certified extract from any such register or record is also admissible without further proof in all civil cases, provided that it purports to be sealed or stamped with the seal of the General Register Office (*g*), and provided that the extract contains a description of the register or record from which it is taken and expresses that it is one of the registers or records deposited with the Registrar-General in pursuance of the statutory provisions already referred to (*h*); but in criminal cases the original register or record must be produced (*i*).

Notice of intention to use register or extract.

611. The party intending to use as evidence on the trial of any action any such certified extract must give notice in writing to the opposite party of such intention and at the same time deliver a copy of the extract and certificate, in sufficient time before the hearing to enable the opposite party to inspect the original register or record (*k*); but if he intends to use the original register or record, he must simply give notice and deliver a copy of a certified extract of the entry he intends to use in evidence (*l*).

SUB-SECT. 3.—*Proof of Marriages Abroad.*

Foreign marriages in general.

612. Where a marriage abroad depends for its validity on foreign or colonial law, the foreign or colonial law is deemed to be a matter of fact, which must be proved by expert evidence (*m*).

Marriages before marriage officers.

613. After the solemnisation of a marriage between parties, one of whom at least is a British subject, by or before a marriage officer, it is not necessary, in support of the marriage, to give any proof of the residence for the time required of either of the parties previously to the marriage, or of the consent of any person whose consent was necessary, nor may any evidence to prove

(*g*) Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92), s. 9.
(*h*) *Ibid.*, s. 10.
(*i*) *Ibid.*, s. 17.
(*k*) *Ibid.*, ss. 11, 13.
(*l*) *Ibid.*, ss. 12, 14. As to interlocutory proceedings, see *ibid.*, s. 15.
(*m*) *Bater* v. *Bater*, [1907] P. 333 (held that the validity of a foreign marriage must be proved by expert evidence, although in a suit to annul the marriage previously determined in the High Court between the same petitioner and respondent, the validity was proved and admitted, on the assumption that a certain divorce decree, on which the capacity of the parties to marry depended, was a valid decree); *Carlin* v. *Carlin* (1906), 70 J. P. 143 (on an application for a separation order under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), it was found as a fact that there had been a valid marriage between the parties in Russia, though there was no evidence of registration of the marriage. On appeal, held that the foreign law was a question of fact, and appeal dismissed); *Wilson* v. *Wilson*, [1903] P. 157 (evidence of a member of the English bar, who showed that he was well acquainted with the law of the colony for reasons connected with his profession, admitted as expert evidence of the validity of a colonial marriage, the usual expert evidence not being obtainable in the particular case); *Cooper-King* v. *Cooper-King*, [1900] P. 65 (petition for restitution of conjugal rights: the only acknowledged expert in this country refused to give evidence as to the validity of a marriage in Hong-Kong except for a higher fee than the petitioner could afford: affidavit of a former governor of Hong-Kong as to the marriage law of the colony accepted in the circumstances). See also titles ESTOPPEL, Vol. XIII., p. 338; EVIDENCE, Vol. XIII., pp. 487 *et seq.*

SECT. 7. Presumption and Proof of Marriage.

the contrary be given in any proceeding touching the validity of the marriage (*n*); nor, where a marriage purports to have been solemnised and registered in the official house of a British ambassador or consul, or on board one of His Majesty's ships, is it necessary to give any proof of the authority of the marriage officer by or before whom the marriage was solemnised and registered, nor may any evidence to prove his want of authority, whether by reason of his not being a duly authorised marriage officer or otherwise, be given in any legal proceeding touching the validity of the marriage (*a*).

Admissibility in evidence of registers.

Any register of marriages in the custody of a marriage officer or sent by a marriage officer to a Secretary of State for transmission to the Registrar-General is admissible in evidence on its mere production from the custody of the marriage officer or Registrar-General (*b*); and any copy or extract from such a register is admissible, if it purports to be signed and certified as a true copy or extract by the marriage officer, or stamped or sealed with the seal of the General Register Office, as the case may be (*c*).

Marriages within lines of army.

614. Registers of marriages of British officers and soldiers abroad, transmitted to the Registrar-General in pursuance of the King's regulations, are deemed to be in the legal custody of the Registrar-General; and such registers, or certified copies thereof purporting to be under the seal of the General Register Office, are admissible in evidence (*d*).

Marriages in India.

615. The production from the India Office of a certified copy of an entry in a marriage register kept in the custody of the Secretary of State, or of a certificate sent to the Secretary of State as required by law, is admissible as evidence of the due solemnisation of a marriage in India (*e*).

Foreign and colonial certificates.

616. A certificate purporting to be a copy or extract from a foreign or colonial register of marriages, certified as a true copy or extract and signed by the person having the legal custody of the register, is admissible as evidence of a foreign or colonial marriage, if it is proved that the register is one which is required to be kept by the local law, and that the copy or extract would be admitted as evidence of the marriage in the local courts (*f*).

(*n*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 13 (1). As to these marriages, see title CONFLICT OF LAWS, Vol. VI., pp. 257 *et seq.*

(*a*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 13 (2).

(*b*) *Ibid.*, ss. 10, 16 (1).

(*c*) *Ibid.*, ss. 10, 16 (1), 17; Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 14; and see title EVIDENCE, Vol. XIII., pp. 534—536.

(*d*) Registration of Births, Deaths, and Marriages (Army) Act, 1879 (42 & 43 Vict. c. 8), s. 2, 3.

(*e*) *Westmacott* v. *Westmacott*, [1899] P. 183 (certified copy of certificate sent here pursuant to the provisions of the Indian Christian Marriage Act, 1872 (Act No. XV. of 1872); *Regan* v. *Regan* (1892), 67 L. T. 720 (copy of entry in register kept in the custody of the Secretary of State, signed by the Under-Secretary of State, and sealed with the seal of the Secretary of State, admitted); *Braid* v. *Braid* (1909), 25 T. L. R. 646; *Ratcliff* v. *Ratcliff and Anderson* (1859) 1 Sw. & Tr. 467 (certificates transmitted under the repealed Act, stat. (1851) 14 & 15 Vict. c. 40, s. 22).

(*f*) *Abbott* v. *Abbott and Godoy* (1860), 29 L. J. (P. & M.) 57 (marriage in

SECT. 8.—*Proceedings to Establish Validity.*

Under Legitimacy Declaration Act, 1858.

617. Any natural-born British subject, or any person whose right to be deemed a natural-born British subject depends wholly or in part on the validity of a marriage, being domiciled in England or Ireland, or claiming real or personal estate in England, may apply by petition to the Probate, Divorce and Admiralty Division (*g*) of the High Court for a decree declaring that the marriage of his father and mother, or of his grandfather and grandmother, or his own marriage, was or is a valid marriage; and the court may make a decree declaratory of the validity or invalidity of the marriage accordingly (*h*). Every such petition must be accompanied by an affidavit verifying the same, and of the absence of collusion (*i*).

Effect of decree.

618. No such decree prejudices any person who has not been cited nor made a party to the proceedings, and is not the heir-at-law or next of kin or other representative of, or a person deriving title under or through, a person so cited or made a party, nor does a decree prejudice any person if it is subsequently proved to have been obtained by fraud or collusion (*j*), nor affect any final judgment or decree already pronounced or made by any court of competent jurisdiction (*k*). Subject to this, a decree is binding for all purposes on His Majesty and all other persons whomsoever (*l*).

Greek marriages.

619. Any party to certain Greek marriages (*m*), or any child or grandchild of such a party, or any person interested in the validity of such a marriage, may present a petition in a similar manner for a decree declaring its validity (*n*).

No such decree alters, takes away, or injuriously affects the status, or any right to or estate or interest in real or personal

Chile: document purporting to be an extract from register, signed by the curate rector of the church where the marriage was solemnised, such signature being verified by a public notary, and both the curate rector's and notary's signatures being verified by the foreign minister of the Chilian Republic, and certified under the hand and seal of the British consul, admitted, on evidence being given that the certificate was one which would be received in the Chilian courts); *Coode* v. *Coode* (1838), 1 Curt. 755 (copy of entry in marriage register at Barbados). See also, as to various marriage confirmation Acts, p. 308, *ante*. A certificate, not purporting to be a copy of an entry in a register required to be kept by law, but only containing a reference to the register, is not admissible as evidence of a foreign marriage in the English courts, even if it would have been admissible in the local courts (*Finlay* v. *Finlay and Rudall* (1862), 31 L. J. (P. M. & A.) 149). See, as to the proof of marriages in Jersey, *Eden* v. *Eden and Batterick* (1908), 24 T. L. R. 602; *Westlake* v. *Westlake* (*otherwise Williams*), [1910] P. 167; and in the Isle of Man, *Rohmann* v. *Rohmann* (1908), 25 T. L. R. 78. See also, for various other provisions, title EVIDENCE, Vol. XIII., p. 505.

(*g*) As to this Division, see p. 462, *post*.

(*h*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 1. See also title BASTARDY, Vol. II., pp. 432 *et seq.*

(*i*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 3.

(*j*) *Ibid.*, s. 8.

(*k*) *Ibid.*, s. 10.

(*l*) *Ibid.*, s. 1.

(*m*) See p. 309, *ante*.

(*n*) Greek Marriages Act, 1884 (47 & 48 Vict. c. 20), s. 1.

SECT. 8. Proceedings to Establish Validity.

property, of any person, which may be dependent on the invalidity of any such marriage (*o*).

Attorney-General to be a party.

620. A copy of every petition under either of the above-mentioned statutes, and of the affidavit accompanying the same, must, one month at least previously to the presenting and filing of the petition, be delivered to the Attorney-General, who must be a respondent on the hearing of the petition and on every subsequent proceeding relating thereto (*p*).

Court may direct citation of other persons.

621. After duly citing the Attorney-General, the parties on applying to have the case set down for hearing must lay the state of the case, by affidavit or otherwise, before the registrar of the court, who will direct whether any, and if so what, other parties shall be cited, the decision of the registrar being subject to an appeal to the judge (*q*). It is not the practice, in the case of a Greek marriage, to direct that the next of kin shall be cited as a matter of course (*r*).

Part III.—Personal Rights and Obligations arising from Marriage.

SECT. 1.—*Obligation of Husband and Wife to Maintain one Another.*

Duty of husband to maintain wife.

622. It is the duty of a husband to maintain his wife according to his estate or condition in life, or according to his means of supporting her (*s*). If he fails to perform this duty, she has implied authority to pledge his credit for necessaries suitable to his station in life (*t*), and this authority is not affected by his lunacy (*a*). If the husband deserts his wife, or is guilty of misconduct justifying her in leaving him and living apart, and she is without means of support, her implied authority to pledge his credit for necessaries becomes an authority of necessity, which cannot be revoked by the husband (*b*).

Wilful neglect to maintain.

623. If a husband wilfully refuses or neglects to maintain his wife, having the means, by work or otherwise, so to do, so that she

(*o*) Greek Marriages Act, 1884 (47 & 48 Vict. c. 20), s. 2.

(*p*) *Ibid.*, s. 1; Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 6.

(*q*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 7; *Brinkley* v. *A.-G.*, *Scaramanga* (*Julia*) v. *A.-G.* (1889), 14 P. D. 83; *Brinkley* v. *A.-G.* (1890), 15 P. D. 76; *Zarafi* v. *A.-G.* (1885), 1 T. L. R. 683. The mode of trial is in the absolute discretion of the court (*Sackville-West* v. *A.-G.*, [1910] P. 143, where an application for a trial by jury was refused).

(*r*) *Zarafi* v. *A.-G.*, *supra*.

(*s*) *Read* v. *Legard* (1851), 6 Exch. 636; *Johnston* v. *Sumner* (1858), 3 H. & N. 261. As to the power of a court of summary jurisdiction to order weekly payments etc. under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), in case of desertion, persistent cruelty etc., see p. 596, *et seq.*, *post*.

(*t*) *Johnston* v. *Sumner*, *supra*; see pp. 417 *et seq.*, *post*.

(*a*) *Read* v. *Legard*, *supra*.

(*b*) See p. 426, *post*.

becomes chargeable to any union or parish under the poor law, he is criminally liable (*c*). But a refusal to maintain her is not wilful for this purpose if it is caused by a *bonâ fide* belief that she has been guilty of adultery (*d*); and a husband cannot be convicted of a wilful refusal or neglect to maintain his wife if he offers to repay what has been paid by the parish or union, and to receive and support her, though she may have left him in consequence of his ill-usage, and even if the offer is made merely to screen himself from the consequences of his neglect (*e*).

Parish relief to wife.

Parish relief given to or on account of a wife is considered as having been given to the husband, and the cost incurred by the guardians of the poor in respect thereof may be recovered from him (*f*).

Order under Poor Law Acts.

624. Whenever a wife becomes chargeable to any union or parish, the guardians of the poor may apply to a court of summary jurisdiction for an order against the husband for payment of such sums, weekly or otherwise, towards her support as may be considered reasonable (*g*).

It is not a condition precedent to the making of such an order that the guardians should have fixed the sum necessary for the relief of the wife, and the court may order payment of such sums as, considering the condition in life of the husband and all the other circumstances of the case, it considers reasonable, although in excess of the cost of the relief previously given by the guardians to the wife (*h*).

An order may be made although the husband offers to receive and maintain the wife, if it is found by the court that she left him on account of his ill-usage, and that it would be dangerous for her to return, even if he promises not to ill-use her in the future (*i*). But the court has no jurisdiction to make an order if the wife refuses to return, and it is not found that she is justified in her refusal (*k*).

Wife leaving husband or committing adultery.

625. The obligation of a husband to maintain his wife ceases if she leaves him without his consent in circumstances which do not justify her in living apart (*l*), and, in any case, if she commits adultery, though he may have been guilty of cruelty or other

(*c*) Vagrancy Act, 1824 (5 Geo. 4, c. 83), ss. 3, 4. As to poor law relief, see title POOR LAW.

(*d*) *Morris* v. *Edmonds* (1897), 77 L. T. 56.

(*e*) *Flannagan* v. *Bishop Wearmouth Overseers* (1857), 8 E. & B. 451.

(*f*) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 56. See title POOR LAW.

(*g*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 33. As to the enforcement of such orders, see title POOR LAW. As to courts of summary jurisdiction generally, see title MAGISTRATES.

(*h*) *Dinning* v. *South Shields Union* (1884), 13 Q. B. D. 25, C. A.

(*i*) *Thomas* v. *Alsop* (1870), L. R. 5 Q. B. 151.

(*k*) *R.* v. *Fordham* (1888), 5 T. L. R. 27.

(*l*) *R.* v. *Flintan* (1830), 1 B. & Ad. 227 (decided under the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3); *Hindley* v. *Westmeath* (*Marquis*) (1827), 6 B. & C. 200; *Johnston* v. *Sumner* (1858), 3 H. & N. 261 (no authority to pledge husband's credit, though he may have been guilty of adultery).

SECT. 1. Obligation of Husband and Wife to Maintain one Another.

misconduct (*m*), except where he connived at or has condoned her offence (*n*).

Duty of wife to maintain husband.

626. A wife is under no duty or obligation, as a general rule, to support her husband, and in no case has he any implied authority, by reason of the relationship, to pledge her credit. But if a wife has separate property, and her husband becomes chargeable to any union or parish, a court of summary jurisdiction has the same power, on the application of the guardians of the poor, to make an order on her for his maintenance out of her separate property, as it would have to make an order against the husband if the wife had become chargeable (*o*).

SECT. 2.—*Right of Consortium.*

Duty of wife to cohabit with husband.

627. It is the duty of a wife to reside and cohabit with her husband (*p*). As against the wife, the only remedy of the husband for breach of this duty is a petition for restitution of conjugal rights (*q*). A husband is not entitled, if his wife refuses to live with him, even without any reasonable cause, to restrain her by force or to keep her in confinement (*r*), nor, where she is living apart by her own desire, will the court grant a writ of *habeas corpus* to the husband to restore her to his custody (*s*).

Enticing her to live apart.

628. If a third person, without just cause, persuades or entices a wife to live apart from her husband, or receives and harbours her

(*m*) *R.* v. *Flintan* (1830), 1 B. & Ad. 227; *Child* v. *Hardyman* (1730), 2 Stra. 875 (no authority to pledge husband's credit, though he refused to maintain her before she committed adultery); *Culley* v. *Charman* (1881), 7 Q. B. D. 89 (decided under the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 33); *Mitchell* v. *Torrington Union* (1897), 76 L. T. 724 (husband not heard of for twenty-seven years: wife married again: husband returned. Held, not liable to guardians of the poor in respect of her maintenance); *Govier* v. *Hancock* (1796), 6 Term Rep. 603 (husband treated wife with great cruelty and turned her away: wife committed adultery. Held, husband not liable for necessaries supplied subsequently to the adultery); *Atkyns* v. *Pearce* (1857), 2 C. B. (N. S.) 763; *Cooper* v. *Lloyd* (1859), 6 C. B. (N. S.) 519; and see pp. 423, 426, *post*.

(*n*) *Wilson* v. *Glossop* (1888), 20 Q. B. D. 354, C. A.; *Harris* v. *Morris* (1801), 4 Esp. 41; and see pp. 423, 426, 431, *post*.

(*o*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 20. As to orders of a similar nature against the husband, see p. 317, *ante*.

(*p*) *Wilkinson* v. *Wilkinson* (1871), L. R. 12 Eq. 604; *Ramsey* v. *Margrett*, [1894] 2 Q. B. 18; at common law husband and wife were for legal purposes regarded as one person. This theory of the unity of the person still survives for some purposes, chiefly connected with the criminal law, but for most purposes has been abrogated. As to the doctrine of coercion in connection with crimes by a married woman, and the position of husband and wife respectively as accessories after the fact, and in regard to conspiracies, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 244, 256, 264. As to the domicil of a married woman, see title CONFLICT OF LAWS, Vol. VI., pp. 191, 263; and as to her nationality, see title ALIENS, Vol. I., pp. 315, 318. As to publication between husband and wife in connection with the law of defamation, see *Wennhak* v. *Morgan* (1888), 20 Q. B. D. 635; *Wenman* v. *Ash* (1853), 13 C. B. 836, and title LIBEL AND SLANDER.

(*q*) See pp. 473, 499, *post*.

(*r*) *R.* v. *Jackson*, [1891] 1 Q. B. 671, C. A. (wife, kept in confinement by husband, discharged on *habeas corpus*), overruling *Re Cochrane* (1840), 8 Dowl. 630. The right of administering corporal correction is obsolete (*R.* v. *Jackson*, *supra*).

(*s*) *R.* v. *Leggatt* (1852), 18 Q. B. 781.

while living apart without her husband's consent, that person commits an actionable wrong for which the husband is entitled to recover damages (*t*).

But where a wife leaves her husband in consequence of his ill-treatment, no action will lie against any person for receiving and harbouring her (*a*); and if, on being applied to by a wife for advice as to whether she should leave her husband, a third person advises her in good faith, and approves of her leaving him, the advice so given is no ground of action (*b*).

Action for loss of *consortium*.

629. A husband may maintain an action for damages for the loss of the society or services of his wife against a third person by whose wrongful act he is deprived of the benefit of such society or services (*c*).

Separation contrary to policy of the law.

630. It is contrary to the policy of the law that husband and wife should be separated without their consent (*d*), and the poor law is administered accordingly (*e*).

(*t*) *Winsmore* v. *Greenbank* (1745), Willes, 577. The action of *crim. con.*, which formerly lay by the husband against a person committing adultery with his wife, was abolished by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 59, and a petition for damages in the Divorce Court substituted (see p. 500, *post*).

(*a*) *Berthon* v. *Cartwright* (1796), 2 Esp. 480; *Philp* v. *Squire* (1791), Peake, 114 [82].

(*b*) *Smith* v. *Kaye* (1904), 20 T. L. R. 261.

(*c*) *Dengate* v. *Gardiner* (1838), 4 M. & W. 5 (slander, in consequence of which persons refused to employ the wife: husband held entitled to maintain action for loss of her services); *Masper* v. *Brown* (1875), 1 C. P. D. 97 (assault on wife but, the defendant having been summoned and fined, and paid the fine, it was held that the action was barred by the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 45, providing that in such a case the defendant should be released from all other proceedings, civil or criminal, for the same cause); *Jackson* v. *Watson & Sons*, [1909] 2 K. B. 193, C. A. (death of wife through eating unwholesome food supplied by defendants); *Riding* v. *Smith* (1876), 1 Ex. D. 91 (injury to a tradesman's business in consequence of a slander imputing adultery to his wife, who assisted him in the business. Held sufficient special damage to support an action by the husband). A husband has by presumption of law, an insurable interest in the life of his wife (*Griffiths* v. *Fleming*, [1909] 1 K. B. 805, C. A.). On principle, a wife would seem to have a similar right of action for the loss of the *consortium* of her husband, but there is practically no authority in support of the proposition. In *Lynch* v. *Knight* (1861), 9 H. L. Cas. 577, where a married woman was slandered by words imputing unchastity, it was held that the loss of the *consortium* of the husband was not sufficient special damage to render the action maintainable (as to this, see now the Slander of Women Act, 1891 (54 & 55 Vict. c. 51)), because the loss of *consortium* was not a natural or reasonable consequence of the slander, but Lord CAMPBELL (*Lynch* v. *Knight*, *supra*, at p. 591), expressed the opinion that the action would have been maintainable if the words used had been such that the loss of *consortium* was a natural and reasonable consequence.

(*d*) As to separation by agreement, see *R.* v. *Lister* (1721), 1 Stra. 478, and pp. 439 *et seq.*, *post*.

(*e*) *R.* v. *Bridgnorth Guardians* (1882), 9 Q. B. D. 765. But where a wife, having become insane and chargeable to the union in which the husband resided, was removed with the consent of the husband to his last place of settlement, it was held that the removal did not contravene the policy of the law as to separation of husband and wife and was valid (*R.* v. *Preston Guardians* (1883), 11 Q. B. D. 113). As to place of settlement, see title POOR LAW.

SECT. 2. Right of Consortium.

Separation a void condition to a gift or legacy.

A gift of income to a married woman living with her husband, to be paid only during such time as she should live apart from him, is void as tending to bring about a separation (*f*); and if a condition having the same tendency is attached to a legacy or gift to a married woman, the condition is void as encouraging her to commit a breach of duty, and the legacy or gift will be treated as unconditional (*g*).

SECT. 3.—*Funeral Expenses.*

Liability of husband.

631. A husband is liable for expenses reasonably incurred in respect of the burial of his wife, provided the funeral is one suitable to his condition in life, even though the expenditure is incurred by a mere volunteer without the knowledge of the husband, and though the wife may have been living apart from him without his consent (*h*). The reasonable funeral expenses of burying a deceased wife are necessaries in respect of which an infant husband is competent to contract (*i*).

Where wife leaves separate property.

632. Where a wife dies leaving separate property, of which she disposes by will, or where she exercises a general power of appointment by will, and in either case charges the separate property, or the property so appointed, with the payment of her funeral expenses, the husband is entitled to be repaid out of the property so charged expenditure incurred by him in respect of such expenses (*k*); and if the husband is appointed an executor of her will made in the exercise of a general power of appointment and containing no express charge of the funeral expenses on the property, he is entitled to retain the funeral expenses out of the estate, even though it is insufficient for creditors (*l*).

Widow not liable.

633. A widow is under no obligation to pay the expenses of the

(*f*) *Re Moore, Trafford* v. *Maconochie* (1888), 39 Ch. D. 116, C. A. (gift by will of 50*s*. a week to be paid during such time as the legatee should live apart from her husband, for her maintenance while so living apart. The legatee was living with her husband at the time of the testator's death, but separated from him some time afterwards. Held, that the legacy was void); compare *Re Charleton Bracey* v. *Shirwin*, [1911] W. N. 54).

(*g*) *Wilkinson* v. *Wilkinson* (1871), L. R. 12 Eq. 604 (gift by will of residue to married woman, with a conditional gift over if she did not cease to reside in A., the place where her husband carried on business, within eighteen months of the testator's death. Held, that she took free from the condition).

(*h*) *Jenkins* v. *Tucker* (1788), 1 Hy. Bl. 90 (husband left his wife and went abroad: wife died in his absence: husband held liable to a volunteer who paid the funeral expenses without his knowledge); *Ambrose* v. *Kerrison* (1851), 10 C. B. 776; *Bradshaw* v. *Beard* (1862), 12 C. B. (N. S.) 344 (wife voluntarily left her husband and went to reside with her brother, with whom she remained for many years until her death: the brother, having buried her without communicating with her husband, was held entitled to recover the expense from the husband); *Bertie* v. *Chesterfield* (*Lord*) (1723), 9 Mod. Rep. 31. As to the duty of the personal representative with regard to the funeral generally, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 240.

(*i*) *Chapple* v. *Cooper* (1844), 13 M. & W. 252. As to infants' contracts for necessaries generally, see title INFANTS AND CHILDREN.

(*k*) *Willeter* v. *Dobie* (1856), 2 K. & J. 647; *Gregory* v. *Lockyer* (1821), Madd. & G. 90. It would probably be held at the present day that the separate estate of the deceased wife is primarily liable for her funeral expenses, whether they are charged thereon or not, and although the husband is not appointed executor.

(*l*) *Re M'Myn, Lightbown* v. *M'Myn* (1886), 33 Ch. D. 575; and see title BURIAL AND CREMATION, Vol. III., pp. 406, 407.

burial of her deceased husband, unless she enters into a contract to do so (*m*), but such expenses are considered necessaries, in respect of which she, though an infant, may make a binding contract (*n*). SECT. 3. Funeral Expenses.

Part IV.—Effect of Marriage with regard to Property.

SECT. 1.—*Historical Summary.*

634. By the rules of the common law husband and wife were regarded as one person, the legal existence of the wife during the marriage being regarded as incorporated and consolidated or merged into that of the husband (*o*); and the wife was incapable, with some exceptions of no importance at the present day (*p*), of acquiring or enjoying any property, real or personal, independently of her husband (*q*). At common law.

635. On the other hand, if real or personal property was devised to, or settled on, a married woman in such terms as to show an intention that she should enjoy it separately from her husband, whether with or without the intervention of trustees, effect was given to the intention in equity (*r*); and where no other trustees were appointed, the court gave effect to the intention of the testator or settlor by converting the husband, who had the legal title, into a trustee for the separate use of his wife (*s*). In equity.

636. In 1857 the legislature further modified the common law rules by providing that property acquired during separation by a married woman, who had obtained a decree of judicial separation or a protection order on the ground of desertion, should be separate property of which she should be capable of disposing as a *feme sole* during the separation, and which, in the event of a resumption of cohabitation, should be considered settled for her separate use (*t*). Property acquired during separation.

637. In 1870 it was provided that wages and earnings and property acquired by a married woman in any employment or occupation, or by means of any separate trading, and also any personalty to which she might succeed as the next of kin of an Married Women's Property Act, 1870.

(*m*) If there are executors, the duty of burial is imposed on them (*Williams* v. *Williams* (1882), 20 Ch. D. 659; *Rogers* v. *Price* (1829), 3 Y. & J. 28; *Tugwell* v. *Heyman* (1812), 3 Camp. 298); and see titles BURIAL AND CREMATION, Vol. III., p. 405; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 246 *et seq.*

(*n*) *Chapple* v. *Cooper* (1844), 13 M. & W. 252. See note (*i*), p. 320, *ante*, and generally, title BURIAL AND CREMATION, Vol. III., pp. 406, 407.

(*o*) 1 Bl. Com. 442.

(*p*) *E.g.*, in the case of the husband being an alien enemy (see title ALIENS, Vol. I., pp. 304, 310 *et seq.*), or having been banished or transported.

(*q*) See pp. 322 *et seq.*, *post*.

(*r*) See title EQUITY, Vol. XIII., p. 6.

(*s*) See pp. 341 *et seq.*, *post*.

(*t*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 21, 25, extended by the Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), ss. 6, 8. See pp. 346 *et seq.*, *post*.

SECT. 1. Historical Summary.

intestate, any amount not exceeding £200 to which she might become entitled under any deed or will, and the rents and profits of any realty descending on her as the heiress or co-heiress of an intestate, should be considered as settled to her separate use (*u*). Certain powers of investment in her own name, and of transfer of such investments independently of her husband, were also given to a married woman (*a*), but, generally, the statutory provisions did not affect the legal title to any property, nor give any power to dispose of the legal estate independently of the husband, but only operated to give the wife the equitable interest in the cases to which they applied (*b*).

Married Women's Property Act, 1882.

638. In 1882 the doctrine of the common law with regard to the unity of the person was, with regard to the acquisition, enjoyment, and disposition of property, completely reversed, and a married woman became entitled to hold, acquire, and dispose of the legal as well as the equitable estate or interest in property of every kind, in the same manner as if she were unmarried (*c*).

This provision, however, applies only to women married on or after the 1st January, 1883, or, in the case of women married before that date, to property the title to which accrued thereon or thereafter (*d*). The common law rules, as modified by the principles of equity, and by the statutory provisions previously referred to, therefore continue to apply to the property of women married before the 1st January, 1883, the title to which accrued before that date.

SECT. 2.—*Non-separate Property of Wife.*

SUB-SECT. 1.—*Estates of Inheritance and Life Estates.*

Interest of husband.

639. At common law a husband, by virtue of the marriage, acquires a freehold interest during the joint lives of himself and his wife, in all estates of inheritance and life estates of which she was seised at the time of the marriage, or of which she became seised during the coverture (*e*), and on the birth of issue capable of inheriting, he becomes entitled, in the case of estates of inheritance, to an estate for life as tenant by the curtesy (*f*).

The freehold interest of the husband so acquired may be

(*u*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), ss. 1, 7, 8; repealed by Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 22. See p. 351, *post*.

(*a*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), ss. 2—5; repealed by Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 22. See p. 350, *post*.

(*b*) See p. 351, *post*.

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (1).

(*d*) *Ibid.*, ss. 2, 5. See p. 348, *post*.

(*e*) *Robertson* v. *Norris* (1848), 11 Q. B. 916. The husband and wife are seised at common law of all such estates in the right of the wife (Co. Litt. 67 a; 1 Wms. Saund. 253, n.). Where a wife, who had been separated from her husband for some years, received the rents of real property which had accrued to her by devise after the separation, and applied them to her own use, it was held that she must be presumed to have received them by her husband's authority (*Doe* d. *Leicester* v. *Biggs* (1808), 1 Taunt. 367).

(*f*) See title REAL PROPERTY AND CHATTELS REAL.

conveyed by him alone (*g*), and on his bankruptcy will pass to his trustee in bankruptcy (*h*).

The husband is entitled, in virtue of his interest, to the custody of the title deeds of the property, but it does not follow that this right of custody will pass to his trustee in bankruptcy (*h*).

Waste.

640. Where the wife is a tenant for life impeachable for waste, and waste is committed during the joint lives of the husband and wife, the husband alone, and neither the wife nor her estate, is answerable therefor (*i*); although waste by the husband may cause a forfeiture of his wife's copyholds (*k*).

Copyholds.

641. If a husband grants a lease of his wife's copyholds which is not warranted by the custom of the manor, the forfeiture by reason of the breach of the custom ceases with his life (*l*).

But the wilful non-performance by a husband of services, subject to the performance of which the copyholds of the wife are held, causes a forfeiture which will be operative against the wife surviving, because the performance of the services is a condition attached to the holding of the property (*m*).

Disposition of property.

642. A wife has no power during coverture to devise an estate of inheritance, not being her separate property (*n*), by will, even with the assent of her husband (*o*); and an estate of inheritance or life estate of a married woman, not being separate property (*n*), can only effectively be conveyed or leased by a deed duly acknowledged by her (*p*).

SUB-SECT. 2.—*Chattels Real.*

Chattels real.

643. To chattels real (*i.e.*, terms of years) belonging to a wife at the time of the marriage, or acquired by her during the coverture, the husband has at common law an interest in his wife's right, and the right to receive the rents and profits, with power to

(*g*) *Robertson* v. *Norris* (1848), 11 Q. B. 916.

(*h*) *Re Pyatt, Ex parte Rogers* (1884), 26 Ch. D. 31, C. A. In this case, where a husband, whose wife was tenant for life, became bankrupt, and there was evidence that she was about to apply for a divorce, it was held that the title deeds ought not to be delivered to the trustee in bankruptcy, but retained in court. It was questioned whether, in ordinary circumstances, an assignee of the right to receive the rents during the joint lives of husband and wife, was entitled as of course to the custody of the title deeds, though it was acknowledged that the husband, in right of his interest, was entitled to such custody. As to custody of title deeds generally, see titles REAL PROPERTY AND CHATTELS REAL; SALE OF LAND; SETTLEMENTS; TRUSTS AND TRUSTEES.

(*i*) *Kingham* v. *Lee* (1846), 15 Sim. 396.

(*k*) *Clifton* v. *Molineux* (1585), 4 Co. Rep. 27 a. As to forfeiture of copyholds generally, see title COPYHOLDS, Vol. VIII., pp. 46 *et seq.*

(*l*) *Saverne* v. *Smith* (1625), Cro. Car. 7, Ex. Ch.; as to forfeifure for waste, see the text, *supra.*

(*m*) *Belfield* v. *Adams* (1615), 3 Bulst. 80.

(*n*) As to separate property, see pp. 341, 377 *et seq., post.*

(*o*) *Dye* v. *Dye* (1884), 13 Q. B. D. 147, C. A. (a renunciation by the husband of his marital right is not sufficient to give testamentary power). As to wills of personal estate with the assent of the husband, see title WILLS.

(*p*) See pp. 381 *et seq., post*, and title REAL PROPERTY AND CHATTELS REAL. For form of acknowledgment before a commissioner, see Encyclopædia of Forms and Precedents, Vol. I., p. 217.

SECT. 2. Non-separate Property of Wife.

mortgage (*q*) or alienate them during the coverture (*r*). The wife is entitled to them in the event of her surviving her husband, subject to any alienation he may have made during his lifetime (*s*), and he is entitled to them in his marital right in the event of his surviving her, without taking out letters of administration (*t*).

Testamentary disposition by husband.

The wife's right to her chattels real by survivorship cannot be defeated by the will of the husband, but only by his act *inter vivos* (*u*), but the husband's testamentary disposition, though made during the wife's lifetime, will be effectual in the event of his surviving her (*a*).

Joint tenancy.

644. When the wife is a joint tenant with a third person of a term of years, and the joint tenancy is not severed during the coverture, the right by survivorship of the third person will prevail over that of the husband, marriage not having the effect, of itself, of severing a joint tenancy (*b*).

Equitable interest.

645. The rights of the husband, and his power of alienation, extend to terms of years held in trust for the benefit of the wife, unless they are held in trust for her separate use (*c*).

Reversionary or contingent interests.

They also extend to a reversionary or contingent interest, whether legal or equitable, of the wife in a term of years, if, in the case of a contingent interest, it depends on the happening of an event or events which, or some of which, may happen during the husband's lifetime (*d*), and his assignment will bind the wife

(*q*) As to the effect of a mortgage with respect to defeating the wife's right by survivorship, see *Clark* v. *Burgh* (1845), 2 Coll. 221; *Bates* v. *Dandy* (1741), 2 Atk. 207; *Hill* v. *Edmonds* (1852), 5 De G. & Sm. 603; *Pitt* v. *Pitt* (1823), Turn. & R. 180; *Jackson* v. *Parker* (1770), Amb. 687, and title MORTGAGE.

(*r*) *Incledon* v. *Northcote* (1747), 3 Atk. 430; *Moody* v. *Matthews* (1802), 7 Ves. 174, 183; *Hill* v. *Edmonds* (1852), 5 De G. & Sm. 603. The purchase by a husband of the reversion to his wife's chattels real does not of itself cause a merger (*Hurley* v. *Hurley*, [1910] 1 I. R. 86, C. A.).

(*s*) *Grute* v. *Locroft* (1592), Cro. Eliz. 287 (demise by husband of his wife's term, to commence immediately after his death, held good against the wife surviving); and see Co. Litt. 46 b, 351 a; *Theobalds* v. *Duffoy* (1724), 9 Mod. Rep. 102; *Moody* v. *Matthews*, *supra*; *Hill* v. *Edmonds*, *supra*.

(*t*) *Re Bellamy, Elder* v. *Pearson* (1883), 25 Ch. D. 620 (wife, being entitled to a term subject to a life interest, died before the term vested in possession. Held, that it was not necessary for the husband to take out administration in order to complete his title); *Doe* d. *Roberts* v. *Polgrean* (1791), 1 Hy. Bl. 535; *Moody* v. *Matthews*, *supra*; 1 Roll. Abr. 345, p. 10; Co. Litt. 46 b, 351 a; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 232.

(*u*) As to the husband's dispositions of his wife's leaseholds, see title REAL PROPERTY AND CHATTELS REAL.

(*a*) Co. Litt. 351 a.

(*b*) Co. Litt. 185 b.

(*c*) *Bates* v. *Dandy* (1741), 2 Atk. 207; *Turner's Case* (1681), 1 Vern. 7; *Draper's Case* (1677), Freem. (CH.) 29; *Bullock* v. *Knight* (1675), 1 Cas. in Ch. 266; *Incledon* v. *Northcote*, *supra*; *Clark* v. *Burgh* (1845), 2 Coll. 221. As to separate use, see pp. 341 *et seq.*, *post*.

(*d*) *Re Bellamy, Elder* v. *Pearson*, *supra*; *Doe* d. *Shaw* v. *Steward* (1834), 1 Ad. & El. 300 (bequest of term of years to A. if he should so long continue to inhabit the house, and after his decease or giving up possession or mortgaging the term, to his wife for the remainder of the term so long as she should live there and continue the widow of A. and unmarried. Held, that A. was entitled to assign his wife's contingent interest).

surviving, though the interest may still be contingent at the time of his death (*e*); but the husband cannot assign his wife's contingent reversionary interest if it is of such a nature that it cannot possibly vest in possession during the coverture (*f*).

Subject to charges and equities.

646. The marital right of the husband does not make him a purchaser for valuable consideration, and his right by survivorship to his wife's term of years is subject to all charges and equities affecting the term (*g*).

Creditors may exercise husband's rights

647. The husband's power of alienation of his wife's leaseholds for years may be taken advantage of by his creditors during the coverture (*h*), and will pass to his trustee in bankruptcy (*i*).

SUB-SECT. 3.—*Chattels Personal and Money.*

Common law rights of husband.

648. At common law marriage operated as an absolute gift to the husband of all personal chattels and money belonging to the wife at the time of the marriage, or acquired by her during the coverture (*k*).

Mode of enforcement.

The right of the husband extended to chattels belonging to the wife which at the time of the marriage were in the possession of a third person, and he was entitled to bring an action of trover or detinue for them without joining the wife (*l*); and although he might join the wife as co-plaintiff if he thought fit, a conversion could not be alleged to the damage of both, because the property was considered to be in the husband alone (*m*).

Extent of right.

The husband's right also extended to chattels acquired by the

(*e*) *Donne* v. *Hart* (1831), 2 Russ. & M. 360.

(*f*) *Duberley* v. *Day* (1852), 16 Beav. 33 (gift of leaseholds to the wife in the event of her surviving her husband).

(*g*) *Mcody* v. *Matthews* (1802), 7 Ves. 174 (annuity charged by the wife on the term before marriage. Held to attach on a renewal of the lease by the husband after her death).

(*h*) Co. Litt. 351 a (they may be sold under a writ of *fi. fa.*).

(*i*) *Doe* d. *Shaw* v. *Steward* (1834), 1 Ad. & El. 300; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 157.

(*k*) Co. Litt. 300 a. The husband might waive his interest in his wife's personal estate and empower her to dispose of it by will, but a general assent to her making a will was not sufficient for this purpose. It was necessary to show that he consented to the particular will, and his consent might be revoked at any time during her life, and even after her death before probate (*Willock* v. *Noble* (1875), L. R. 7 H. L. 580; *R.* v. *Bettesworth* (1731), 2 Stra. 891; *Henley* v. *Philips* (1740), 2 Atk. 48; *Brook* v. *Turner* (1676), 1 Mod. Rep. 211). But if the husband after his wife's death acted on the will, or once agreed to it, he was not at liberty subsequently to retract his assent (*In the Goods of Cooper* (1881), 6 P. D. 34; *Maas* v. *Sheffield* (1845), 10 Jur. 417; *Brook* v. *Turner* (1676), 2 Mod. Rep. 170). As to testamentary capacity generally, see title WILLS.

(*l*) *Widgery* v. *Tepper* (1877), 7 Ch. D. 423, C. A. (in this case the wife was entitled to a share in certain engravings in the possession of A. The husband sold her share, subject to a stipulation that six of the engravings should be delivered to him in specie, and received the purchase-money. The husband died while the six engravings were still in the hands of the purchaser. Held, that they formed part of his estate); *Powes* v. *Marshall* (1663), 1 Sid. 172; *Blackborne* v. *Greaves* (1674), 2 Lev. 107. Money on deposit, or on current account at a bank, is, however, a chose in action (*Foley* v. *Hill* (1848), 2 H. L. Cas. 28), as to which, see pp. 326 *et seq.*, *post*.

(*m*) *Nelthrop* v. *Anderson* (1692), 1 Salk. 114.

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wife while living apart from him, unless she had obtained a decree of judicial separation or protection order (*n*), and to the wife's personal earnings, for which he alone could sue, a payment to the wife not operating as a discharge unless she was authorised by the husband to receive payment (*o*).

SUB-SECT. 4.—*Choses in Action.*

Common law rights of husband.

649. Marriage operated at common law as a qualified gift to the husband of his wife's choses in action (*p*), conditional on his reducing them into possession during the coverture (*q*). Equity followed the law in this respect with regard to equitable choses in action not settled to the separate use of the wife (*r*), but subject to her equity to a settlement (*s*).

Rights of survivor.

650. If the husband dies before reducing his wife's choses in action into possession, and she survives, she is entitled to them absolutely (*t*). If, on the other hand, the husband survives the wife, he is entitled to recover all her choses in action not then reduced into possession, on taking out letters of administration (*a*), and although he may die before recovering them, they will form part of his estate (*b*). Where the husband dies before taking out letters of administration, two administrations must be taken out,

(*n*) *Bourne* v. *Fosbrooke* (1865), 18 C. B. (N. S.) 515. As to the effect of a decree of judicial separation or protection order, see p. 346, *post*.

(*o*) *Offley* v. *Clay* (1840), 2 Man. & G. 172; *Dengate* v. *Gardiner* (1838), 4 M. & W. 5; *Buckley* v. *Collier* (1692), 1 Salk. 114. As to choses in action generally, see *infra*.

(*p*) As to what are choses in action, see title CHOSES IN ACTION, Vol. IV., pp. 360 *et seq*.

(*q*) Co. Litt. 351 a.

(*r*) *Osborn* v. *Morgan* (1852), 9 Hare, 432.

(*s*) As to the wife's equity to a settlement, see pp. 334 *et seq*., *post*.

(*t*) Co. Litt. 351 a; *Scawen* v. *Blunt* (1802), 7 Ves. 294; *Langham* v. *Nenny* (1797), 3 Ves. 467; *Fleet* v. *Perrins* (1869), L. R. 4 Q. B. 500, Ex. Ch. (money paid to A. to be appropriated to the wife's use. A. wrote to her that he held the money at her disposal. The husband died, and then the wife. Held, that the wife's representatives were entitled to recover the money from A. as a chose in action not reduced into possession by the husband); *Dalton* v. *Midland Counties Rail. Co.* (1853), 13 C. B. 474, 478 (railway stock registered in wife's name); *Wilkinson* v. *Charlesworth* (1847), 10 Beav. 324 (income of trust fund to which wife entitled for life).

(*a*) As to the husband's right to administer to his wife's estate, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 232. He does not acquire his right under the Statute of Distribution (22 & 23 Car. c. 10), but under the Statute of Frauds (29 Car. 2, c. 3), s. 24, and is not entitled under a limitation or gift to the next of kin of the wife or to persons who would otherwise be entitled under the Statute of Distribution (*Anderson* v. *Dawson* (1808), 15 Ves. 532, 537; *Milne* v. *Gilbart* (1854), 5 De G. M. & G. 510, C. A.; *Proudley* v. *Fielder* (1833), 2 My. & K. 57; *Bailey* v. *Wright* (1811), 18 Ves. 49). Where a wife, being entitled to choses in action, but having no equitable or statutory separate property, made a will without the consent of the husband, and probate was granted, it was held that the executor was a trustee for the husband, the grant of probate not affecting the beneficial title to the property (*Smart* v. *Tranter* (1890), 43 Ch. D. 587, C. A.).

(*b*) *Humphrey* v. *Bullen* (1737), 1 Atk. 458; *Elliot* v. *Collier* (1747), 3 Atk. 526; *Turner* v. *Crane* (1683), 1 Vern. 170; *Grosvenor* v. *Lane* (1741), 2 Atk. 180; *Proudley* v. *Fielder*, *supra*; *Betts* v. *Kimpton* (1831), 2 B. & Ad. 273.

one to the wife's estate and the other to the husband's estate, and double duty be paid accordingly (*c*).

Gift to husband and wife jointly.

651. A gift of the income of personalty to husband and wife jointly operates at common law as a gift to the husband alone (*d*).

Arrears of rent from wife's realty.

Arrears of rent payable in respect of the wife's realty and accruing due during coverture belong to the wife if she survives (*e*), and if the husband survives he may recover them as her administrator (*f*). In the case of a rentcharge in fee, in tail, or for life, the husband surviving may sue or distrain for arrears accruing due during the coverture without taking out letters of administration (*g*).

Joint tenancy.

Marriage does not of itself operate as a severance of a wife's legal or equitable joint tenancy in a chose in action, because the husband merely acquires the right of making the property his by reducing it into possession (*h*).

Reduction into possession.

652. In order to effect a reduction into possession, the husband must do something to change the property in the chose in action—something to divest the right of the wife and make his right absolute (*i*).

Where a fund to which the wife is entitled has not been actually

(*c*) *Partington* v. *A.-G.* (1869), L. R. 4 H. L. 100; and see titles ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 308; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 183.

(*d*) *Re Bryan, Godfrey* v. *Bryan* (1880), 14 Ch. D. 516; *Ward* v. *Ward* (1880), 14 Ch. D. 506.

(*e*) Co. Litt. 351 a; *Browne* v. *Dunnery* (1617), Hob. 208; *Temple* v. *Temple* (1600), Cro. Eliz. 791; *Salwey* v. *Salwey* (1770), Amb. 692.

(*f*) *Brown* v. *Farndell* (1689), Carth. 51.

(*g*) Stat. (1540) 32 Hen. 8, c. 37. The statute does not apply to rents reserved on leases for years (*Turner* v. *Lee* (1637), Cro. Car. 471; *Prescott* v. *Boucher* (1832), 3 B. & Ad. 849).

(*h*) *Re Butler's Trusts, Hughes* v. *Anderson* (1888), 38 Ch. D. 286, C. A., overruling *Baillie* v. *Treharne* (1881), 17 Ch. D. 388. Marriage only operates as a severance of the wife's joint tenancy where it would, of itself, without any act of the husband, divest her property and vest it in him, as in the case of chattels personal in possession.

(*i*) *Nash* v. *Nash* (1817), 2 Madd. 133 (the father of the wife gave her a cheque for £10,000; she took from the bankers a promissory note for the amount, payable on demand, and delivered it to her husband; the money remained at the bank, except as to the sum of £1,000, which was received by the husband; and the husband received interest thereon until the time of his death. Held, that the £9,000 had not been reduced into possession); *Widgery* v. *Tepper* (1877), 7 Ch. D. 423, C. A. (the wife was entitled to a share in certain engravings in the possession of A.; the husband sold her share, subject to a stipulation that six of the engravings should be delivered to him in specie, and received the purchase-money. Held, a reduction into possession of the entire share of the wife, including the six engravings which remained in the hands of the purchaser); *Heath* v. *Lewis, Ex parte Johnson* (1864), 10 Jur. (N. S.) 1093 (inoperative mortgage of fund in court, held not a reduction into possession); *Ryland* v. *Smith* (1836), 1 My. & Cr. 53 (the wife was entitled to stock and cash under a will; the husband wrote to the executors requesting that the stock should be transferred to trustees for the separate use of the wife, and that the cash should be paid to himself; the cash was paid to him and a portion of it was employed in increasing the amount of the stock. The husband became bankrupt and died. Held, that the stock had not been reduced into possession, and the wife was therefore entitled to it by survivorship, but that the assignees in bankruptcy were entitled to that which had been purchased by the husband); and see cases cited in notes, pp. 328, 329, *post*.

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received by the husband, it will not be considered reduced into possession unless the husband has at some time been in a position to assert his right by action for the amount as for money had and received to his use (*k*). A mere appropriation of a fund remaining outstanding in the hands of executors or trustees or other persons liable therefor is not sufficient, although interest thereon may have been paid to the husband (*l*) or to husband and wife jointly (*m*) from time to time.

Transfer of stock etc.

653. The transfer of stock, to which a wife becomes entitled during coverture, into her name (*n*), or the transfer of her stock or shares (*o*), or of a fund in court to which she is entitled (*p*), into the joint names of husband and wife, is not a reduction into possession by the husband. But a transfer into the name of the husband alone, or of some person as agent or trustee for the husband, is a reduction into possession (*q*).

Receipt of the money.

654. The actual receipt by a husband in that character of money due to the wife, or the receipt thereof by an agent, whether authorised by the husband alone or by husband and wife jointly, is a reduction into possession, and an agent so authorised may be sued

(*k*) *Aitchison* v. *Dixon* (1870), L. R. 10 Eq. 589 (A., B., and C. were trustees of a will; B., who was A.'s solicitor, opened an account in the name of "the executor of X." A.'s wife was entitled to a share under the will, for which B. drew a cheque in her name, and the money was invested in a debenture taken in the names of B. & D. as trustees for her. Held, that there had been no reduction into possession by A.); *Parker* v. *Lechmere* (1879), 12 Ch. D. 256 (a cheque for £995 was paid to a wife in respect of a legacy; the husband and wife indorsed the cheque and they went together to the husband's bank, where the wife, with the husband's assent, told the manager to open an account in her name, and credit £800 to that account, and to credit the balance of £195 to the husband's account; the husband never interfered with her account, on which she alone drew cheques. Held, that the £800 was not reduced into possession).

(*l*) *Nash* v. *Nash* (1817), 2 Madd. 133; *Twisden* v. *Wise* (1683), 1 Vern. 161 (money left in hands of trustees); *Blount* v. *Bestland* (1800), 5 Ves. 515 (legacy charged on land; interest paid by the executrix to the husband from time to time as it became due); *Howman* v. *Corie* (1690), 2 Vern. 190 (wife entitled before marriage to a sum charged on her brother's estate; the brother in a marriage settlement covenanted to pay it to the husband, and he received interest thereon from time to time, but died without getting in the principal. Held, not reduced into possession); *Topham* v. *Morecraft* (1858), 8 E. & B. 972 (receipt by husband of a bill of exchange for a portion of a sum due to his wife held not a reduction into possession); *Harwood* v. *Fisher* (1834), 1 Y. & C. (EX.) 110 (agreement to sell to devisees legacy charged on realty, and receipt of interest thereon held not a reduction into possession).

(*m*) *Re Selby, Ex parte Norton* (1856), 8 De G. M. & G. 258, C. A.; and see *Re Bayley's Estate, Ex parte O'Connell* (1863), 16 I. Ch. R. 215.

(*n*) *Wildman* v. *Wildman* (1803), 9 Ves. 174; *Ryland* v. *Smith* (1836), 1 My. & Cr. 53.

(*o*) *Nicholson* v. *Drury Buildings Estate Co.* (1877), 7 Ch. D. 48.

(*p*) *Prole* v. *Soady* (1868), 3 Ch. App. 220.

(*q*) See *Re Jenkins* (1828), 5 Russ. 183, where the husband having been found lunatic, the wife was appointed committee of his person and estate, and stock, which was standing in the name of a trustee for the wife, was under an order of the court transferred to the name of the Accountant-General in the matter of the lunacy, and a portion of it was sold and the proceeds applied in payment of costs. It was held that the stock was reduced into possession, and that the wife was not entitled to it by survivorship. And see *Roche* v. *Roche* (1844), 7 I. Eq. R. 436.

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by the husband alone (*r*). But a deposit of money in the joint names of husband and wife, with a direction by the husband to the depositee to keep it separate from his other moneys (*s*), or the receipt or possession of money by the husband in the character of trustee for the wife (*t*), is not a reduction into possession.

Negotiable instrument.

655. The rule requiring reduction into possession in order to complete the title of a husband applies to bills of exchange, promissory notes and other negotiable instruments, and the mere receipt by the husband of interest thereon is not a reduction into possession (*a*).

But a bill of exchange or promissory note payable to a wife passes by the indorsement of the husband alone, the indorsement operating as a reduction into possession (*b*). No interest in such a bill or note, not being separate property, passes by the wife's indorsement, even if she carries on a separate trade and indorses it for a separate trading debt (*c*), unless the indorsement is made with the authority of the husband (*d*).

Right of husband to sue.

656. A husband cannot sue alone in respect of debts or other choses in action due or belonging to the wife before marriage, but he must join the wife as co-plaintiff (*e*).

(*r*) 1 Roll. Abr. 342, 350; *Rees* v. *Keith* (1840), 11 Sim. 388; *Widgery* v. *Tepper* (1877), 7 Ch. D. 423, C. A. (sale by husband of wife's share in property, and receipt by him of purchase-money); *Re Barber, Dardier* v. *Chapman* (1879), 11 Ch. D. 442 (receipt by an agent appointed by husband and wife of money, part of the estate of an intestate, of which the wife was administratrix. Held, a reduction into possession of her share in the money); *Fleet* v. *Perrins* (1869), L. R. 4 Q. B. 500, 508, Ex. Ch. (if the money is actually received by an agent for the wife, or is paid into a bank used by husband and wife, so that the receipt is that of the wife, that is *primâ facie* a reduction into possession, because her receipt is *primâ facie* a receipt by the husband); *Doswell* v. *Earle* (1806), 12 Ves. 473. In *Rogers* v. *Bolton* (1880), 8 L. R. Ir. 69, it was held that the receipt by a wife without her husband's authority of a debt contracted with her before marriage operated as a reduction into possession.

(*s*) *Scrutton* v. *Pattillo* (1875), L. R. 19 Eq. 369.

(*t*) *Baker* v. *Hall* (1806), 12 Ves. 497, where a trustee and executor married one of the residuary legatees; *Wall* v. *Tomlinson* (1810), 16 Ves. 413. As to where the husband, being an executor, is indebted to the estate in which his wife is beneficially interested, see *Re Briant, Poulter* v. *Shackel* (1888), 39 Ch. D. 471, and *Knight* v. *Knight* (1874), L. R. 18 Eq. 487.

(*a*) *Hart* v. *Stephens* (1845), 6 Q. B. 937 (husband received interest during his wife's life on a promissory note belonging to her before marriage. Held, not a reduction into possession, and that the payments of interest for the purpose of the Statute of Limitations must be considered as having been made to the husband as the wife's agent); *Gaters* v. *Madeley* (1840), 6 M. & W. 423 (promissory note received by wife during coverture); *Howard* v. *Oakes* (1848), 3 Exch. 136; *Richards* v. *Richards* (1831), 2 B. & Ad. 447; *Scarpellini* v. *Atcheson* (1845), 7 Q. B. 864; *M'Neilage* v. *Holloway* (1818), 1 B. & Ald. 218. For the general law relating to negotiable instruments, see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 457 *et seq.*

(*b*) *Mason* v. *Morgan* (1834), 2 Ad. & El. 30.

(*c*) *Barlow* v. *Bishop* (1801), 1 East, 432; and see *Scarpellini* v. *Atcheson, supra.* Since 1870, however, all property acquired by means of separate trading by the wife is her separate property; see p. 350, *post.*

(*d*) *Prestwick* v. *Marshall* (1831), 7 Bing. 565; *Prince* v. *Brunatte* (1834), 1 Bing. (N. C.) 435; *Cotes* v. *Davis* (1808), 1 Camp. 485.

(*e*) *Hardy* v. *Robinson* (1663), 1 Keb. 440; *Tirell* v. *Bennet* (1666), 2 Keb. 89; *Milner* v. *Milnes* (1790), 3 Term Rep. 627; *Rumsey* v. *George* (1813), 1 M. & S.

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But he may sue alone for the recovery of choses in action accruing to the wife, and in respect of all covenants and contracts entered into with her, during the marriage (*f*), and also for arrears of rent reserved on a lease of the wife's estate (*g*).

In an action on a contract during coverture, where the consideration moves wholly or partly from the wife, the husband may, if he thinks fit, instead of suing alone, give her an interest by joining her as co-plaintiff (*h*); and where money is received for the use of the wife in virtue of a joint authority given by husband and wife, they may sue for it jointly, and in such case the defendant is not entitled to set off a debt due to him from the husband (*i*). Husband and wife may also sue jointly for the dividends on stock of which she is the registered proprietor (*k*).

Survival to wife of benefit of judgment.

657. Where a wife is a party to an action for the recovery of her non-separate chose in action, and the husband dies after obtaining judgment but before execution, the benefit of the judgment survives to the wife (*l*). But if the action is brought by the husband alone, and he dies after obtaining judgment, that is a reduction into possession, and his representatives are entitled as against the wife surviving (*l*).

Similarly, a decree in a joint suit by husband and wife in equity is not a reduction into possession, and the wife is entitled to the benefit of the decree if the husband dies before further proceedings are taken (*m*), except where by the decree the money is ordered to be paid to the husband (*n*) or applied to his use (*o*).

176; *Sherrington* v. *Yates* (1844), 12 M. & W. 855, Ex. Ch. (promissory note); *Bates* v. *Dandy* (1741), 2 Atk. 207 (bond). *M'Neilage* v. *Holloway* (1818), 1 B. & Ald. 218, and *Re Shaw, Ex parte Barker* (1821), 1 Gl. & J. 1, to the contrary, must be considered not to be law. As to the position of the husband's trustee in bankruptcy, see p. 331, *post*.

(*f*) *Hilliard* v. *Hambridge* (1648), Aleyn, 36; *Ankerstein* v. *Clarke* (1792), 4 Term Rep. 616; *Philliskirk* v. *Pluckwell* (1814), 2 M. & S. 393; *Coppin* v. —— (1728), 2 P. Wms. 497; *Day* v. *Padrone* (1740), 2 M. & S. 396, n.; *Howell* v. *Maine* (1694), 3 Lev. 403; *Bret* v. *Cumberland* (1616), Cro. Jac. 399; *Tregmiell* v. *Reeve* (1636), Cro. Car. 437; *Bates* v. *Dandy, supra; Howard* v. *Oakes* (1848), 3 Exch. 136.

(*g*) *Beaver* v. *Lane* (1677), 2 Mod. Rep. 217.

(*h*) As, for instance, in an action on a covenant concerning her land (*Aleberry* v. *Walby* (1719), 1 Stra. 229; *Dunston* v. *Burwell* (1748), 1 Wils. 224), or on a bond or note given to her (*Howard* v. *Oakes* (1848), 3 Exch. 136; *Philliskirk* v. *Pluckwell, supra*), or a contract in consideration of her services (*Brashford* v. *Buckingham* (1608), Cro. Jac. 77, 205; *Fountain* v. *Smith* (1659), 2 Sid. 128), if the promise is made to her (*Buckley* v. *Collier* (1692), 1 Salk. 114; *King* v. *Basingham* (1723), 8 Mod. Rep. 199). But not where the only consideration is money paid by her, because the money must necessarily be her husband's (*Abbot* v. *Blofield* (1622), Cro. Jac. 644).

(*i*) *Jones* v. *Cuthbertson* (1873), L. R. 8 Q. B. 504, Ex. Ch.

(*k*) *Dalton* v. *Midland Counties Rail. Co.* (1853), 13 C. B. 474.

(*l*) *Oglander* v. *Baston* (1686), 1 Vern. 396.

(*m*) *Nanney* v. *Martin* (1663), 1 Cas. in Ch. 27; *Bond* v. *Simmons* (1744), 3 Atk. 20; *Macaulay* v. *Philips* (1798), 4 Ves. 15; *Murray* v. *Elibank* (*Lord*) (1804), 10 Ves. 84, 91; *Johnson* v. *Johnson* (1820), 1 Jac. & W. 472.

(*n*) *Heygate* v. *Annesley* (1791), 3 Bro. C. C. 362.

(*o*) *Packer* v. *Wyndham* (1715), Prec. Ch. 412; *Tidd* v. *Lister* (1854), 3 De G. M. & G. 857 (income of wife's life estate ordered to be received by a receiver and applied in payment of her husband's debts. Held, that arrears in the hands

If a dispute with reference to a wife's chose in action is referred to arbitration, an award that the money shall be paid to the husband is a reduction into possession (*p*).

Release by husband.

658. A husband may release his wife's non-separate choses in action, whether legal or equitable, and whether accruing to the wife before or during the marriage, not being reversionary interests, so as to bind the wife on her surviving him (*q*).

Bankruptcy of husband.

659. The bankruptcy of a husband does not of itself operate as a reduction into possession of his wife's choses in action (*r*), and the trustee in bankruptcy acquires no further or better right in respect thereof than belonged to the husband (*s*). If, therefore, the husband dies before a reduction into possession by the trustee, the wife is entitled by survivorship as against him (*t*). The husband's trustee in bankruptcy cannot sue alone in respect of a debt due to the wife before marriage (*a*).

In respect of all non-separate choses in action other than those completely assignable at law, such as money in the funds, stock, or shares in companies, or a debt secured by a mortgage of a term of years, the trustee in bankruptcy of the husband takes subject to the wife's equity to a settlement (*b*).

Assignment by husband: choses assignable at law.

660. A husband may transfer money in the funds standing in his wife's name (*c*), or assign a mortgage for a term of years vested in her (*d*), or indorse and negotiate bills of exchange, promissory notes, or other negotiable instruments payable to her (*e*) : the transfer or assignment in such cases being complete at law operates as a reduction into possession by the husband.

A husband has no power to assign a debt secured by a mortgage in fee to the wife, because the estate, not being assignable by him, continues in the wife, and carries to her, on her surviving him, the money secured thereby with it (*f*).

When a chose in action of the wife, completely assignable at law,

of the receiver not paid away were reduced into possession by the effect of the order).

(*p*) *Oglander* v. *Baston* (1686), 1 Vern. 396.

(*q*) *Morton* v. *Hopkins* (1569), 3 Dyer, 271 a; *Bates* v. *Dandy* (1741), 2 Atk. 207 (bond debt); 2 Roll. Abr. 410; Gilb. 88 (legacies bequeathed to wife); *Hore* v. *Becher* (1842), 12 Sim. 465 (amount secured by bond before marriage).

(*r*) *Mitford* v. *Mitford* (1803), 9 Ves. 87; *Parker* v. *Dykes* (1698), 1 Eq. Cas. Abr. 54; *Gayer* v. *Wilkinson* (1773), 1 Bro. C. C. 50, n.

(*s*) *Ex parte Coysegame* (1754), 1 Atk. 192.

(*t*) *Pierce* v. *Thornely* (1828), 2 Sim. 167, where the husband died pending proceedings by the trustee for the recovery of a legacy to which the wife was entitled.

(*a*) *Sherrington* v. *Yates* (1844), 12 M. & W. 855, Ex. Ch. (promissory note given to the wife before marriage). Whether the trustee in bankruptcy can sue jointly with the wife in such a case, *quære* (*ibid.*). As to the powers of the husband to sue, see p. 329, *ante*.

(*b*) See pp. 334 *et seq.*, *post*.

(*c*) *Pringle* v. *Hodgson* (1798), 3 Ves. 617; *Wildman* v. *Wildman* (1803), 9 Ves. 174, 177.

(*d*) As to the power of the husband to assign chattels real vested in the wife, see p. 324, *ante*.

(*e*) See p. 329, *ante*.

(*f*) *Packer* v. *Wyndham* (1715), Prec. Ch. 412, 418.

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is mortgaged by the husband, that is only a reduction into possession to the extent of the mortgage debt, even if the equity of redemption is reserved to himself (*g*).

Choses only assignable in equity.

661. In the case of equitable choses in action, and such legal choses as are not assignable at law independently of the Judicature Act, 1873 (*h*), an assignment by the husband does not bind the wife unless it is for valuable consideration (*i*), and the chose in action is immediately recoverable (*k*), while in any case the assignee takes subject to the wife's equity to a settlement (*l*). An assignment by way of equitable mortgage is effectual, but only to the extent of the mortgage debt (*m*).

Reversionary choses in action.

662. A husband is not entitled to receive or give a discharge for a reversionary chose in action of his wife until it falls into possession (*n*).

If it becomes due, and is reduced into possession by the husband, during the coverture, he is entitled to it as in the case of other choses in action; on the other hand, if it does not become payable, or is not reduced into possession, during the husband's lifetime, the wife surviving him is entitled to it (*o*).

Where the wife is entitled to such an interest in personalty, and dies while it is still reversionary, leaving the husband surviving, he is entitled to it on taking out letters of administration, and the right in the event of his bankruptcy will pass to the trustee in bankruptcy, whose title is not affected by the circumstance that the bankrupt dies before the fund is reduced into possession by the trustee (*p*).

How far assignable.

663. A husband cannot assign or mortgage a contingent or reversionary chose in action of his wife which is so limited that it cannot by any possibility vest in possession before his death, so as to defeat her right by survivorship (*q*), even with her consent (*r*), otherwise than by deed acknowledged by her (*s*).

(*g*) *Pigott* v. *Pigott* (1867), L. R. 4 Eq. 549 (mortgage of land tax; wife surviving, held entitled, subject to the mortgage).

(*h*) 36 & 37 Vict. c. 66, s. 25 (6). An assignee under this statute takes subject to all equities.

(*i*) *Bates* v. *Dandy* (1741), 2 Atk. 207; *Wright* v. *Rutter* (1795), 2 Ves. 673; *Johnson* v. *Johnson* (1820), 1 Jac. & W. 472; *Stamper* v. *Barker* (1820), 5 Madd. 157.

(*k*) *Bates* v. *Dandy*, *supra*; *Salisbury* (*Earl*) v. *Newton* (1759), 1 Eden, 370. As to reversionary choses in action, see p. 333, *post*.

(*l*) *Blount* v. *Bestland* (1800), 5 Ves. 515; see pp. 334 *et seq.*, *post*.

(*m*) *Bates* v. *Dandy*, *supra*.

(*n*) *Harley* v. *Harley* (1852), 10 Hare, 325. Trust to pay the interest of residue of personalty to the wife for five years, and then to pay her the capital. Held, that the husband was not entitled to receive the capital, and was unable to give a discharge therefor, during the five years.

(*o*) *Purdew* v. *Jackson* (1824), 1 Russ. 1.

(*p*) *Drew* v. *Long* (1853), 22 L. J. (CH.) 717.

(*q*) *Belcher* v. *Hudson* (1609), Cro. Jac. 222; *Gage* (*or Gray*) v. *Acton* (1700), 1 Salk. 325; *Dalbiac* v. *Dalbiac* (1809), 16 Ves. 116, 122.

(*r*) *Richards* v. *Chambers*, *Seaman* v. *Duill* (1805), 10 Ves. 580; *Lee* v. *Muggeridge* (1812), 1 Ves. & B. 118; *Fraser* v. *Baillie* (1780), 1 Bro. C. C. 518. An assurance policy on the life of the husband is a reversionary chose in action which can only effectively be assigned by a deed acknowledged (*Re Turner*, *Turner* v. *Fitzroy* (1892), 66 L. T. 758).

(*s*) As to assignment by deed acknowledged, see p. 381, *post*.

If the chose in action is one which may fall into possession during the coverture, the husband may assign it for valuable consideration so as to place the assignee in as favourable a position as, but not more favourable than, himself (*t*). If, therefore, the chose in action does not become recoverable during the husband's lifetime, the assignment will not defeat the wife's right by survivorship (*u*); and even if it does become recoverable during the husband's lifetime, the wife's right by survivorship will not be defeated unless the assignee also reduces it into possession before the husband's death (*a*).

Wife joining in assignment.

664. A wife has no power, even by consent in open court, to dispose of her reversionary choses in action otherwise than by deed acknowledged (*b*), and the fact that she joins in an assignment by the husband in any other form does not preclude her from asserting her right by survivorship against the assignee, or from otherwise altering the effect of the assignment (*c*).

Release.

A release by the husband, or by husband and wife, of the wife's reversionary choses in action is as inoperative as an assignment against her right by survivorship (*d*).

Wife's will.

A wife cannot, even with the assent of her husband, dispose of her non-separate reversionary choses in action by will (*e*).

Compromise.

665. The court may sanction a *bonâ fide* compromise of a suit relating to a fund in which a married woman has a reversionary interest (*f*).

(*t*) *Ellison* v. *Elwin* (1843), 13 Sim. 309; *La Vasseur* v. *Scratton* (1844), 14 Sim. 116; *Re Insole* (1865), L. R. 1 Eq. 470.

(*u*) *Purdew* v. *Jackson* (1824), 1 Russ. 1; *Honner* v. *Morton* (1828), 3 Russ. 65.

(*a*) *Prole* v. *Soady* (1868), 3 Ch. App. 220 (stop order on fund in favour of mortgagee is not a reduction into possession); *Ashby* v. *Ashby* (1844), 1 Coll. 549, 553; *Ellison* v. *Elwin*, *supra*; *La Vasseur* v. *Scratton*, *supra*; *Borton* v. *Borton* (1849), 16 Sim. 552.

(*b*) As to assignment by deed acknowledged, see p. 381, *post*.

(*c*) *Re Elcom*, *Layborn* v. *Grover Wright*, [1894] 1 Ch. 303, C. A.; *Re Insole* (1865), L. R. 1 Eq. 470; *Re Emery's Trusts* (1884), 50 L. T. 197 (a mortgage by husband and wife of her non-separate reversionary chose in action, otherwise than by deed acknowledged, is only effectual as a mortgage of the husband's interest); *Re Turner*, *Turner* v. *Fitzroy* (1892), 66 L. T. 758 (two life policies were assigned by a husband in trust for his wife, her executors, administrators and assigns, absolutely. In 1883 husband and wife purported to revoke the trusts, and to resettle the policies on the wife during widowhood, with remainder to the children. In 1888 the husband died, and in 1891 the widow married again. Held, that the deed of resettlement was inoperative to defeat the wife's right by survivorship, and that the mere fact of her receiving the income of the policy moneys was not an election to confirm the resettlement, and that she was entitled to the proceeds absolutely); *Stiffe* v. *Everitt* (1836), 1 My. & Cr. 37 (husband cannot assign wife's life interest in a fund, even with her concurrence, otherwise than by deed acknowledged, but can only dispose of her interest during the coverture); *Prole* v. *Soady*, *supra* (mortgage of fund by husband and wife jointly); *Purdew* v. *Jackson*, *supra*; *Honner* v. *Morton*, *supra*; *Whittle* v. *Henning* (1848), 2 Ph. 731; *Borton* v. *Borton*, *supra*; *Box* v. *Box* (1843), 1 Drury *temp.* Sug. 42.

(*d*) *Rogers* v. *Acaster* (1851), 14 Beav. 445.

(*e*) *Willock* v. *Noble* (1875), L. R. 7 H. L. 580.

(*f*) *Wall* v. *Rogers*, *Wall* v. *Ogle* (1869), L. R. 9 Eq. 58 (action against trustee for breach of trust in relation to the fund in which the wife was interested).

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Effect of divorce.

Judicial separation.

Protection order.

666. On a dissolution of marriage the wife is entitled absolutely to all her choses in action which have not then been reduced into possession by the husband or by his assignee or mortgagee (*g*). For this purpose the decree of dissolution dates from the decree *nisi* (*h*).

On a decree of judicial separation, any chose in action, not reduced into possession at the date of the decree, which falls into possession while the separation continues, becomes the absolute property of the wife as if she were a *feme sole* (*i*).

A protection order on the ground of desertion has the same effect with respect to the wife's choses in action not reduced into possession at the date of the desertion, to which the protection order dates back, as a decree of judicial separation (*k*).

SUB-SECT. 5.—*Equity to a Settlement.*

When the equity arises.

667. Whenever it is necessary for the husband or his assignee to apply to a court of equity to enable him to recover the wife's

(*g*) *Wells* v. *Malbon* (1862), 31 Beav. 48 (share of residue to which wife entitled not received at date of dissolution); *Swift* v. *Wenman* (1870), L. R. 10 Eq. 15; *Heath* v. *Lewis, Ex parte Johnson* (1864), 4 Giff. 665 (fund in court; colonial divorce at suit of husband. Held, wife entitled as against a mortgagee of the husband); *Wilkinson* v. *Gibson* (1867), L. R. 4 Eq. 162 (reversionary interest in stock: after the decree of dissolution the interest fell into possession, and she took steps to realise, but died before the fund was recovered. Held, that all rights of the husband depending on the marriage ceased at its dissolution, and that the wife's executors were entitled to the stock). See also *Codrington* v. *Lindsay* (1873), 8 Ch. App. 578.

(*h*) *Prole* v. *Soady* (1868), 3 Ch. App. 220 (wife had a reversionary interest in a fund in court; husband and wife joined in mortgage of her interest, the deed not being acknowledged; an order for payment to the mortgagee was made between decree *nisi* and decree absolute. Held, that the wife was entitled as against the mortgagee, the order for payment being inoperative). As to dissolution of marriage generally, see pp. 473 *et seq.*, *post*.

(*i*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 25; Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 8; *Re Ford* (1863), 32 Beav. 621; *Johnson* v. *Lander* (1869), L. R. 7 Eq. 228; *Re Insole* (1856), L. R. 1 Eq. 470 (wife joined husband in mortgaging reversionary interest, the deed not being acknowledged; the interest fell into possession after she had obtained a decree of judicial separation, and while she was still living apart. Held, that she was entitled as against the mortgagee). As to judicial separation generally, see p. 500, *post*.

(*k*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21; Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), ss. 8, 9; *Re Emery's Trusts* (1884), 50 L. T. 197 (wife entitled to two funds subject to life interests; they were mortgaged by husband and wife by deed not acknowledged; the tenant for life of one fund died, and the wife obtained a protection order before reduction into possession; husband and wife subsequently resumed cohabitation, and then the other tenant for life died. Held, that both funds belonged to the wife as a *feme sole* during the separation, and that she was entitled as against the mortgagees); *Re Coward and Adam's Purchase* (1875), L. R. 20 Eq. 179 (legacy charged on realty not reduced into possession at the time of the desertion); *Nicholson* v. *Drury Buildings Estate Co.* (1877), 7 Ch. D. 48 (wife's shares transferred to joint names of husband and wife, with her assent; in 1874 she obtained a protection order; in 1876 the company went into voluntary liquidation, and the liquidator sent a notice to husband and wife proposing to refund £900 in respect of the shares. Held, that the wife was entitled to the money as accruing to her after the desertion, the transfer into the joint names not being a reduction into possession). On application by a married woman who has obtained a protection order, suing as a *feme sole*, for payment out of a fund in court, the court will require evidence that the separation is a continuing one, and that no settlement has been made, but her affidavit on these points will be sufficient (*Ewart* v. *Chubb* (1875), L. R. 20 Eq. 454).

SECT. 2. Non-separate Property of Wife.

property, the court may stipulate, as the consideration for lending its assistance, that a proper provision shall be made out of the property for the wife and children (*l*). This right to a provision is known as the wife's equity to a settlement, and is based on the maxim that "he who comes into equity must do equity" (*m*). Its existence depends on the law of the domicil of the parties (*n*), and it has no application to the equitable or statutory separate property of a married woman (*o*).

Out of what property.

668. A wife has no equity to a settlement out of property which can be recovered by the husband or his assignees at law, without the assistance of a court of equity (*p*), except where the property, though in its nature legal, becomes from collateral circumstances the subject of a suit in equity (*q*). Her equity, for instance, is not available as against a legal mortgagee of her chattels real (*r*), nor as against the husband or his trustee in bankruptcy in respect of a debt secured by a mortgage of a term of years (*s*).

But the equity to a settlement attaches to all unsettled equitable estates and interests (*t*), whether the title of the wife accrued before or after the marriage (*a*), and also to legal interests for the recovery of which proceedings in a court of equity may, in the circumstances, be necessary (*b*).

A settlement of a portion of the property does not deprive the wife of her equity to a settlement as regards the residue (*a*), and

(*l*) *Oxenden* v. *Oxenden* (1705), 2 Vern. 493; *Sturgis* v. *Champneys* (1839), 5 My. & Cr. 97; *Clark* v. *Cook* (1849), 3 De G. & Sm. 333.

(*m*) *Warren* v. *Newton* (1844), 7 I. Eq. R. 211; see title EQUITY, Vol. XIII., p. 70.

(*n*) *Re Marsland* (1886), 55 L. J. (CH.) 581.

(*o*) See pp. 341 *et seq.*, *post.*

(*p*) *Bosvil* v. *Brander* (1718), 1 P. Wms. 458. See pp. 325, 329, 330, *ante.* The right depends on the control which courts of equity exercise over property falling under their domination.

(*q*) *Re Hearn, Ex parte Blagden* (1815), 2 Rose, 249; *Oswell* v. *Probert* (1795), 2 Ves. 680 (fund arising from real estate sold under a decree, the wife's interest in the estate being legal, but it being necessary to come into equity to get the benefit); *Boxall* v. *Boxall* (1884), 27 Ch. D. 220, where the wife sold her leaseholds for years and the husband took proceedings in equity to set aside the sale; *Osborn* v. *Morgan* (1852), 9 Hare, 432 (reversionary interest); *Freeman* v. *Fairlie* (1847), 11 Jur. 447 (rent of realty, the subject of a Chancery suit, paid into court).

(*r*) *Hill* v. *Edmonds* (1852), 5 De G. & Sm. 603; *Hatchell* v. *Eggleso* (1851), 1 I. Ch. R. 215.

(*s*) *Bosvil* v. *Brander* (1718), 1 P. Wms. 458 (debt secured by mortgage of a term of years; no equity to settlement against husband's assignees in bankruptcy); and see pp. 324, 331, *ante.*

(*t*) *Barnes* v. *Robinson* (1863), 9 Jur. (N. S.) 245 (equitable life interest in realty); *Gleaves* v. *Paine* (1863), 1 De G. J. & Sm. 87 (equity of redemption of mortgaged property); *Wortham* v. *Pemberton, Newenham* v. *Pemberton* (1847), 1 De G. & Sm. 644 (tenancy in tail in possession subject to a jointure term is equitable for this purpose during the term); *Ruffles* v. *Alston* (1875), L. R. 19 Eq. 539 (debt secured by promissory note of the wife's brother, who had constituted himself a trustee of the debt); *Elibank (Lady)* v. *Montolieu* (1801), 5 Ves. 737 (share as next of kin of intestate); *Hanson* v. *Keating* (1844), 4 Hare, 1.

(*a*) *Barrow* v. *Barrow* (1854), 18 Beav. 529.

(*b*) See note (*q*), *supra.*

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she has the same equity in respect of a life interest as of an absolute interest (*c*). The equity attaches to sums however small (*d*).

A wife has no equity to a settlement out of personalty given to or in trust for her and her husband jointly, because, owing to the common law doctrine of the unity of the person, the husband takes the whole, equity in this respect following the law in the absence of a trust for the separate use of the wife (*e*).

How enforceable.

669. It is not necessary for the wife to wait until proceedings are taken by the husband or his assignees before claiming her equity to a settlement. Where the property is purely equitable, or it is clear that proceedings in equity will be necessary to recover it, the right of the wife may be enforced at her own suit (*f*).

An immediate order for giving effect to the equity to a settlement may be made in an administration action, although the fund in which the wife is interested is not distributable until further consideration, and the amount of her share has not been ascertained (*g*).

Cannot be prejudiced by set-off.

670. An executor or administrator cannot retain or set off a debt due from the husband to the prejudice of the wife's equity to a settlement (*h*).

Rights of children.

671. The equity to a settlement is so far personal to the wife that the children have no independent claim (*i*), and if she dies without asserting her equity, the children cannot set it up against the husband surviving (*k*).

A claim, however, by the wife must be made for the benefit of the children (*l*) as well as herself, and if, on a claim being made by her, the matter is referred to the master for report, the children are entitled to the benefit of the decree, although the wife dies before the report is made (*m*). So, if, on a claim being made by the wife,

(*c*) *Taunton* v. *Morris* (1879), 11 Ch. D. 779, C. A.; *Steed* v. *Calley* (1833), 2 My. & K. 52; *Gilchrist* v. *Cator* (1847), 1 De G. & Sm. 188; *Gardner* v. *Marshall* (1845), 14 Sim. 575.

(*d*) *Re Kincaid* (1853), 1 Drew. 326.

(*e*) *Re Bryan, Godfrey* v. *Bryan* (1880), 14 Ch. D. 516; *Atcheson* v. *Atcheson* (1849), 11 Beav. 485; *Ward* v. *Ward* (1880), 14 Ch. D. 506.

(*f*) *Elibank* (*Lady*) v. *Montolieu* (1801), 5 Ves. 737 (bill by wife as next of kin against her husband and the administrator); *Osborn* v. *Morgan* (1852), 9 Hare, 432 (suit by wife in respect of reversionary interest); *Barnes* v. *Robinson* (1863), 9 Jur. (N. S.) 245.

(*g*) *Re Robinson's Settled Estate, Robinson* v. *Robinson* (1879), 12 Ch. D. 188 (petition for equity to settlement after judgment and before further consideration).

(*h*) *Elibank* (*Lady*) v. *Montolieu, supra*; *Carr* v. *Taylor* (1805), 10 Ves. 574; *Re Cordwell's Estate, White* v. *Cordwell* (1875), L. R. 20 Eq. 644; *Re Briant, Poulter* v. *Shackel* (1888), 39 Ch. D. 471; questioning *Knight* v. *Knight* (1874), L. R. 18 Eq. 487, *contra*, where the husband was sole executor, and largely indebted to the estate. As to retainer and set-off by personal representatives, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 256, 328.

(*i*) *Hodgens* v. *Hodgens* (1837), 4 Cl. & Fin. 323, H. L.

(*k*) *Scriven* v. *Tapley* (1765), 2 Eden, 337; *Murray* v. *Elibank* (*Lord*) (1806), 13 Ves. 1; *Lloyd* v. *Williams* (1816), 1 Madd. 450.

(*l*) Including her children by a former marriage (*Conington* v. *Gilliat*, [1876] W. N. 275).

(*m*) *Groves* v. *Perkins* (1834), 6 Sim. 576, 584; *Groves* v. *Clarke* (1836), 1 Keen, 132.

the terms of a settlement are agreed upon by counsel for the parties, the children are entitled to the benefit of the compromise, and to have the agreement carried out, although the wife dies before any further steps are taken (*n*).

But the children have no claim except under a contract or decree in the wife's lifetime (*o*), and should the husband have died pending the proceedings, and before the settlement is made, they have no equity as against the wife's right by survivorship (*p*).

Although an order for a settlement is made, the wife may subsequently waive the benefit of it, so as to deprive the children, by giving her consent in open court (*q*); but after claiming her equity as against the trustee in bankruptcy of the husband, she cannot afterwards release it, in favour of her husband, so as to deprive the children of the benefit (*r*). Unless in such case she waives the equity in favour of the trustee in bankruptcy, it attaches unalterably for the benefit of the children (*r*).

Terms of settlement.

672. The proportion of the property to be settled on the wife and children is a matter of judicial discretion, to be determined according to the circumstances of each particular case (*s*).

In the absence of special circumstances, the general rule is to settle one-half on the wife and children, with an ultimate remainder, in default of children, to the husband (*t*).

The court will not, as a general rule, interfere with the husband's right by survivorship in default of children (*u*).

All the circumstances are, however, to be taken into consideration (*s*); and, in particular, the insolvency of the husband; his desertion, cruelty, or adultery; whether he contributes to the wife's support or not; whether there has been any previous settlement; and what property of the wife he has already had, are all matters which are considered material (*a*).

(*n*) *Lloyd* v. *Mason* (1845), 5 Hare, 149.

(*o*) *Wallace* v. *Auldjo* (1863), 2 Drew. & Sm. 216 (bill filed, and wife died before any further step taken); *De la Garde* v. *Lemprière* (1843), 6 Beav. 344 (wife legatee; bill for administration, but no claim to equity to a settlement); *Baker* v. *Bayldon* (1848), 8 Hare, 210 (wife defendant in suit for administration; died before putting in answer).

(*p*) *Johnson* v. *Johnson* (1820), 1 Jac. & W. 472.

(*q*) *Lloyd* v. *Williams*, (1816), 1 Madd. 450, 467.

(*r*) *Barker* v. *Lea* (1822), Madd. & G. 330.

(*s*) *Re Briant, Poulter* v. *Shackel* (1888), 39 Ch. D. 471; *Taunton* v. *Morris* (1879), 11 Ch. D. 779, C. A.; *Barrow* v. *Barrow* (1854), 18 Beav. 529; *Re Erskine's Trust* (1855), 1 K. & J. 302; *Green* v. *Otte* (1823), 1 Sim. & St. 250. And see note (*a*), *infra*. As to wards of court marrying without leave of the court, see title INFANTS AND CHILDREN.

(*t*) *Roberts* v. *Cooper*, [1891] 2 Ch. 335, C. A.; *Spirett* v. *Willows* (1866), 1 Ch. App. 520; *Marshall* v. *Gibbings* (1855), 4 I. Ch. R. 276; *Barrow* v. *Barrow, supra; Jewson* v. *Moulson* (1742), 2 Atk. 417; *Brown* v. *Clark* (1796), 3 Ves. 166; *Pringle* v. *Hodgson* (1798), 3 Ves. 617, 620; *Steinmetz* v. *Halthin* (1820), 1 Gl. & J. 64; *Re Gordon, Ex parte O'Ferrall* (1822), 1 Gl. & J. 347.

(*u*) *Re Suggitt's Trusts* (1868), 3 Ch. App. 215; *Spirett* v. *Willows, supra*.

(*a*) In the following cases, the husband being insolvent, the whole was settled on the wife and children against him and his assignees in bankruptcy:—*Taunton* v. *Morris, supra; Newman* v. *Wilson* (No. 2) (1862), 31 Beav. 34; *Re Howard, Howard* v. *Howard* (1894), 13 R. 233; *Squires* v. *Ashford* (1856),

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The whole of the property may be settled on the wife and children where the husband has been guilty of gross misconduct, such as desertion, cruelty or adultery, or if he is insolvent (*b*), but, except in such cases, the court will not, as a general rule, settle the whole away from the husband (*c*).

Settlement by agreement.

673. A settlement by agreement between the husband and wife will be supported by the court against the creditors of the husband if it be such a settlement as the court would have decreed (*d*).

Income.

674. The income of the wife's property, or a portion thereof, may be ordered to be paid to her or settled to her separate use,

23 Beav. 132; *Scott* v. *Spashett* (1851), 3 Mac. & G. 599; *Brett* v. *Greenwell* (1838), 3 Y. & C. (EX.) 230; *Gardner* v. *Marshall* (1845), 14 Sim. 575; *Smith* v. *Smith* (1861), 3 Giff. 121; *Francis* v. *Brooking* (1854), 19 Beav. 347; *Dunkley* v. *Dunkley* (1852), 2 De G. M. & G. 390; *Watson* v. *Marshall* (1853), 17 Beav. 363; *Gleaves* v. *Paine* (1863), 1 De G. J. & Sm. 87. See also *Re Townsend's Settlement Trusts* (1879), 41 L. T. 19; *Re Cutler* (1851), 14 Beav. 220; *Marshall* v. *Fowler* (1852), 16 Beav. 249; *Walker* v. *Drury* (1853), 17 Beav. 482; *Re Wilson, Re Gowland's Trust* (1855), 1 Jur. (N. S.) 569; *Gent* v. *Harris* (1853), 10 Hare, 383; *Re Tubb's Estate, Tubb* v. *Curtis* (1860), 8 W. R. 270; *Nicholson* v. *Carline* (1874), 22 W. R. 819; *Bray* v. *Laycock* (1854), 2 Eq. Rep. 385; *Morgan* v. *Morgan* (1854), 2 Eq. Rep. 1270. The whole was settled in the following cases, in the particular circumstances:—*Boxall* v. *Boxall* (1884), 27 Ch. D. 220 (husband deserted wife and children and contributed nothing for their support); *Re Pope's Trust* (1873), 21 W. R. 646 (wife had been deserted for twenty years, and had not heard of her husband for five years. Held, entitled to fund in court as if a *feme sole*); *Reid* v. *Reid* (1886), 33 Ch. D. 220 (sum of £1,500; husband having disregarded an order for restitution of conjugal rights. Held, aggravated misconduct); *Bond* v. *Simmons* (1744), 3 Atk. 20 (where the husband had received a portion of the fund, the whole of the residue was given to the wife); *Re Cordwell's Estate, White* v. *Cordwell* (1875), L. R. 20 Eq. 644 (husband earning not more than 12*s.* a week, with wife and six children to keep); *Fowke* v. *Draycott* (1885), 29 Ch. D. 996. See also *Bagshaw* v. *Winter* (1852), 5 De G. & Sm. 466; *Ward* v. *Yates* (1860), 1 Drew. & Sm. 80; *Re Grove's Trusts* (1862), 3 Giff. 575; *Layton* v. *Layton* (1853), 1 Sm. & G. 179; *Re Disney* (1855), 2 Jur. (N. S.) 206. See also the following cases:—*Coster* v. *Coster* (1839), 9 Sim. 597 (husband left wife and children unprovided for; three-fourths settled); *Nicholls* v. *Danvers* (1711), 2 Vern. 671 (wife left husband in consequence of his cruelty; property settled as to income to wife for life for separate use, then to husband for life, principal to the issue, and in default of issue to the survivor); *Callow* v. *Callow* (1886), 55 L. T. 154 (husband undischarged bankrupt, but they lived together, and he contributed out of his earnings to her support; two-thirds settled); *Ex parte Pugh* (1852), 1 Drew. 202 (two-thirds settled against husband's creditors, the wife having been reduced from comparative comfort to penury by his embarrassments); *Napier* v. *Napier* (1841), 1 Dr. & War. 407 (husband insolvent; sum of £1,000; £600 to wife and children, £400 to creditors). No settlement decreed in the following cases:—*Vaughan* v. *Buck* (1843), 13 Sim. 404 (the husband and wife were living together, and he was maintaining her out of her income as well as he could, though inadequately; no means of support except her income. Court refused to order any part of her income to be settled to her separate use); *Re Erskine's Trust* (1855), 1 K. & J. 302 (living apart by mutual consent; adequate settlement on marriage); *Giacometti* v. *Prodgers* (1873), 8 Ch. App. 338 (sum of £6,000; wife sufficiently provided for from another source with £1,000 a year to separate use); *Tidd* v. *Lister* (1854), 3 De G. M. & G. 857.

(*b*) See note (*a*), p. 337, *ante*.

(*c*) *Re Suggitt's Trusts* (1868), 3 Ch. App. 215 (two-thirds settled, there being no insolvency, misconduct, or inability to support the wife and children).

(*d*) *Wheeler* v. *Caryl* (1751), Amb. 121.

where the husband neglects or fails to maintain her (*e*), but the court will not, as a general rule, order any settlement of her income so long as she is supported by her husband (*f*).

Equity against:—

675. A wife has the same equity to a settlement against the trustee in bankruptcy of the husband as she has against the husband himself (*g*).

(i.) Trustee in bankruptcy;

The wife's equity to a settlement is also available against a mortgagee or purchaser of the property for valuable consideration (*h*); and, in the absence of fraud, the fact that the wife joins in the mortgage or assignment does not preclude her from asserting her equity (*i*), unless the mortgage or assignment is by deed acknowledged (*k*), by which means realty or the proceeds of realty to which she is entitled, or in which she is interested, may be effectually disposed of so as to defeat her equity to a settlement (*k*); and she may in a similar manner release or extinguish her equity to a settlement out of any personal property to which she or her husband in her right is entitled in possession under any instrument made since the 31st December, 1857 (*l*).

(ii.) Assignee for value.

A wife has no equity to a settlement out of arrears of past income of real or leasehold property assigned for value by the husband, though without her concurrence (*m*); nor against an assignee for value of her husband's interest in her real estate (*n*).

(*e*) *Bond* v. *Simmons* (1744), 3 Atk. 20; *Gilchrist* v. *Cator* (1847), 1 De G. & Sm. 188 (wife left by husband without support and threatened by him with violence; annuity of £50 a year directed to be paid to her till further order); *Watkyns* v. *Watkyns* (1740), 2 Atk. 96, 98 (the husband having left the kingdom, the wife's income was ordered to be paid to her until he returned and provided for her); *Peters* v. *Grote* (1835), 7 Sim. 238 (a portion of the capital of a fund in court ordered to be applied for the maintenance of a deserted wife who was insane); *Rishton* v. *Cobb* (1839), 9 Sim. 615 (husband deserted wife and went abroad; dividends ordered to be paid to her till further order); *Wright* v. *Morley*, *Morley* v. *St. Alban* (1805), 11 Ves. 12 (wife entitled to £260 a year, husband assigned £100 a year of the income and went abroad, leaving her unprovided for; the whole of the residue was settled on her for her separate use).

(*f*) *Vaughan* v. *Buck* (1843), 13 Sim. 404, cited note (*a*), p. 337, *ante*.

(*g*) *Sturgis* v. *Champneys* (1839), 5 My. & Cr. 97 (rents of equitable freeholds); *Barnes* v. *Robinson* (1863), 9 Jur. (N. S.) 245 (equitable life estate in realty); *Taunton* v. *Morris* (1879), 11 Ch. D. 779, C. A. (life interest in personalty); *Oswell* v. *Probert* (1795), 2 Ves. 680; *Carr* v. *Taylor* (1805), 10 Ves. 574; *Life Association of Scotland* v. *Siddal* (1861), 3 De G. F. & J. 271; *Jewson* v. *Moulson* (1742), 2 Atk. 417, 420; *Lumb* v. *Milnes* (1800), 5 Ves. 517; *Squires* v. *Ashford* (1856), 23 Beav. 132; *Bosvil* v. *Brander* (1718), 1 P. Wms. 458.

(*h*) *Lee* v. *Egremont*, *Egremont* v. *Lee* (1852), 5 De G. & Sm. 348; *Hanson* v. *Keating* (1844), 4 Hare, 1; *Newman* v. *Wilson* (No. 2) (1862), 31 Beav. 34; *Elliott* v. *Cordell* (1820), 5 Madd. 149; *Macaulay* v. *Philips* (1798), 4 Ves. 15, 19; *Like* v. *Beresford* (1797), 3 Ves. 506; *Pryor* v. *Hill* (1792), 4 Bro. C. C. 138.

(*i*) *Hanson* v. *Keating*, *supra* (mortgage by husband and wife of her equitable interest in a term of years; equity to a settlement held available against mortgagee); *Scott* v. *Spashett* (1851), 3 Mac. & G. 599; *Marshall* v. *Gibbings* (1855), 4 I. Ch. R. 276; *Life Association of Scotland* v. *Siddal*, *supra*; but see *Roberts* v. *Cooper*, [1891] 2 Ch. 335, C. A.

(*k*) *Williams* v. *Cooke* (1863), 4 Giff. 343; *Tennent* v. *Welch* (1888), 37 Ch. D. 622. As to deeds acknowledged, see p. 381, *post*.

(*l*) Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57), s. 1.

(*m*) *Re Carr's Trusts* (1871), L. R. 12 Eq. 609.

(*n*) *Durham* v. *Crackles* (1863), 32 L. J. (CH.) 111; *Stanton* v. *Hall* (1831), 2 Russ. & M. 175.

SECT. 2. Non-separate Property of Wife.

If a purchaser for value is misled by the fraud of the wife, she is precluded from asserting her equity to a settlement against him, even if she acted in the transaction under the coercion of her husband (*o*).

Barred by payment or transfer to husband or assignee.

676. A wife's equity to a settlement will be barred if the fund or property subject thereto is paid or transferred to the husband or his assignee before proceedings are taken for enforcing the equity (*p*); but a trustee is not justified in making a payment or transfer to the husband or assignee after notice that proceedings have been instituted (*q*), and, on the other hand, he is always justified, even in the absence of proceedings, in refusing to make any such payment or transfer of her income or property, even at her request, and in insisting on giving her an opportunity to assert her equity (*r*).

Adultery of wife.

677. Where a wife is living in adultery apart from her husband, the court will not, as a general rule, interfere on her application to enforce her equity to a settlement (*s*), nor on the other hand will it order her fund to be paid to her husband, because he does not maintain her (*t*); but where both parties are living in adultery and apart, the wife's equity to a settlement may be enforced (*a*), and in special circumstances the court may order the income of her fund to be paid to a wife who has been guilty of adultery, until further order, on her undertaking to have no further communication with her paramour (*b*). The fact that a wife has left her husband and is living apart from him, not in adultery, does not affect her equity to a settlement (*c*).

Living apart.

Waiver of equity.

678. A wife may waive her equity to a settlement, and consent to a payment or transfer to her husband or his assignee. As a general rule, her consent will only be received after her share has been ascertained (*d*), and will only be taken on a separate examination apart from the husband (*e*), though, where the amount is small, the separate examination may be dispensed with (*f*).

(*o*) *Re Lush's Trusts* (1869), 4 Ch. App. 591; *Roberts* v. *Cooper*, [1891] 2 Ch. 335, C. A.

(*p*) *Murray* v. *Elibank* (*Lord*) (1805), 10 Ves. 84, 90.

(*q*) *Macaulay* v. *Philips* (1798), 4 Ves. 15, 18; *Gardner* v. *Walker* (1722), 1 Stra. 503.

(*r*) *Re Swan* (1864), 2 Hem. & M. 34.

(*s*) *Carr* v. *Eastabrooke* (1798), 4 Ves. 146; *Watkyns* v. *Watkyns* (1740), 2 Atk. 96. This rule does not apply to female wards of court who marry without the consent of the court. The equity to a settlement will be enforced in their favour though they are living in adultery (*Ball* v. *Coutts* (1813), 1 Ves. & B. 292, 302, 304). See title INFANTS AND CHILDREN.

(*t*) *Carr* v. *Eastabrooke*, *supra*; *Ball* v. *Montgomery* (1793), 2 Ves. 191.

(*a*) *Greedy* v. *Lavender* (1850), 13 Beav. 62.

(*b*) *Re Lewin's Trust* (1855), 20 Beav. 378 (the husband had had the wife imprisoned in the common gaol in Paris and otherwise treated her very harshly).

(*c*) *Eedes* v. *Eedes* (1841), 11 Sim. 569.

(*d*) *Jerneyan* v. *Baxter* (1821), Madd. & G. 32; but see *Packer* v. *Packer* (1844), 1 Coll. 92.

(*e*) *Tasburgh's Case* (1813), 1 Ves. & B. 507; *Minet* v. *Hyde* (1789), 2 Bro. C. C. 663. An affidavit that no settlement has been made is also required. See p. 458, *post*.

(*f*) *Elworthy* v. *Wickstead* (1819), 1 Jac. & W. 69. See p. 459, *post*.

SECT. 2. Non-separate Property of Wife.

An infant married woman cannot waive her equity to a settlement (*g*); and the court will not take the consent of a wife to part with her reversionary interest, which can only be effectively disposed of by deed acknowledged (*h*). By infant.

It is the duty of the court to explain to the wife the effect of her consent, and if, in consequence of the facts not being known to the court, the consent is given under a mistake as to its effect, it will be rescinded (*i*). Duty of court.

The consent of the wife to waive her equity may be retracted by her at any time before the payment or transfer of the fund in pursuance thereof (*k*). Retractation.

SECT. 3.—*Separate Property of Wife.*

SUB-SECT. 1.—*In Equity.*

679. Although the rules of the common law would not permit a wife to enjoy real or personal property separately from and independently of her husband (*l*), it was otherwise in equity, and if real or personal property was limited in such a way as to show an intention that the wife should enjoy it separately from her husband, such intention was given effect to, and the beneficial interest of the wife was protected from the control and interference of the husband (*m*). Limitation to wife's separate use.

680. Where the property was limited or given to the wife directly for her separate use, without the intervention of trustees, the husband, taking the legal estate, was considered a trustee for her, and accountable accordingly (*n*). Husband a trustee if no other appointed.

The rule that the husband was a trustee of property limited to the separate use of the wife, where no other trustees were appointed, applied to what became the separate property of the wife in pursuance of a marriage contract made abroad (*o*).

(*g*) *Shipway* v. *Ball* (1881), 16 Ch. D. 376; *Stubbs* v. *Sargon* (1840), 2 Beav. 496.

(*h*) *Osborn* v. *Morgan* (1852), 9 Hare, 432; *Wade* v. *Saunders* (1823), Turn. & R. 306. See pp. 381 *et seq.*, *post*.

(*i*) *Watson* v. *Marshall* (1853), 17 Beav. 363, where the wife consented to a payment being made to the husband, and the fund was claimed by the husband's assignee in bankruptcy.

(*k*) *Penfold* v. *Mould* (1867), L. R. 4 Eq. 562; *Watson* v. *Marshall*, *supra*.

(*l*) See pp. 321 *et seq.*, *ante*.

(*m*) See title EQUITY, Vol. XIII., p. 6, and the cases cited in the following notes.

(*n*) *Bennet* v. *Davis* (1725), 2 P. Wms. 316 (devise of realty to wife for her separate use. Held, that the husband took as trustee for her, and that his assignee in bankruptcy took subject to the same trust); *Parker* v. *Brooke* (1804), 9 Ves. 583 (bequest of leaseholds for years for wife's separate use for life, remainder to children. Held that the husband took as trustee); *Rich* v. *Cockell*, *Rich* v. *Hull* (1804), 9 Ves. 369, 375; *Davison* v. *Atkinson* (1793), 5 Term Rep. 434; see also title EQUITY, Vol. XIII., p. 9. As to the right of the trustees of property limited to the separate use of a married woman to indemnity out of the trust property or the wife's interest therein against liabilities incurred by them, see *Butler* v. *Cumpston* (1868), L. R. 7 Eq. 16; *Sheriff* v. *Butler* (1866), 14 L. T. 510; and title TRUSTS AND TRUSTEES.

(*o*) *Re Sibeth*, *Ex parte Sibeth* (1885), 14 Q. B. D. 417, C. A.

SECT. 3. **Separate Property of Wife.**

Limitation to separate use of *feme sole* or widow.

681. If real or personal property was limited or given to a single woman or widow for her separate use, it would, on her marriage or re-marriage, become her separate property in equity, and, if given without the intervention of trustees, the husband took it as trustee for, and was accountable to, her accordingly (*p*).

Separate property by ante-nuptial agreement.

682. In order that real property of a *feme sole* not limited to her separate use may be made her separate property in equity by an ante-nuptial agreement with her husband, the agreement must be in writing, and must be signed by her as well as the husband, his signature alone being insufficient because his marital right does not extend to the whole of her interest in freeholds or copyholds (*q*).

But in the case of chattels personal, a mere renunciation by the husband of his marital right, and a declaration that they shall continue to belong to the wife for her sole and separate use, is sufficient to make them her separate property (*r*).

Words necessary to create separate use.

683. No particular form of words was necessary in order to constitute a trust for the separate use of the wife. Whether such a trust was constituted or not depended on the intention of the settlor or testator, to be gathered from the terms of the instrument by which the property was limited or given as a whole, and the other circumstances of the particular case (*s*). But the intention to

(*p*) *Tullett* v. *Armstrong* (1838), 1 Beav. 1; *Newlands* v. *Paynter* (1840), 4 My. & Cr. 408 (chattels given to *feme sole* for her separate use without the intervention of a trustee; after-taken husband held a trustee for her); *Anderson* v. *Anderson* (1822), 2 My. & K. 427 (leaseholds for years given to *feme sole* for separate use. Held that, on her marriage, the husband took as trustee for her and, a separation having taken place, a conveyance to her sole and separate use, and an account of the rents and profits received by the husband after the wife had given notice to the tenants not to pay him, were directed).

(*q*) Statute of Frauds (29 Car. 2, c. 3), s. 7; *Dye* v. *Dye* (1884), 13 Q. B. D. 147, C. A.

(*r*) *Walrond* v. *Goldmann* (1885), 16 Q. B. D. 121; and see *Williams* v. *Mercier* (1884), 10 App. Cas. 1; *Re Whitehead, Ex parte Whitehead* (1885), 14 Q. B. D. 419, C. A.

(*s*) *Shewell* v. *Dwarris* (1858), John. 172; *Re Peacock's Trusts* (1879), 10 Ch. D. 490.

In the following cases it was held that a trust for separate use was established:—*Baggett* v. *Meux* (1844), 1 Coll. 138 (gift to the wife's "sole and separate use"); *Tyrrell* v. *Hope* (1743), 2 Atk. 558 (in trust that the wife should "enjoy and receive" certain rents and profits); *Darley* v. *Darley* (1746), 3 Atk. 399 (gift to husband as trustee "for his wife's livelihood"); *Cape* v. *Cape* (1837), 2 Y. & C. (EX.) 543 (legacy to trustees to be applied to her support and maintenance); *Lee* v. *Prieaux* (1791), 3 Bro. C. C. 381; *Cooper* v. *Wells* (1865), 11 Jur. (N. S.) 923 (her receipt to be a sufficient discharge); *Surman* v. *Wharton*, [1891] 1 Q. B. 491 (own proper use and benefit with full power and authority to give receipts); *Hartley* v. *Hurle* (1801), 5 Ves. 540 (to be paid into her own proper hands; *contra*, *Tyler* v. *Lake* (1831), 2 Russ. & M. 183); *Dawson* v. *Bourne* (1852), 16 Beav. 29 (legacy to wife "without comprehending" her husband); *Dixon* v. *Olmius* (1795), 2 Cox, Eq. Cas. 414 (bond and mortgage debts, to be delivered up to her whenever she should demand or require the same); *Prichard* v. *Ames* (1823), Turn. & R. 222 (for her own use and at her own disposal); *Baker* v. *Ker* (1882), 11 L. R. Ir. 3 (money to be paid by the husband's representatives after his death to the wife for her sole and absolute use and disposal); *Elton* v. *Shephard* (1781), 1 Bro. C. C. 532 (for her separate use); *Margetts* v. *Barringer* (1835), 7 Sim. 482 (for her own use and benefit independently of any other

exclude the marital right of the husband had to be clearly manifested (*t*). The mere fact that he was named as one of several trustees of the property was not of itself sufficient indication of such an intention (*a*).

The nature of the property itself might be such as to indicate that it was intended to be for the wife's separate use (*b*); and the

person); *Bland* v. *Dawes* (1881), 17 Ch. D. 794 (legacy for her "sole use and disposal"); *Re May, Ex parte Ray* (1815), 1 Madd. 199 (sole use, benefit and disposition).

With regard to the words "sole use and benefit" there is some conflict of authority. In *Adamson* v. *Armitage* (1815), 19 Ves. 416, there being trustees, it was held that a trust for separate use was constituted. In *Re Killick and Sadd, Ex parte Killick* (1844), 3 Mont. D. & De G. 480, where freehold houses and furniture were devised and bequeathed, without the intervention of trustees, for the wife's own sole use and benefit, it was held that she took both houses and furniture for her separate use (see also *Cox* v. *Lyne* (1832), You. 562). A similar decision was given in *Negus* v. *Jones* (1883), Cab. & El. 52, where the words were "sole and absolute use and benefit." In *Green* v. *Britten* (1863), 1 De G. J. & Sm. 649, C. A., a gift in trust for the wife's sole benefit during her lifetime was held to be a trust for her separate use; and a similar decision was given in *Inglefield* v. *Coghlan* (1845), 2 Coll. 247, where the words were "solely and entirely for her own use and benefit during her life." In *Re Tarsey's Trust* (1866), L. R. 1 Eq. 561, there was a bequest of the residue of personalty to a widow for "her own sole use and benefit absolutely," following a preceding pecuniary legacy to trustees in trust to invest the same and pay the dividends to her "for her own sole and separate use and benefit free from the control of any husband she might marry," and it was held that she took the residue for her separate use as well as the dividends of the legacy. In this case it was laid down that the word "sole" must be taken as meaning "separate" unless it appears from the will that the testator meant it to apply to something other than the marital right of the husband. On the other hand, it was held in *Gilbert* v. *Lewis* (1862), 1 De G. J. & Sm. 38, that a legal devise, without the intervention of trustees, for the sole use and benefit of a married woman, was not a gift for her separate use. This decision was approved by the House of Lords in *Massy* v. *Rowen* (1869), L. R. 4 H. L. 288, where a trust for the sole use of the testator's daughter was held not to be for her separate use, the word "sole" not being a technical word like "separate." And see the cases cited in note (*t*), *infra*.

(*t*) *Austin* v. *Austin, Austin* v. *Boyce* (1876), 4 Ch. D. 233. In the following cases it was held that the intention to exclude the marital right of the husband was not sufficiently indicated:—*Dakins* v. *Berisford* (1671), 1 Cas. in Ch. 194 (annuity in trust to pay the same to the wife and her assigns); *Lumb* v. *Milnes* (1800), 5 Ves. 517 (trust to pay income to wife for life, and apply the capital to such uses as she, whether sole or married, should appoint. Held, that the income was not in trust for her separate use); *Jacobs* v. *Amyatt* (1793), 1 Madd. 376, n. (fund to be paid to her, to and for her use during her life); *Massey* v. *Parker* (1834), 2 My. & K. 174 (legacy "for and under sole control"); *Re Turner, Turner* v. *Fitzroy* (1892), 66 L. T. 758 (policies in trust for the wife, her executors, administrators and assigns, absolutely). To or for "her own use and benefit":—*Johnes* v. *Lockhart* (1793), 3 Bro. C. C. 385, n.; *Wills* v. *Sayers* (1819), 4 Madd. 409; *Roberts* v. *Spicer* (1821), 5 Madd. 491; *Kensington* v. *Dollond* (1834), 2 My. & K. 184; *Beales* v. *Spencer* (1843), 2 Y. & C. Ch. Cas. 651; see also *Blacklow* v. *Laws* (1842), 2 Hare, 40; *Barnes* v. *Forsyth* (1853), 1 W. R. 142; *Lewis* v. *Mathews* (1866), L. R. 2 Eq. 177; *Foley* v. *Foley* (1869), 18 W. R. 81; *Tyler* v. *Lake* (1831), 2 Russ. & M. 183 (to pay into her own proper hands for her own use and benefit, and in case of her death, to pay to her husband for his own use and benefit). And see *Gilbert* v. *Lewis*, *supra*, and *Massy* v. *Rowen*, *supra*, referred to in note (*s*), *supra*. As to the interpretation of deeds, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.* As to the construction of wills, see title WILLS.

(*a*) *Re Boyes, Ex parte Beilby* (1821), 1 Gl. & J. 167.

(*b*) As in the case of plate and china, jewellery, trinkets and wearing apparel

SECT. 3. Separate Property of Wife.

intervention or non-intervention of trustees was a circumstance to be taken into consideration in cases where the intention was not clearly expressed (*c*).

Effect of restraint on anticipation.

A gift for separate use would not be implied from the mere fact that a restraint on anticipation was attached, although a restraint on anticipation is effective only in the case of equitable or statutory separate property (*d*).

The payment of money to the separate account of the wife at a bank to be at her disposal is an indication of an intention that she should enjoy it independently of her husband (*e*).

Trust may be limited to particular marriage,

684. A trust for the separate use of a married woman might be confined to the existing or a particular marriage, but it would, as a general rule, be construed as applying also to any future husbands (*f*).

or to income only.

Such a trust might also be limited to the rents or income of property, though the *corpus* also was given to the married woman, the *corpus* in such case being subject to the ordinary common law rules as to non-separate property (*g*).

Gift of income for unlimited period.

A gift of stock or other personal property in trust to pay the dividends or income arising therefrom to a married woman for her separate use, without any limitation of the period during which she is to be entitled, gives her an absolute right to the capital for her separate use (*h*).

Income for separate use for life and *corpus* to executors or administrators.

A gift of the income of property to the separate use of a married woman for life, and of the *corpus* to her executors or administrators, operates as a gift to her of the entire property for her separate use in equity (*i*). The effect is the same if the property is limited to

for her own use (*Re Brymer's Trusts* (1871), 24 L. T. 263; *Graham* v. *Londonderry* (1746), 3 Atk. 393); and see *Williams* v. *Mercier* (1884), 10 App. Cas. 1; *Re Jamieson, Ex parte Pannell* (1889), 60 L. T. 159.

(*c*) *Adamson* v. *Armitage* (1815), 19 Ves. 416, and *Gilbert* v. *Lewis*, (1862), 1 De G. J. & Sm. 38, referred to note (*s*), p. 342, *ante*.

(*d*) *Stogdon* v. *Lee*, [1891] 1 Q. B. 661, C. A. (by a separation deed the husband covenanted to pay an annuity to the wife during the joint lives for her separate use. Held, that the separate use continued only during their joint lives, and that arrears remaining unpaid at the husband's death were not her separate property so as to be liable to her creditors).

(*e*) *Carnegie* v. *Carnegie* (1874), 31 L. T. 7, C. A.

(*f*) Where, by a marriage settlement, income was limited to the wife for life for her separate use, free from the debts of A. B., her intended husband, it was held that the separate use was not confined to the particular coverture, but revived on a second marriage (*Re Gaffee* (1849), 1 Mac. & G. 541, followed in *Hawkes* v. *Hubback* (1870), L. R. 11 Eq. 5). *Knight* v. *Knight* (1834), 6 Sim. 121, and *Benson* v. *Benson* (1835), 6 Sim. 126, similar cases where the contrary was held, must be considered overruled. *Moore* v. *Morris* (1857), 4 Drew. 33, where, in the case of a gift for the separate use of a wife independently of her husband B., it was held that the separate use applied only to B., and did not extend to a future husband, is also a very doubtful authority. See also *Beable* v. *Dodd* (1786), 1 Term Rep. 193; *Horseman* v. *Abbey* (1819), 1 Jac. & W. 381.

(*g*) *Troutbeck* v. *Boughey* (1866), L. R. 2 Eq. 534 (realty limited to trustees in trust for wife for life, and afterwards for her daughter absolutely, all principal moneys, rents, dividends etc. to be paid into their own proper hands and to be for their separate use. Held, that the *corpus* was not limited to the separate use of the daughter).

(*h*) *Elton* v. *Shephard* (1781), 1 Bro. C. C. 532; *Haig* v. *Swiney* (1823), 1 Sim. & St. 487; *Adamson* v. *Armitage*, *supra*.

(*i*) *Bishop* v. *Wall* (1876), 3 Ch. D. 194.

her for life for her separate use, and afterwards as she may by deed or will appoint, and in default of appointment, to her executors or administrators (*k*), and, in such case, she is entitled in equity to the property absolutely for her separate use, on releasing the power of appointment (*l*).

Not liable for husband's debts.

685. Property held by a husband in trust for the separate use of his wife is not liable for his debts (*m*), and cannot be seized at the instance of his execution creditors (*n*); nor will it pass to his trustee in bankruptcy (*o*).

Purchaser with notice is bound.

686. The equity of a wife in respect of property given to her separate use is enforceable as against all volunteers, and all purchasers for value who take with notice, actual or constructive, of her interest, but not as against a purchaser for value who acquires the legal interest without actual or constructive notice thereof (*p*).

Husband's right as survivor.

But equity only interferes to protect the wife from the control or interference of the husband during the coverture, and after her death his common law rights are not affected by a limitation to her separate use in the event of her not having disposed of the property either by act *inter vivos* or by will (*q*).

SUB-SECT. 2.—*Acquired during Separation.*

Separation by agreement.

687. If husband and wife agreed to separate, and not to interfere with each other, property acquired by the wife during the separation

(*k*) *Re Onslow, Plowden* v. *Gayford* (1888), 39 Ch. D. 622; *London Chartered Bank of Australia* v. *Lemprière* (1873), L. R. 4 P. C. 572; *Mayd* v. *Field* (1876), 3 Ch. D. 587; *Hodges* v. *Hodges* (1882), 20 Ch. D. 749.

(*l*) *Re Davenport, Turner* v. *King*, [1895] 1 Ch. 361.

(*m*) *Jarman* v. *Woolloton* (1790), 3 Term Rep. 618.

(*n*) *Newlands* v. *Paynter* (1840), 4 My. & Cr. 408 (chattels given to her separate use without the intervention of any trustees); *Duncan* v. *Cashin* (1875), L. R. 10 C. P. 554 (furniture seized by sheriff; on an interpleader sheriff ordered to withdraw); and see title EXECUTION, Vol. XIV., pp. 49, 84.

(*o*) *Re Sibeth, Ex parte Sibeth* (1885), 14 Q. B. D. 417, C. A.; *Bennet* v. *Davis* (1725), 2 P. Wms. 316. Furniture, belonging to the wife for her separate use, in the house in which she resides with her husband, is not in his order and disposition (*Simmons* v. *Edwards* (1847), 16 M. & W. 838; *Re Massey, Ex parte Massey* (1835), 2 Mont. & A. 173; *Re Bloxham, Ex parte Elliston* (1835), 2 Mont. & A. 365; *Re Killick and Sadd, Ex parte Killick* (1844), 3 Mont. D. & De G. 480; *Re Horwood, Ex parte Hencliffe* (1830), Mont. '24; and see *Miller* v. *Demetz* (1835), 1 Mood. & R. 479). But it has been held in Ireland that if furniture is lent by the wife to the husband for the purposes of his business, the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3, applies, and the furniture must be treated as assets (*Re Donaldson*, [1902] 2 I. R. 310, C. A.). Where stock bequeathed to a wife for her separate use had been transferred into the name of the husband and sold out by him, and he became bankrupt, the wife was permitted to prove in the bankruptcy for the value of the stock (*Re Whitmore, Ex parte Wells* (1842), 2 Mont. D. & De G. 504); see also titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 151, 156 *et seq.*, 181, 222; DISTRESS, Vol. X., p. 144.

(*p*) *Parker* v. *Brooke* (1804), 9 Ves. 583; and see title EQUITY, Vol. XIII., p. 76.

(*q*) *Molony* v. *Kennedy* (1839), 10 Sim. 254 (husband and wife living apart; husband held entitled to cash and bank notes held by her for her separate use, without taking out letters of administration); *Bird* v. *Peagrum* (1853), 13 C. B. 639 (wife lent part of her separate money to A. Held, that the husband might after her death sue A., as for money lent *jure mariti*, without taking out letters of administration, the money being his at law).

SECT. 3. Separate Property of Wife.

by means of her own industry was considered as settled to her separate use (*r*).

Judicial separation.

688. Where a wife is separated from her husband under a decree of judicial separation, she is considered as a *feme sole* (*s*) with respect to property of every description which she may acquire or which may come to or devolve upon her after the date of the decree and while the separation continues, including any property to which she is entitled for an estate in remainder or reversion at the date of the decree; and any such property may be disposed of by her as if she were a *feme sole*, and on her death intestate will devolve as if her husband had been then dead (*t*); and in case she resumes cohabitation with her husband, all such property as she may be entitled to when the resumption of cohabitation takes place will be deemed to be held to her separate use, subject to any agreement in writing made between her and her husband while separate (*a*).

Protection order.

689. A wife who obtains a protection order on the ground of her husband's desertion is entitled to everything earned by her by means of any lawful occupation (*b*), and to all property acquired by her since the commencement of the desertion, as against her husband and his creditors and persons claiming under him, as if she were a *feme sole*, and during the continuance of the order she is deemed to be, and to have been since the desertion, in the like position as regards property, including any property of or to which she is possessed or entitled for an estate in remainder or reversion at the date of the desertion, as if she had obtained a decree of judicial separation (*c*).

Every protection order must state the time at which the desertion,

(*r*) *Haddon* v. *Fladgate* (1858), 1 Sw. & Tr. 48 (verbal agreement for separation; wife held entitled to dispose by will of property acquired by her own industry during the separation).

(*s*) *Munt* v. *Glynes* (1872), 41 L. J. (CH.) 639 (held, entitled to payment of a legacy, notwithstanding a restraint on anticipation).

(*t*) See *In the Goods of Worman* (1859), 1 Sw. & Tr. 513, as to granting letters of administration to the next of kin in such a case, and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 183.

(*a*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 25; Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 8. A separation order under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), has the same effect as a decree of judicial separation; see *ibid.*, s. 5, and p. 598, *post*. As to a resumption of cohabitation, see *Re Emery's Trusts* (1884), 50 L. T. 197.

(*b*) The protection does not extend to money or property acquired by unlawful means, as for instance, by keeping a brothel (*Mason* v. *Mitchell* (1865), 3 H. & C. 528).

(*c*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21; Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), ss. 6, 8; *Re Rainsdon's Trusts* (1859), 4 Drew. 446 (wife who had obtained a protection order held entitled to petition without a next friend for payment out of court of a legacy to which she became entitled subsequently to the desertion); *Cooke* v. *Fuller* (1858), 26 Beav. 99 (bequest to wife for separate use without power of anticipation; wife being subsequently deserted obtained protection order. Held, entitled to payment); *In the Goods of Elliott* (*Ann*) (1871), L. R. 2 P. & D. 274 (wife may dispose by will of property acquired between the desertion and protection order). Where a wife died intestate after obtaining a protection order, the court granted administration to her next of kin without citing the husband (*In the Goods of Stephenson* (1866), L. R. 1 P. & D. 287).

in consequence of which it is made, commenced, and the order, as regards all persons dealing with the wife in reliance thereon, is conclusive as to the time when the desertion commenced (*d*).

If the husband, or any creditor of or person claiming under the husband, seizes or continues to hold any property of the wife after notice of a protection order, he is liable at the suit of the wife to restore the specific property and also a sum equal to double its value (*e*).

Property must be acquired during separation.

690. The foregoing provisions apply only to property acquired during the separation, and not, for instance, to property acquired before the decree of judicial separation or the commencement of the desertion, as the case may be, which it was agreed by the husband, on consenting to the decree or protection order, that the wife should retain to her separate use (*f*).

A judicial separation or protection order does not affect a restraint on anticipation attached to property in possession already belonging to the wife at the date of the decree or commencement of the desertion (*g*).

Choses in action.

691. A chose in action not reduced into possession at the time of the desertion or decree is property coming to or devolving on the wife after the desertion or decree within the meaning of the foregoing provisions (*h*).

Fund in court.

692. Where, after a judicial separation or protection order, an application is made by the wife for the payment out to her of a fund in court, evidence will be required that the separation is a continuing one, but her affidavit as to this and also as to there being no settlement will be accepted (*i*).

Discharge of protection order.

693. If a protection order is discharged at the instance of the husband on the ground that there had been no desertion, it is void *ab initio*, and the parties will be left in their original position as regards all rights of property (*k*).

Separation without order.

694. In the absence of a decree of judicial separation or protection order, and subject to any agreement between husband and wife, the earnings of and property acquired by the wife during a separation are subject to the same rules as if the parties were

(*d*) Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 9.

(*e*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21.

(*f*) *Nicol* v. *Nicol* (1886), 31 Ch. D. 524, C. A., where the husband, on consenting to a judicial separation, agreed that certain property should be held to the separate use of the wife for her life, and it was held that, on a reconciliation and return to cohabitation, the separate use created by the agreement was at an end.

(*g*) *Waite* v. *Morland* (1888), 38 Ch. D. 135, C. A.; *Hill* v. *Cooper*, [1893] 2 Q. B. 85, C. A. As to the effect of a restraint on anticipation, see pp. 359 *et seq.*, *post*.

(*h*) *Re Coward and Adam's Purchase* (1875), L. R. 20 Eq. 179; *Nicholson* v. *Drury Buildings Estate Co.* (1877), 7 Ch. D. 48; *Re Emery's Trusts* (1884), 50 L. T. 197; and see pp. 326 *et seq.*, *ante*.

(*i*) *Ewart* v. *Chubb* (1875), L. R. 20 Eq. 454; and see p. 458, *post*.

(*k*) *Rudge* v. *Weedon* (1859), 28 L. J. (CH.) 889.

SECT. 3. Separate Property of Wife.

living together, even though the husband may have deserted the wife (*l*).

SUB-SECT. 3.—*Under the Married Women's Property Acts.*

Present position.

695. A married woman is now capable of acquiring, holding and disposing by will (*m*) or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee (*n*).

Marriage after 1882.

696. A woman married on or after the 1st January, 1883 (*o*), is entitled to have and to hold as her separate property, and to dispose of in the same manner as if she were a *feme sole*, all real and personal property, including any chose in action (*p*), which belonged to her at the time of her marriage or is acquired by or devolves upon her after marriage, including any wages, earnings, money and property gained by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband (*q*), or by the exercise of any literary, artistic, or scientific skill (*r*).

Marriage before 1883.

697. A woman married before the 1st January, 1883, is similarly entitled to have, hold and dispose of as her separate property all real and personal property, including any chose in action (*p*), her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, accrued on or after that date, including any wages, earnings, money and property so gained or acquired by her (*s*).

The title to property does not accrue on or after the 1st January, 1883, within the meaning of this provision, because, being in remainder, or reversion, or contingent at that date, it first becomes vested in possession subsequent thereto (*t*), nor because the property

(*l*) See *In the Goods of Pepper* (1874), 31 L. T. 274, where it was held that a married woman had no power to dispose by will of earnings acquired after desertion by her husband, no protection order having been obtained.

(*m*) As to the wills of married women, see title WILLS.

(*n*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (1). The Act does not affect the rights of the husband after the death of the wife, in the event of her dying intestate (*Hope* v. *Hope*, [1892] 2 Ch. 336 (curtesy); *Re Lambert's Estate, Stanton* v. *Lambert* (1888), 39 Ch. D. 626 (undisposed-of personalty); *Re Atkinson, Waller* v. *Atkinson*, [1899] 2 Ch. 1, C. A.; *Re Evans's Estate*, [1910] 1 I. R. 95 (chattels real)). As to the remedies of a married woman for the security and protection of her separate property, see pp. 453, 459, *post*; and as to summary proceedings for determining questions as to the title to any property as between husband and wife, see p. 460, *post*.

(*o*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 25.

(*p*) *Ibid.*, s. 24.

(*q*) As to separate trading, see p. 352, *post*.

(*r*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 2. Where property was given in trust for a single woman for life for her separate use, with remainder as she should by will appoint, and in default of appointment to her executors, administrators and assigns, and she married after 1882, it was held that the life interest merged in the ultimate remainder, giving her the absolute right to the property, and entitling her to release the power of appointment (*Re Davenport, Turner* v. *King*, [1895] 1 Ch. 361; and see *Re Onslow, Plowden* v. *Gayford* (1888), 39 Ch. D. 622).

(*s*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 5.

(*t*) *Reid* v. *Reid* (1886), 31 Ch. D. 402, C. A. (entitled before 1882, subject to

is subsequently converted from realty into personalty, or from personalty into realty (*a*).

Spes successionis.

698. A mere hope or expectation of succeeding to property as one of a class of possible next of kin is not a contingent title to the property; and property acquired by a married woman after 1882, though in pursuance of such a hope or expectation existing before 1883, is statutory separate property (*b*).

Deposits, stock etc.

699. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the National Debt Commissioners or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body—municipal, commercial, or otherwise—or of any industrial, provident, friendly, benefit, building, or loan society, which on the 1st January, 1883, were standing in the sole name of a married woman, or which on or after that date have been allotted to, or placed, registered, or transferred in or into or made to stand in, the sole name of, any married woman, are deemed, unless and until the contrary is shown, to be her separate property; and the fact of their standing in her sole name is sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest and profits thereof without the concurrence of her husband, and to indemnify the Postmaster-General, the National Debt Commissioners, the Bank of England or Ireland, and all directors, managers and trustees of any such bank, corporation, company, public body, or society in respect thereof (*c*).

Deposits in joint names.

These provisions apply, so far as relates to the right, title, or

a life interest, the tenant for life dying after 1st January, 1883); *Re Tucker, Emanuel* v. *Parfitt* (1885), 54 L. J. (CH.) 874 (vested remainder falling into possession after 1st January, 1883); *Re Hobson's Settlement, Webster* v. *Rickards* (1885), 55 L. J. (CH.) 300 (similar case); *Re Adames' Trusts* (1885), 33 W. R. 834 (contingently entitled before 1883 to a share in a fund, which vested after 1882); *Re Tench's Trusts, Ex parte M'Cormack* (1885), 15 L. R. Ir. 406. The cases *contra*—*Baynton* v. *Collins* (1884), 27 Ch. D. 604; *Re Thompson and Curzon* (1885), 29 Ch. D. 177; and *Re Dixon, Dixon* v. *Smith* (1885), 54 L. J. (CH.) 964—must be considered overruled by *Reid* v. *Reid* (1886), 31 Ch. D. 402, C. A.

(*a*) *Re Bacon, Toovey* v. *Turner*, [1907] 1 Ch. 475 (a woman, married in 1875, became entitled in 1877 on an intestacy to reversionary realty, which was converted by sale in 1901, and did not fall into possession until 1906. Held, that the title accrued in 1877, and that the sale in 1901 gave no new property nor any fresh title).

(*b*) *Re Parsons, Stockley* v. *Parsons* (1890), 45 Ch. D. 51 (trust for such persons as, at the time of the failure of preceding trusts, would have been entitled as next of kin of the testator; the preceding trusts failed in 1886. Held, separate property under the Act). The Irish Court of Appeal held the contrary in *Re Beaupré's Trusts* (1888), 21 L. R. Ir. 397, C. A., where property was settled, in default of children, for such persons as should be the next of kin of A., who died in 1885.

(*c*) Married Women's Property Act, 1882 (45 & 56 Vict. c. 75), ss. 6, 7. As to investments in any such deposits etc. with moneys of the husband without his consent, see pp. 351, 404, *post*.

SECT. 3. Separate Property of Wife.

interest of the married woman, to cases where such deposits, annuities, stock, and other interests are standing in, or allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any person or persons other than her husband (*d*).

No corporation or joint-stock company is, however, required or authorised to admit any married woman to be a holder of any shares or stock therein to which any liability is incident, contrary to the provisions of any statute, charter, bye-law, articles of association, or deed of settlement regulating the corporation or company (*e*).

Wife has the legal as well as the equitable title.

700. A married woman has the legal as well as the equitable title to all real and personal property belonging to her as her separate property in accordance with the foregoing provisions, and may accordingly dispose of the same without the concurrence of her husband (*f*).

Wages etc. acquired between 1870 and 1883.

701. The wages and earnings of any married woman, whatever the date of her marriage, acquired or gained by her on or after the 9th August, 1870, and before the 1st January, 1883, in any employment, occupation, or trade in which she was engaged, or which she carried on separately from her husband (*g*), and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, are deemed to be property held and settled to her separate use, independent of her husband, and her receipts alone are a good discharge (*h*).

This provision does not affect the legal, but only the equitable, title to the money or property, but if any such wages or earnings are invested by the husband in his own name, he is a trustee for his wife in the absence of proof of a gift on her part (*i*).

Deposits etc. between 1870 and 1883.

702. Deposits in savings banks and Government annuities made or granted on or after the 9th August, 1870, and before the 1st January, 1883, in the name of a married woman, and also investments in public stocks or funds, or in fully-paid shares, stock, debentures, or debenture-stock of any incorporated or joint-stock company, to the holding of which no liability is attached, and also any shares, benefits, debentures, rights or claims in, to, or upon the funds of any industrial, provident, friendly, building, or loan society, standing between those dates in the name of a married woman, are deemed to be her separate property, to be accounted for and

(*d*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 8.

(*e*) *Ibid.*, s. 7. See title COMPANIES, Vol. V., p. 147.

(*f*) See pp. 377, 380, *post*.

(*g*) As to separate trading, see p. 352, *post*.

(*h*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 1. The Act was repealed by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 22, but subject to the preservation of all rights acquired under it.

(*i*) *Re Dearmer, James* v. *Dearmer* (1885), 53 L. T. 905 (wife carried on a ladies' school in her own name separately from the husband, and he invested part of the earnings in his name. Held, husband a trustee for her). As to gifts between husband and wife, see pp. 392 *et seq.*, *post*.

paid to her, or transferred and the dividends and profits paid as if she were unmarried (*k*), subject, where the deposit or investment is shown to have been made with the moneys of the husband without his consent, to the power of the court to order payment or transfer to the husband (*l*).

Personalty acquired as next of kin etc. between 1870 and 1883.

703. Where any woman married on or after the 9th August, 1870, and before the 1st January, 1883, became entitled during her marriage and between those dates to any personal property as the next of kin of an intestate, or to any sum not exceeding £200 under any deed or will, such property or money, subject to the trusts of any settlement affecting the same, belongs to her for her separate use, and her receipts alone are a good discharge therefor (*m*).

If several sums, not exceeding £200 each, were acquired at the same time and under the same instrument, but under different titles, as in the case of a pecuniary legacy and also a share in the residue, this provision applies, and the sums must not be aggregated so as to exclude them from the provisions of the section, though the total may have exceeded £200 (*n*).

The limit of £200 only applies to money acquired under a deed or will, and not to personalty acquired as the next of kin of an intestate. Personalty acquired between the dates mentioned as next of kin, whatever may have been its value, belongs to the wife for her separate use, subject to any settlement affecting the same (*o*).

This provision does not affect the legal title to the property, but only gives the married woman the beneficial interest as if it had been given for her separate use (*p*).

Realty acquired as heiress between 1870 and 1883.

704. Where any freehold, copyhold, or customaryhold property descended on or after the 9th August, 1870, and before the 1st January, 1883, upon any woman married between those dates, as the heiress or co-heiress of an intestate, the rents and profits thereof, subject to the trusts of any settlement, belong to her for her separate use, and her receipts alone are a good discharge for such rents and profits (*q*).

(*k*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), ss. 2—5. See note (*h*), p. 350, *ante*.

(*l*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), ss. 2—4, 9. See note (*h*), p. 350, *ante*, and p. 404, *post*.

(*m*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 7; see note (*h*), p. 350, *ante*. Where a *feme sole* entitled under a will to a sum less than £200, expectant on the death of A., married after 9th August, 1870, and A. died during the marriage, it was held that she became entitled after 9th August, 1870, within the meaning of the section, although she was entitled in expectancy before that date (*Lane* v. *Oakes* (1874), 30 L. T. 726).

(*n*) *Re Davies, Harrison* v. *Davis*, [1897] 2 Ch. 204; *Re Middleton's Will* (1868), 16 W. R. 1107; *Bower* v. *Smith* (1871), L. R. 11 Eq. 279.

(*o*) *Re Voss, King* v. *Voss* (1880), 13 Ch. D. 504.

(*p*) *Howard* v. *Bank of England* (1875), L. R. 19 Eq. 295 (consols; wife deserted by husband. Held, that the bank could not be compelled to permit a transfer without the concurrence of the husband, the stock not having been placed in the wife's name under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 3.

(*q*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 8. See note (*h*), p. 350, *ante*.

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This provision does not affect the legal title to the property, and does not vest the *corpus* in the married woman even in equity, but only gives her an equitable right to the rents and profits (*r*).

SUB-SECT. 4.—*Separate Trading.*

Custom of City of London.

705. By the custom of the City of London a married woman may carry on a trade within the city as if she were a *feme sole*, provided it is carried on on her sole account and the husband has no concern in it, and all property acquired by means of such separate trading belongs to the wife as if she were a *feme sole* (*s*), but by the custom the husband may determine the separate trading by intermeddling (*t*).

Separate trading with consent of husband.

706. Apart from the custom of the City of London, a married woman could always carry on a separate trade or business by agreement made between herself and her husband before marriage, or by his subsequent permission, the business and all profits being deemed in equity to be held for her separate use (*a*). If the business was carried on in pursuance of an agreement made before marriage, the agreement was binding on the husband's creditors, the property employed in the business not being liable for his debts (*a*).

Under Married Women's Property Acts.

707. Earnings and property acquired by a wife by means of separate trading on or after the 9th August, 1870, and before the 1st January, 1883, are deemed in equity to be settled to her separate use (*b*), and all earnings and property so acquired since the 31st December, 1882, are her separate property both at law and in equity (*c*).

A married woman carrying on a trade separately from her husband is, since the 31st December, 1882, in respect of her separate property, subject to the bankruptcy laws in the same manner as if she were a *feme sole* (*d*).

(*r*) *Johnson* v. *Johnson* (1887), 35 Ch. D. 345 (she cannot convey except by deed acknowledged). See *Troutbeck* v. *Boughey* (1866), L. R. 2 Eq. 534.

(*s*) *Langham* v. *Bewett* (1627), Cro. Car. 68. A married woman carrying on a separate trade according to the custom is liable to the bankruptcy laws as if she were a *feme sole* (*Ex parte Carrington* (1740), 1 Atk. 206). Subject to this, no married woman is liable to be made bankrupt, except in pursuance of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (5). See also title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 9 *et seq.*

(*t*) *Lavie* v. *Phillips* (1765), 3 Burr. 1776, 1782.

(*a*) *Jarman* v. *Woolloton* (1790), 3 Term Rep. 618; *Haselinton* v. *Gill* (1784), 3 Term Rep. 620, n.; *Beecher* v. *Major* (1865), 13 L. T. 54; and see *Cecil* v. *Juxon* (1738), 1 Atk. 278, and *Haddon* v. *Fladgate* (1858), 1 Sw. & Tr. 48, as to earnings made by a wife in trading after desertion by her husband, or while living apart by mutual agreement. Compare *In the Goods of Pepper* (1874), 31 L. T. 274.

(*b*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 1. See *Re Dearmer, James* v. *Dearmer* (1885), 53 L. T. 905.

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 2, 5. A married woman carrying on a separate trade will be presumed to have separate estate in the absence of evidence to the contrary (*Eddowes* v. *Argentine Loan and Mercantile Agency Co.* (1890), 63 L. T. 364, C. A.).

(*d*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (5). It

What is a separate trade.

708. Whether a trade carried on by a wife is carried on separately from her husband is a question of fact (*e*). A business is not necessarily carried on separately because it is the separate property of the wife, and she has an interest in the profits; the test is whether she is trading independently of the husband, without being accountable to him for any of the profits of the business (*f*).

Where the parties live together at the premises on which the business is carried on, the burden of proving that it is a separate trade so as to entitle the wife to claim the profits as her separate property lies on her (*g*).

But a separate trade may be carried on by a wife residing with her husband (*h*), and the mere fact that the husband takes part in the management or occasionally gives assistance does not prevent it being a separate trade (*i*). If, however, he interferes in such a way as to make himself personally liable for debts incurred in carrying it on, the business is not a separate one (*j*).

is not necessary, in order to invoke the jurisdiction of the Court of Bankruptcy, to prove that a married woman carrying on a separate trade has separate property (*Re Simon*, [1909] 1 K. B. 201, C. A.). It has been held in Ireland that a farm is not a trade within the meaning of this sub-section (*Re Long*, [1905] 2 I. R. 343, C. A.). See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 9 *et seq.*

(*e*) *Jarman* v. *Woolloton* (1790), 3 Term Rep. 618. A business may be carried on by husband and wife as partners; see title PARTNERSHIP.

(*f*) *Re Edwardes, Ex parte Edwardes* (1895), 43 W. R. 509; compare *Re Worsley*, [1901] 1 K. B. 309, C. A., cited note (*i*), *infra.*

(*g*) *Re Whittaker, Whittaker* v. *Whittaker* (1882), 21 Ch. D. 657. In this case the court refused, on the uncorroborated testimony of the wife after the husband's death, to admit her claim to investments made by the husband in his own name of the proceeds of a farm which she had rented before marriage, and which she alleged he had authorised her to carry on on her own account, treating the proceeds as her separate property. It was held that there was not sufficient evidence of an intention by the husband to constitute himself a trustee for the wife.

(*h*) *Ashworth* v. *Outram* (1877), 5 Ch. D. 923, C. A.; *Lovell* v. *Newton* (1878), 4 C. P. D. 7 (husband carried on the trade of a butcher; he became incapable in consequence of intemperance, and was removed to the infirmary suffering from *delirium tremens;* a friend lent money to the wife to enable her to continue the trade for the support of herself and her family; she carried it on for several months, when the husband returned, but did not interfere in any way. Held (under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), a separate trade and the property of the wife); *Re Worsley, supra; Laporte* v. *Cosstick* (1874), 23 W. R. 131.

(*i*) *Ashworth* v. *Outram, supra* (wife, after marriage, continued to carry on in her maiden name a fruit preserving business belonging to her before marriage; she kept a separate banking account and managed the business, the husband taking no part in the management, though he lived on the premises and assisted occasionally. Held, on his death, that the capital and stock were the wife's under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93); *Re Worsley, supra* (business bought by the wife with her separate money; she assumed the responsibility for all debts incurred in carrying it on, accepting bills in her own name etc. Held, that the mere fact that the husband lived on the premises and took part in the management did not prevent it being her separate business); *Re Simon*, [1909] 1 K. B. 201, C. A.

(*j*) *Laporte* v. *Cosstick, supra* (lodging-house managed by wife; husband ordered goods in his own name and paid the rent, treating it as his business. Held, not the wife's separate business).

SECT. 4. Gift or Limitation to Husband and Wife.

SECT. 4.—*Gift or Limitation to Husband and Wife.*

Before 1883.

709. A devise, limitation, or surrender of freeholds or copyholds to husband and wife before the 1st January, 1883, created a tenancy by entireties, the husband being entitled to the rents and profits during their joint lives, and the survivor, whether husband or wife, being entitled to the whole (*k*). It is immaterial whether the estate was in possession, remainder, or reversion (*l*).

A gift or limitation of personalty to husband and wife before the 1st January, 1883, vested the entire interest in the husband alone at law and in equity (*m*).

Limitation to husband and wife and third person.

710. If real property was given or limited to husband and wife and a third person before the 1st January, 1883, the husband and wife, in the absence of an indication of intention to the contrary, took one moiety as tenants by entireties, and the third person the other moiety (*n*).

If personal property was similarly given or limited, the husband *primâ facie* took one moiety absolutely, and the third person the other moiety (*o*).

Rule of construction.

This rule as to the respective shares of the parties, which is based on the doctrine of the unity of the person (*p*), is merely a rule of construction (*q*), and a slight expression of an intention to the contrary is sufficient to exclude it (*r*). Husband and wife, though taking as tenants by entireties, may take two shares between them (*q*), and in ascertaining the intention of the testator or settlor, the disposition of the names of the parties is a material circumstance to be taken into consideration (*q*).

In the application of the rule it is immaterial whether the

(*k*) Co. Litt. 187 ; *Doe* d. *Freestone* v. *Parratt* (1794), 5 Term Rep. 652. Such an estate can only be effectively conveyed by deed acknowledged. The conveyance of the husband alone passes no interest as against the wife surviving. See title REAL PROPERTY AND CHATTELS REAL.

(*l*) Co. Litt. 187 b.

(*m*) *Re Bryan*, *Godfrey* v. *Bryan* (1880), 14 Ch. D. 516 (income of sum of money for benefit of husband and wife during their joint lives, and for the life of the survivor. Held, husband took the entire interest) ; *Atcheson* v. *Atcheson* (1849), 11 Beav. 485 (bequest to husband and wife) ; *Ward* v. *Ward* (1880), 14 Ch. D. 506 (annuity in trust for husband and wife during joint lives).

(*n*) *Back* v. *Andrew* (1691), 2 Vern. 120 (surrender of copyholds to husband and wife and their daughter and their heirs. Held, the husband and wife took one moiety, and the daughter the other).

(*o*) *Bricker* v. *Whatley* (1684), 1 Vern. 233 (bequest to A., B. and C., and the wife of C. Held A., B. and C. each took one-third) ; *Re Wylde* (1852), 2 De G. M. & G. 724, C. A. ; *Gordon* v. *Whieldon* (1848), 11 Beav. 170 (bequest to A. and his wife and children ; there were two children. Held that A. and his wife took one-third, and each of the children one-third).

(*p*) *Dias* v. *De Livera* (1879), 5 App. Cas. 123, P. C.

(*q*) *Warrington* v. *Warrington* (1842), 2 Hare, 54, where a testatrix gave the residue of her property equally between her brother, her sister, and her nephew and his wife, and it was held that the nephew and his wife each took a fourth share; *Re Dixon*, *Byram* v. *Tull* (1889), 42 Ch. D. 306, where there was a gift of residue to A. and B., his wife, C. the wife of X., D. the wife of Y., E., F. and G., his wife, and it was held that each took one-seventh, the wives taking separate shares. As to the construction of wills generally, see title WILLS.

(*r*) See note (*s*), p. 355, *post*.

property is real or personal, and whether the third person takes as a joint tenant or as a tenant in common (*s*).

SECT. 4. Gift or Limitation to Husband and Wife.

After 1882.

711. Where a gift or limitation of real or personal property to husband and wife takes effect after the 31st December, 1882, they take as joint tenants or tenants in common, according to the terms of the instrument, in the same manner as if they were not married, the wife's share being separate property, since tenancies by entireties have ceased to exist in all cases of property the title to which accrues after that date (*t*).

But in the case of a gift or limitation to husband and wife and another person or other persons, the husband and wife are still *primâ facie* only entitled to one share between them, as in the case of gifts and limitations before the 1st January, 1883, subject, as before that date, to any expression or indication of an intention to the contrary (*u*).

Effect of divorce.

712. A decree for dissolution of marriage converts a tenancy of land by entireties into a joint tenancy between the parties, but it does not operate to sever a joint tenancy between husband and wife (*x*).

SECT. 5.—*Paraphernalia.*

What are paraphernalia.

713. The term "paraphernalia" (*a*) comprises such jewels and ornaments, exclusive of old family jewels (*b*), and those which are a wife's separate property, as the wife is permitted by the husband

(*s*) *Re March, Mander* v. *Harris* (1884), 27 Ch. D. 166, C. A. But the rule is not excluded by the mere fact that in another portion of the same will the husband and wife are given separate legacies (*Re Wylde* (1852), 2 De G. M. & G. 724, C. A.).

(*t*) By the operation of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75); see *Hunt* v. *Hunt* (1908), 25 T. L. R. 132; and p. 348, *ante*. See also the cases cited in note (*u*), *infra*. As to the distinction between joint tenancies and tenancies in common, see title REAL PROPERTY AND CHATTELS REAL.

(*u*) *Re Jupp, Jupp* v. *Buckwell* (1888), 39 Ch. D. 148 (gift of residue by testatrix between her sister M. B., D. B., her husband, and H. B., her stepdaughter. Held, that M. B. and D. B. each took a fourth, and H. B. a moiety, M. B.'s share being separate property); *Re March, Mander* v. *Harris, supra* (residuary personalty bequeathed to C. J. M., and J. H. and E. his wife, to and for their own benefit absolutely, all three being appointed executors. Held, that they took as joint tenants, C. J. M. taking a moiety, and J. H. and E. each one-fourth, E.'s share being separate property); compare *Re Dixon, Byram* v. *Tull* (1889), 42 Ch. D. 306, cited in note (*q*), p. 354, *ante*.

(*x*) *Thornley* v. *Thornley*, [1893] 2 Ch. 229.

(*a*) The doctrine of paraphernalia was recently discussed at length in *Masson, Templier & Co.* v. *De Fries*, [1909] 2 K. B. 831, C. A. In this case FARWELL, L.J., seems to have considered that the doctrine is now obsolete, but the other Lords Justices did not express an opinion on the point. Subject to this, the rules relating to the doctrine are stated here; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 219, 220.

(*b*) *Jervoise* v. *Jervoise* (1853), 17 Beav. 566. But where the husband had acquired jewels from his mother, which he allowed his wife to wear during his life in the same way as other ornaments given by him to her, it was held that they were not proved to be "old" family jewels, and were paraphernalia, which belonged to the widow, and to a second husband on her remarriage and death (*Laing* v. *Walker* (1891), 64 L. T. 527).

SECT. 5. Paraphernalia.

to wear for the decoration of her person (*c*). It is confined to jewels and other ornaments for the person (*d*).

Although old family jewels are not paraphernalia (*e*), other articles of jewellery given by the husband to the wife to be worn with the family jewels may be (*e*), and it is sufficient if they are only worn on important occasions (*f*). The fact that they are very valuable, and that the husband keeps possession of them when they are not being worn, does not exclude them from being paraphernalia (*g*).

Jewels and trinkets given to the wife by relatives or friends, and not by the husband, are generally considered the wife's separate property, or as given for her separate use, and not as paraphernalia (*h*), and even in the case of gifts by the husband, it must appear that they were only intended for the decoration of her person, and not as absolute gifts, otherwise they will be deemed to be her separate property (*i*).

Christmas and birthday gifts, and gifts of jewellery and trinkets in order to settle differences, will be presumed to be absolute gifts and not paraphernalia, in the absence of a clear expression of intention to the contrary (*i*).

Disposition by husband or wife.

714. Paraphernalia cannot be disposed of by a wife during her husband's lifetime, either by act *inter vivos* or by will, nor can the husband dispose of them by will (*k*), whatever may be their value (*l*), but he may sell, pledge, or give them away during his lifetime (*m*).

Liability for debts.

715. Paraphernalia are liable for a husband's debts on failure of other assets (*n*), even if they were bought out of his wife's pin money (*o*) while she was living with her husband (*p*). But, subject to the liability for his debts, they belong to the widow, and if they

(*c*) *Bindon's* (*Viscountess*) *Case* (1586), Moore (K. B.), 213.

(*d*) *Burton* v. *Pierpoint* (1722), 2 P. Wms. 78; *Graham* v. *Londonderry* (1746), 3 Atk. 393.

(*e*) See note (*b*), p. 355, *ante*.

(*f*) *Graham* v. *Londonderry*, *supra*; *Northey* v. *Northey* (1740), 2 Atk. 77.

(*g*) *Northey* v. *Northey*, *supra*.

(*h*) *Graham* v. *Londonderry*, *supra*; *Lucas* v. *Lucas* (1738), 1 Atk. 270. But in *Jervoise* v. *Jervoise* (1853), 17 Beav. 566, pearl ornaments given to the wife by a third person were held part of her paraphernalia.

(*i*) *Masson, Templier & Co.* v. *De Fries*, [1909] 2 K. B. 831, C. A. Wearing apparel purchased by a wife for her own personal use with money supplied to her by her husband is *primâ facie* her separate property (*ibid.*). The Married Women's Property Acts do not appear to have altered the law with respect to gifts of paraphernalia, when it is proved that they were intended as paraphernalia and not absolute gifts (*Tasker* v. *Tasker*, [1895] P. 1). As to gifts between husband and wife generally, see pp. 392 *et seq.*, *post*.

(*k*) *Seymore* v. *Tresilian* (1737), 3 Atk. 358; *Hastings* (*Lord*) v. *Douglas* (1634), Cro. Car. 344; and see *Re Hewson*, *D'Almaine* v. *Moseley* (1854), 23 L. J. (CH.) 256, C. A.

(*l*) *Northey* v. *Northey*, *supra*, where the value of the jewels was equal to £3,000 a year.

(*m*) *Graham* v. *Londonderry*, *supra*.

(*n*) *Ridout* v. *Plymouth* (*Earl*) (1740), 2 Atk. 104; *Burton* v. *Pierpoint*, *supra*; *Townshend* (*Lord*) v. *Windham* (1750), 2 Ves. Sen. 1, 7; *Parker* v. *Harvey* (1726), 4 Bro. Parl. Cas. 604, 609; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 293, note (*f*).

(*o*) See p. 357, *post*.

(*p*) *Tyrrell's* (*Lady*) *Case* (1674), Freem. (CH.) 304.

are taken for his debts, the widow is entitled to marshal all other assets, both realty and personalty, against the heir and all devisees and legatees (*q*).

If they have been pledged by the husband, the widow is entitled to have them redeemed out of his personalty, to the prejudice of legatees (*r*).

Right of widow, how barred.

716. The right of a widow to paraphernalia may be barred by a provision in her marriage settlement (*s*), or by agreement between her and her husband (*t*), or by her election or acquiescence, as, for instance, if he bequeath them to her for life, by her taking under the will instead of claiming them absolutely (*a*).

SECT. 6.—*Pin Money.*

Definition.

717. Pin money is an allowance made by a husband to his wife for the purchase of dresses and ornaments, in order that his dignity in society may be kept up (*b*). It may be a yearly allowance settled on the wife before marriage (*c*), or it may be made subsequently in the shape of gratuitous gifts from time to time for the purposes mentioned (*d*).

The wife is under an implied duty to apply her pin money towards her dress, decoration and adornment, and therefore cannot assign it (*e*).

Waiver by presumption

718. If pin money secured by settlement is allowed to run into arrear, and the wife is supported by the husband, it will be presumed that she waived her claim in consideration of such support (*f*), and she will only be entitled, on surviving her husband, to claim arrears for one year prior to his death (*g*).

But this presumption may be rebutted, and if it appears that the wife demanded her pin money without success (*h*), or if she lived separate from her husband without any allowance, she is entitled to claim all arrears due at his death (*h*); and there is no such

(*q*) *Snelson* v. *Corbet* (1746), 3 Atk. 369; *Tipping* v. *Tipping* (1721), 1 P. Wms. 729 (realty descending to heir-at-law); *Incledon* v. *Northcote* (1747), 3 Atk. 430; and *Boyntun* v. *Boyntun* (1784), 1 Cox, Eq. Cas. 106 (devisees); *Graham* v. *Londonderry* (1746), 3 Atk. 393 (specific legatee); *Tynt* v. *Tynt* (1729), 2 P. Wms. 542 (devisee); *Probert* v. *Clifford* (1736), 2 P. Wms. 544, n.

(*r*) *Graham* v. *Londonderry*, *supra*.

(*s*) *Cholmely* v. *Cholmely* (1688), 2 Vern. 82, where marriage articles provided that the wife should have no part of her husband's personal estate except what he left her by will.

(*t*) As to contracts between husband and wife, see p. 432, *post*.

(*a*) *Clarges* v. *Albemarle* (*Duchess*) (1691), 2 Vern. 245.

(*b*) *Howard* v. *Digby* (1834), 2 Cl. & Fin. 634, H. L.

(*c*) See title SETTLEMENTS.

(*d*) As to savings from such an allowance, see p. 358, *post*.

(*e*) *Jodrell* v. *Jodrell* (1845), 9 Beav. 45.

(*f*) *Powell* v. *Hankey* (1722), 2 P. Wms. 82, 84; *Thomas* v. *Bennet* (1726), 2 P. Wms. 341; *Fowler* v. *Fowler* (1735), 3 P. Wms. 353, 355; *Thrupp* v. *Harman* (1834), 3 My. & K. 513.

(*g*) *Howard* v. *Digby*, *supra*; *Offley* v. *Offley* (1691), Prec. Ch. 26; *Foss* v. *Foss* (1864), 15 I. Ch. R. 215; *Aston* v. *Aston* (1749), 1 Ves. Sen. 264, 267; *Townshend* (*Lord*) v. *Windham* (1750), 2 Ves. Sen. 1, 7; *Peacock* v. *Monk* (1751), 2 Ves. Sen. 190; *Thomas* v. *Bennet*, *supra*.

(*h*) *Ridout* v. *Lewis* (1738), 1 Atk. 269 (on complaints by the wife from time

SECT. 6. Pin Money.

presumption where the wife is insane, and therefore incapable of waiving her rights (*i*).

Satisfaction.

Payments by the husband in discharge of debts incurred for purposes for which pin money is applicable are a satisfaction of his obligation *pro tanto*, and may be set off by him against any claim by the wife for arrears (*k*).

The wife's representatives after her death have no claim in respect of arrears of pin money (*l*).

The claim of a widow for arrears of pin money may be satisfied by a legacy from the husband of an equal or greater amount (*m*).

Misconduct of wife.

719. The claim of a wife to pin money secured by a marriage settlement is not affected by her elopement or adultery (*n*).

SECT. 7.—*Savings of Wife.*

From separate property.

720. The savings of a wife from equitable or statutory separate property (*o*), or the produce thereof, belong to her for her separate use or as her separate property, as the case may be (*p*).

From housekeeping allowance.

721. Where husband and wife are living together, any savings by her from the proceeds of his business, or from an allowance by him for housekeeping expenses, dress, or the like, belong to the husband, though they may be invested in the name of the wife, unless it

to time as to arrears, the husband had always said that she should have it at the last); *Foss* v. *Foss* (1864), 15 I. Ch. R. 215; *Moore* v. *Moore* (1738), 1 Atk. 272 (living apart); and see *Edgeworth* v. *Edgeworth* (1865), 16 I. Ch. R. 348.

(*i*) *Brodie* v. *Barry* (1813), 2 Ves. & B. 36.

(*k*) *Howard* v. *Digby* (1834), 2 Cl. & Fin. 634, H. L.

(*l*) *Ibid.* It has been held in Ireland that the rule that the wife's representatives cannot claim arrears after her death does not apply where she has assigned her right for value, or where the husband has been deprived of the enjoyment of the estate on which the pin money was charged, and that assignees for value may claim all arrears (*Tuffnell* v. *O'Donoghue*, [1897] 1 I. R. 360). This decision is, however, open to the objection that pin money, being an allowance for a specific purpose which obviously cannot be fulfilled if it is assigned, is, on principle, not assignable. See also *Foss* v. *Foss*, *supra*. The point does not appear to have been specifically raised in any of the English cases; but see *Howard* v. *Digby*, *supra*, and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 220.

(*m*) *Fowler* v. *Fowler* (1735), 3 P. Wms. 353, 355; and see title EQUITY, Vol. XIII., pp. 136 *et seq.*

(*n*) *Moore* v. *Moore* (1738), 1 Atk. 272; *Sidney* v. *Sidney* (1734), 3 P. Wms. 269; *Seagrave* v. *Seagrave* (1807), 13 Ves. 439, 443, 444; *Buchanan* v. *Buchanan* (1809), 1 Ball & B. 203.

(*o*) See pp. 341 *et seq.*, *ante*.

(*p*) *Gore* v. *Knight* (1706), 2 Vern. 535; *Fettiplace* v. *Gorges* (1789), 1 Ves. 46; *Butler* v. *Cumpston* (1868), L. R. 7 Eq. 16; *Duncan* v. *Cashin* (1875), L. R. 10 C. P. 554 (furniture settled to separate use of the wife, renewed out of her separate moneys); *Darkin* v. *Darkin* (1853), 17 Beav. 578 (savings invested in joint names, and applied in purchase of realty. Held, after husband's death, the separate property of the wife). Compare *Spicer* v. *Dawson*, *Spicer* v. *Spicer*, *Lawford* v. *Spicer* (1857), 5 W. R. 431 (bond settled to separate use of wife for life, then gift over; some arrears of income remaining in the hands of the trustee, were invested for her benefit after her husband's death. Held, on her remarriage, that the arrears so invested were not to be considered settled to her separate use, but passed to the second husband).

appears that he intended that any such savings should belong to her as her separate property as a gift from him (*q*).

When living apart.

722. Where husband and wife are living apart, and he makes her an allowance for her maintenance and support, the decision whether savings from the allowance belong to the husband, or to the wife as her separate property, depends upon the terms of the agreement for separation, if any, and the intention of the parties to be ascertained from the circumstances of the particular case (*r*).

When husband a lunatic.

Where the husband is a lunatic, and an allowance for separate maintenance is made to the wife living apart under an order of the court, savings therefrom are her separate property even if the order does not expressly state that the allowance is for her separate use (*s*). But such an allowance is not assignable by the wife (*t*).

Part V.—Dispositions of Property.

SECT. 1.—*Restraint on Anticipation.*

SUB-SECT. 1.—*How Imposed.*

Imposition of restraint.

723. A married woman to whom any property is given or limited for her separate use (*u*), or so as to become her statutory separate property (*a*), may be restrained from alienating or anticipating the same during the coverture (*b*).

(*q*) *Barrack* v. *M'Culloch* (1856), 3 K. & J. 110; *Tyrrell's* (*Lady*) *Case* (1674), Freem. (CH.) 304; *Walter* v. *Hodge* (1818), 2 Swan. 92; *Slanning* v. *Style* (1734), 3 P. Wms. 334, 337 (profits in respect of butter, eggs, poultry etc. arising from a farm; the husband called the savings her pin money. Held, her separate property, and, the husband having borrowed £100, that she was entitled to prove as a creditor against his estate); and see *Herbert* v. *Herbert* (1692), Prec. Ch. 44; *Mangey* v. *Hungerford* (undated), 2 Eq. Cas. Abr. 156; *Mews* v. *Mews* (1852), 15 Beav. 529 (proceeds of surplus butter, eggs and poultry deposited by a farmer's wife, with his sanction, with a firm in her own name; the husband called it her money. Held, not sufficient evidence to establish a gift by the husband, and that the money was his); *Pope* v. *Bushell & Co.* (1888), 4 T. L. R. 610 (savings from husband's business). See also *Withers* v. *Berry* (1895), 39 Sol. Jo. 559, and further, as to gifts by husband to wife, pp. 392 *et seq.*, *post*.

(*r*) *Brooke* v. *Brooke* (1858), 25 Beav. 342 (husband in India remitted money to wife in England for her support; she saved a considerable amount out of the allowance. Held, that the husband was not entitled to recover the savings); *Messenger* v. *Clarke* (1850), 5 Exch. 388 (separation by verbal agreement; husband remitted to wife a certain sum weekly for her support; she invested savings in stock. Held, that the husband was entitled to recover the stock, as money lent, from a person to whom she gave it shortly before her death); *Birkett* v. *Birkett* (1908), 98 L. T. 540 (husband went abroad temporarily to seek employment, and during his absence remitted money to the wife unconditionally, a portion of which she used for the maintenance of herself and the children, and the residue of which she saved and deposited in the Post Office Savings Bank in her own name. Held, that the husband was entitled on a separation to the savings so deposited).

(*s*) *In the Goods of Tharp* (1878), 3 P. D. 76, C. A.

(*t*) *Re Robinson* (1884), 27 Ch. D. 160, C. A.

(*u*) See p. 341, *ante*.

(*a*) See p. 348, *ante*.

(*b*) *Brandon* v. *Robinson* (1811), 18 Ves. 429.

SECT. 1.
Restraint on Anticipation.

A restraint on anticipation may be attached to a gift or limitation of any kind of property, real or personal, whether in possession or remainder or reversion, and whether the *corpus* or only the income is given to the married woman, and by the intervention of trustees it may be attached to a legacy or gift of a sum of money (*c*), but it is confined to property given or limited to her separate use and to separate property under the Married Women's Property Acts (*d*).

Gifts without impeachment of waste.

A direction that a married woman to whom a life estate is given shall not be impeachable for waste is not inconsistent with a restraint on anticipation (*e*).

Words necessary to create.

724. No particular form of words is necessary to impose a restraint on anticipation. It is sufficient if, on the construction of the instrument under which the property is acquired as a whole, it appears to have been the intention of the testator or settlor to exclude the power of disposition (*f*). Words merely showing an intention to exclude the rights of the husband, and to protect the property from his debts and engagements, or importing that her receipts alone are to be a sufficient discharge, are not, however, sufficient. An intention to prevent the wife from alienating or anticipating the property must be shown (*g*).

(*c*) See cases cited in the following notes.

(*d*) It is no longer necessary, since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), to express that the property is given for the separate use of the married woman, in order to restrain her from anticipation; separate property under that Act will support a restraint on anticipation (*Re Lumley, Ex parte Hood Barrs*, [1896] 2 Ch. 690, C. A.). The restraint on anticipation was invented by the Court of Chancery for the purpose of protecting the equitable separate property of a married woman against the influence and control of her husband, and before the Married Women's Property Acts was confined to property given for her separate use (*Tullett* v. *Armstrong* (1840), 4 My. & Cr. 377, 393, 394; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661, C. A.; *Re Ridley, Buckton* v. *Hay* (1879), 11 Ch. D. 645, 649). Unless restrained, a married woman may dispose of her equitable or statutory separate property as if she were a *feme sole*; see p. 377, *post*. At the present day, the chief importance of the restraint on anticipation is in the protection it affords a married woman against her own debts and engagements and the consequences of her wrongful acts; see pp. 363 *et seq.*, *post*.

(*e*) *Re Lumley, Ex parte Hood Barrs, supra; dictum* in *Clive* v. *Clive* (1872), 7 Ch. App. 433, not followed.

(*f*) See p. 342, 348, *ante*.

(*g*) In the following cases, a restraint on anticipation was held to be imposed:—*Steedman* v. *Poole* (1847), 6 Hare, 193 (bequest of leaseholds for years, free from the control of any future husband, and not to be sold or mortgaged. Held, restrained from anticipation even during the then existing marriage); *Brown* v. *Bamford* (1846), 1 Ph. 620 (trust to pay rents to such persons as the wife by writing, but not by way of anticipation, should appoint, and in default of appointment, into her own hands for her sole and separate use. Held, that the restraint on anticipation attached to the whole gift, and not merely to the power of appointment); *White* v. *Herrick* (1873), 21 W. R. 454 (income to be paid to the wife free from her debts and engagements, whether contracted by herself or any husband she might marry); *Re Gaffee* (1849), 1 Mac. & G. 541 (trust to pay dividends to the wife for life, or to her appointees, without anticipation); *Harnett* v. *Macdougall* (1845), 8 Beav. 187; *Moore* v. *Moore* (1844), 1 Coll. 54 (trust to pay dividends to such persons as the wife should, but not by way of anticipation, appoint, and in default of appointment, to her for her separate use); *Baker* v. *Newton* (1839), 2 Beav. 112 (for her own absolute use, without liberty to sell or assign during her life); *Harrison* v. *Harrison* (1888), 13 P. D. 180, 184, C. A. (for her sole, separate and inalienable

Power of appointment.

725. Where property is given for the separate use of a married woman for life, with a power of appointment by deed or will over the *corpus*, a direction that any appointment by deed shall not come into operation until after her death does not of itself import a restraint on anticipation so as to prevent her from making an irrevocable appointment by deed (*h*).

A settlement on a married woman for life, with remainder as she may appoint, and in default of appointment, for her executors and administrators, does not import a restraint on anticipation (*i*).

Words forming part of gift.

726. Where a restraint on anticipation is imposed by words forming a portion of the sentence giving the property, and as part of the gift, the restraint is commensurate with the property, and is not affected by additional words applicable to a particular coverture only (*j*), or otherwise qualifying the nature of the restraint (*k*).

use); *Baker* v. *Bradley* (1855), 7 D. M. & G. 597, C. A.; *Field* v. *Evans* (1846), 15 Sim. 375 (income to be paid to such persons as the wife might appoint from time to time, or to permit her to receive the same for her separate use, her receipts, or the receipts of any persons to whom she might appoint the same after it should become due, to be sufficient discharges); *Re Smith, Chapman* v. *Wood* (1884), 51 L. T. 501 (for her own sole and separate use, free from the debts of her present or any future husband, the receipts of her for the said rents etc. to be given after the same shall become due to be good and effectual discharges); *Baggett* v. *Meux* (1844), 1 Coll. 138; affirmed (1846), 1 Ph. 627 (devise of realty to the wife's separate use, with a declaration that she should not mortgage or incumber the same); *Goulder* v. *Camm* (1859), 1 De G. F. & J. 146, C. A. ("no sale or mortgage to take place"); *Re Lavender's Policy*, [1898] 1 I. R. 175, C. A. (policy of assurance on life of husband, the moneys being expressed to be payable for the sole and separate use of the wife, and one of the conditions being: "This policy is not assignable").

In the following cases it was held that there was no restraint on anticipation:—*Acton* v. *White* (1823), 1 Sim. & St. 429 (to pay rents as they should become due and payable into the hands of the wife and not otherwise, for her life for her separate use, the receipts of the wife alone, for what should be actually paid into her own proper hands, to be a good discharge); *Parkes* v. *White* (1805), 11 Ves. 209, 222; *Pybus* v. *Smith* (1791), 3 Bro. C. C. 340 (to pay interest on rents into her own hands from time to time); *Glyn* v. *Baster* (1827), 1 Y. & J. 329 (dividends to be paid into the wife's own hands, independent of her present or any future husband, and her receipts to be a sufficient discharge as if she were sole and unmarried); *Re Ross's Trust, Ex parte Collins* (1851), 1 Sim. (N. S.) 196 (stock in trust for her separate use for life, the dividends to be paid to her on her personal appearance and receipt); *Witts* v. *Dawkins* (1806), 12 Ves. 501 (rents and profits to be paid according to the appointment of the wife from time to time, and in default of appointment to her for her sole and separate use, her or her appointee's receipts to be effectual discharges); *Sturgis* v. *Corp* (1806), 13 Ves. 190 (for the wife's sole and separate use; not to be subject to debts, control or engagements of husband; her receipts alone to be a good discharge); *Browne* v. *Like* (1807), 14 Ves. 302 (for the wife's sole and separate use; to pay into her own proper hands; her receipts to be a sufficient discharge). In *Re Hutchings to Burt* (1888), 59 L. T. 490, C. A., it was held that a mere expression by a testator of a wish that his daughter, to whom he devised freeholds, should not sell did not operate as a restraint on anticipation.

(*h*) *Alexander* v. *Young* (1848), 6 Hare, 393. See also *Medley* v. *Horton* (1844), 14 Sim. 222; *Re Linzee's Settlement* (1856), 23 Beav. 241; *Barrymore* v. *Ellis* (1836), 8 Sim. 1.

(*i*) *London Chartered Bank of Australia* v. *Lemprière* (1873), L. R. 4 P. C. 572; *Mayd* v. *Field* (1876), 3 Ch. D. 587.

(*j*) *Re Gaffee* (1849), 1 Mac. & G. 541.

(*k*) *Harrop* v. *Howard* (1845), 3 Hare, 624 (restraint on anticipation annexed

SECT. 1. Restraint on Anticipation.

Words rendered ineffectual by nature or terms of gift.

727. Words importing a restraint on anticipation may be rendered ineffectual by the nature and terms of the gift, or the omission to appoint trustees. Thus, if a legacy or share of a fund is given by will to a married woman for her separate use, and is followed by a clause in restraint of anticipation, no trustees being appointed, the restraint clause will be ineffectual unless the testator has expressed or shown an intention that the executors should keep the money invested and pay only the income to her (*l*). Again, a direction that the legacy or share to which the married woman is entitled shall be paid to her is inconsistent with a restraint on anticipation (*m*). In such cases, the question whether the restraint

to a gift held effectual, although it was subsequently provided that her or her appointee's receipts should be a sufficient discharge).

(*l*) *Re Bown, O'Halloran* v. *King* (1884), 27 Ch. D. 411, C. A. (trustees directed to pay income of a fund to A. for life, and after his death to pay a share of the fund to a married woman for her separate use, without power of anticipation, her receipt to be a sufficient discharge. Held, that she was entitled to receive the capital of her share on A.'s death); *Re Croughton's Trusts* (1878), 8 Ch. D. 460 (a reversionary share of a mixed fund, subject to a life interest, was given to a married woman for her separate use without power of anticipation. The tenant for life died during the lifetime of the testatrix, and the share of the married woman was represented by a sum of cash in court. Held, that she was entitled to have it paid out to her); *Re Taber, Arnold* v. *Kayess* (1882), 51 L. J. (CH.) 721 (bequest of a sum of money to A., and in the event of his dying in the lifetime of the testator, to A.'s children equally, followed by restraint clause. A. died in the testator's lifetime, and one of his children was a married woman. Held, that she was entitled to payment of her share); *Re Grey's Settlements, Acason* v. *Greenwood* (1887), 34 Ch. D. 712, C. A. (sum of £1,500 to be raised and paid to a married woman without power of anticipation, and one-fourth of the residue to be held on trust for her absolutely without power of anticipation. Held, that she was entitled to receive the £1,500, but not the capital of the one-fourth share of the residue); *Re Holmes, Hallows* v. *Holmes* (1892), 67 L. T. 335, C. A. (trust for widow for life, and then as to capital and income for her children living at her decease, all moneys, capital and income, to which any female should be entitled to be "paid into her own hands for her separate use free from marital control," when and as the same should become actually due and payable, and "not by way of anticipation." Held, that the restraint on anticipation did not prevent payment of the capital of the shares to children who were married women, when they became due on the widow's death); *Russell* v. *Lawder*, [1904] 1 I. R. 328 (legacy to married woman without power of anticipation, but no trustees appointed. Held, restraint ineffectual; entitled to payment); compare *Re Ellis' Trusts* (1874), L. R. 17 Eq. 409 (bequest of Consols, followed by restraint clause. Held restraint effectual); *Re Clarke's Trusts* (1882), 21 Ch. D. 748 (devise and bequest of residuary real and personal estate without power of anticipation, the residue consisting of two sums of stock and a sum of cash. Held, that the restraint was effectual as to the stock, that being income-bearing, but not as to the sum of cash. This decision was questioned in *Re Bown, O'Halloran* v. *King, supra*); *Re Currey, Gibson* v. *Way* (1886), 32 Ch. D. 361 (share in residuary real and personal estate, subject to restraint on anticipation. Held, beneficiary not entitled to have the capital of the personalty paid); *Re Benton, Smith* v. *Smith* (1882), 19 Ch. D. 277 (trust to convert and invest proceeds of property and to stand possessed of the investments for daughters for their separate use without power of anticipation, the property consisting of leaseholds and a sum of money. Held, that the restraint was effectual as to both).

(*m*) *Re Fearon, Hotchkin* v. *Mayor* (1896), 45 W. R. 232 (bequest of fund in trust for married woman to be paid to her for her separate use without power of anticipation; no indication of an intention that only income should be paid. Held, that the words of restraint must be disregarded); and see *Re Bown, O'Halloran* v. *King, supra, Re Grey's Settlements, Acason* v. *Greenwood, supra,* and *Re Holmes, Hallows* v. *Holmes, supra; Re Bankes, Reynolds* v. *Ellis,*

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is effective does not depend upon whether the gift is of an income-bearing fund or sum in cash, although that is a matter to be taken into consideration in ascertaining the intention of the testator, but upon whether, having regard to all the circumstances of the particular case, the testator has shown an intention that only the income should be paid to the married woman, and the capital retained during the coverture (*n*).

Gifts subject to preceding life interest.

728. Where property is given to a married woman with a restraint on anticipation, subject to a preceding life interest, the restraint is not necessarily to be construed as limited to the period during which the married woman's interest is reversionary (*o*), but it may be so construed, if that appears to have been the intention of the testator or settlor having regard to the nature of the property, the terms of the gift, and the other circumstances of the particular case (*p*).

SUB-SECT. 2.—*Effect.*

Operates only during coverture.

729. A restraint on anticipation operates only during coverture (*q*), and any condition against alienation otherwise than during coverture is absolutely void (*r*).

The restraint, however, unless expressly limited to a particular marriage, revives on a remarriage, whether of a widow or divorced wife, subject to any disposition which may have been made during discoverture (*s*).

If property is given to a single woman subject to a restraint on anticipation, and she marries without having disposed of the property or removed the restraint, the restraint will attach on the

[1902] 2 Ch. 333. As to construction of repugnant clauses in deeds, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 456. As to rules of construction of wills, see title WILLS.

(*n*) See note (*l*) on p. 362, *ante*.

(*o*) *Re Tippett's and Newbould's Contract* (1888), 37 Ch. D. 444, C. A. (leaseholds vested in trustees).

(*p*) *Re Sykes's Trusts* (1862), 2 John. & H. 415; *Re Holmes, Hallows* v. *Holmes* (1892), 67 L. T. 335, C. A.; *Re Bown, O'Halloran* v. *King* (1884), 27 Ch. D. 411, C. A.; *Re Croughton's Trusts* (1878), 8 Ch. D. 460; and *Re Taber, Arnold* v. *Kayess* (1882), 51 L. J. (CH.) 721, cited in note (*l*), p. 362, *ante*.

(*q*) *Re Wood, Wood* v. *Hooper* (1889), 61 L. T. 197; *Brown* v. *Pocock* (1833), 2 Russ. & M. 210; *Jones* v. *Salter* (1815), 2 Russ. & M. 208; *Woodmeston* v. *Walker* (1831), 2 Russ. & M. 197. As to marshalling between two mortgagees of the property, one of whose mortgages was granted during coverture, and the other during discoverture, where only a portion of the property mortgaged is subject to a restraint on anticipation, see *Re Loder's Trusts* (1886), 56 L. J. (CH.) 230.

(*r*) *Re Wolstenholme, Marshall* v. *Aizlewood* (1881), 43 L. T. 752.

(*s*) *Hawks* v. *Hubback* (1870), L. R. 11 Eq. 5; *Abergavenny (Marquis)* v. *Sugden* (1886), 2 T. L. R. 754; *Clark* v. *Jaques* (1838), 1 Beav. 36; *Shafto* v. *Butler* (1871), 40 L. J. (CH.) 308 (divorce and remarriage without any settlement); *Dixon* v. *Dixon* (1838), 1 Beav. 40; *Stroud* v. *Edwards* (1897), 77 L.T. 280, C. A. (income of property given to wife for life, subject to restraint on anticipation, the property to go to her absolutely in the event of her surviving her husband; she was divorced and remarried. There being no evidence as to when the first husband died, it was held that the restraint reattached on the remarriage, and that a creditor who had obtained a judgment against her was not entitled to the appointment of a receiver). A restraint attached to a gift of property is not confined to the existing coverture merely because words are added which are applicable only to such coverture (*Re Gaffee* (1849), 1 Mac. & G. 541).

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marriage, and also on any subsequent marriage, subject to any disposition during discoverture (*t*).

Where an annuity is given by will to a single woman, subject to a restraint on anticipation, the restraint does not deprive her of the option of requiring payment of the fund which is to be laid out in providing the annuity, instead of having it so laid out (*a*).

May be for limited time.

730. A restraint on anticipation may be imposed for a limited time only, as, for instance, during the life of a tenant, subject to whose life interest the married woman is entitled to the property (*b*).

Prevents alienation.

731. While a restraint on anticipation continues, it renders void any attempted alienation or disposition of the property subject thereto, whether by way of mortgage or charge or otherwise (*c*). The restraint cannot be released during coverture (*d*), nor can it then be removed by agreement (*e*).

Any such attempted alienation is void not only as against a purchaser for value from the wife, but also as against all subsequent purchasers from him with notice, actual or constructive, of the restraint (*f*).

An attempted alienation does not involve a forfeiture of the married woman's interest; it is simply ineffective to pass any of her right or interest in the property (*g*).

Even if a legacy is given to a married woman on condition that she conveys an estate of much less value, which is subject to a restraint on anticipation, so that it would be clearly for her benefit to comply with the condition, she cannot do so, except by order of the court (*h*).

(*t*) *Clark* v. *Jaques* (1838), 1 Beav. 36; *Tullett* v. *Armstrong* (1838), 1 Beav. 1; *Scarborough* v. *Borman* (1840), 4 My. & Cr. 377. For form of release by an unmarried woman of a restraint on settled property, see Encyclopædia of Forms and Precedents, Vol. XV., p. 43.

(*a*) *Woodmeston* v. *Walker* (1831), 2 Russ. & M. 197.

(*b*) *Re Spencer, Thomas* v. *Spencer* (1885), 30 Ch. D. 183; *Re Bown, O'Halloran* v. *King* (1884), 27 Ch. D. 411, C. A.; and see other cases cited, note (*p*), p. 363, *ante*. As to limitations with regard to extent of interest, see p. 367, *post*.

(*c*) *Re Sykes's Trusts* (1862), 2 John. & H. 415 (a married woman entitled to a sum payable on the death of her father, subject to a restraint on anticipation during the father's life, promised to repay to A. certain advances out of the fund when it fell in. After the father's death the fund was paid into court, and the married woman promised A. that if he would not oppose her application for payment out to her, he should be paid; A. did not oppose the application, and the money was paid out to her. Held, that A. had no charge on the fund); *Hill* v. *Cooper*, [1893] 2 Q. B. 85, C. A. (mortgage of life interest subject to restraint: void); *Re Tippett's and Newbould's Contract* (1888), 37 Ch. 444, C. A.; *Steedman* v. *Poole* (1847), 6 Hare, 193 (leaseholds for years cannot be assigned or charged during the restraint); see, however, *Vaughan* v. *Wilkinson* (1885), 1 T. L. R. 537 (a married woman had pledged plate which was subject to a restraint on anticipation. Held, that she could not sue for its recovery without repayment of the loan).

(*d*) *Bateman* (*Lady*) v. *Faber*, [1898] 1 Ch. 144, C. A.

(*e*) *Shafto* v. *Butler* (1871), 40 L. J. (CH.) 308.

(*f*) *Steedman* v. *Poole*, *supra* (leaseholds demised by husband and wife to purchaser, and by him to another person; underlease set aside on the application of the wife).

(*g*) *Re Wolstenholme, Marshall* v. *Aizlewood* (1881), 43 L. T. 752.

(*h*) *Robinson* v. *Wheelwright* (1856), 6 De G. M. & G. 535; and see *Haynes* v.

SECT. 1. Restraint on Anticipation.

Where property with a restraint on anticipation attached is given by an instrument under which a question of election arises, the doctrine of election does not apply (*i*). Election.

A lease, at all events if it is at less than the full rental value, is in the nature of an incumbrance which is prohibited by a restraint on alienation (*k*). Lease.

732. A restraint on anticipation does not prevent the wife from barring an estate tail by deed acknowledged, that being in the nature of an enlargement and not an alienation, the fee simple continuing to be subject to the restraint (*l*); nor does it affect the statutory power of enlarging a long term of years into a fee simple (*m*). Entail may be barred.

733. A married woman is not entitled to payment of a capital sum which is subject to a restraint on anticipation, but only to receive the income from time to time as it becomes due (*n*). Income.

She has no power to assign an apportioned part of the income accruing due up to the date of assignment, but not then payable, but only to deal with it after it becomes due and payable to her (*o*).

A married woman may appoint an attorney to receive the dividends or income of property subject to a restraint on anticipation, but if the fund is in court, the dividends will only be paid to an attorney on an affidavit or statutory declaration by him that he receives them for her use, and not for the use of any person to whom she has assigned or purported to assign them (*p*). Appointment of attorney to receive income.

Foster, [1901] 1 Ch. 361. As to the statutory power of the court to dispense with the restraint in such a case, see p. 372, *post*.

(*i*) *Re Wheatley, Smith* v. *Spence* (1885), 27 Ch. D. 606; see also *Re Vardon's Trusts* (1885), 31 Ch. D. 275, C. A.

(*k*) *Baggett* v. *Meux* (1844), 1 Coll. 138; affirmed (1846), 1 Ph. 627 (lease to trustee for husband at less than rental value); *Steedman* v. *Poole* (1847), 6 Hare, 193. As to effect of a restraint on anticipation on the powers of leasing under the Settled Estates and Settled Land Acts, see p. 367, *post*, and titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*l*) *Cooper* v. *Macdonald* (1877), 7 Ch. D. 288, C. A. As to the necessity for a deed acknowledged, see p. 478, *post*. For form of disentailing assurance by married woman, see Encyclopædia of Forms and Precedents, Vol. V., p. 444.

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 65 (2); see title REAL PROPERTY AND CHATTELS REAL.

(*n*) *Re Spencer, Thomas* v. *Spencer* (1885), 30 Ch. D. 183 (surplus income of real and personal property directed, after providing for an annuity, to be accumulated during the life of A., and after her death the capital and accumulations to be paid to A.'s children, subject to a restraint on anticipation during A.'s life. Held, that during her life the married daughters were only entitled to receive the income of the surplus income invested as it became due); *Re Currey, Gibson* v. *Way* (1886), 32 Ch. D. 361 (share in residuary personalty); *Re Benton, Smith* v. *Smith* (1882), 19 Ch. D. 277 (money in trust to invest and hold investments for separate use).

(*o*) *Re Brettle, Jollands* v. *Burdett* (1864), 2 De G. J. & Sm. 79, C. A. (bond debt carrying interest half-yearly, to be paid from time to time as it became due). As to the form of order for payment of dividends on a fund in court to a married woman restrained from anticipation, see *Stewart* v. *Fletcher* (1888), 38 Ch. D. 627; and as to forms of order generally, see title JUDGMENTS AND ORDERS.

(*p*) *Stewart* v. *Fletcher*, *supra*; Conveyancing and Law of Property Act, 1881

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Restraint cannot be evaded.

Even by fraud.

Or by estoppel.

Covenant to settle after-acquired property.

Compromise.

Charging lien for costs.

734. Where a married woman is restrained from anticipation, she cannot by any means deprive herself of the right to receive the income as it becomes due (*q*). The restraint cannot be evaded by any device, nor can it be dispensed with or rendered ineffective in any way, except in certain cases by order of the court (*q*).

Even where the married woman, or both she and her husband, is or are guilty of fraud, as, for instance, if they join in a mortgage, fraudulently concealing the existence of a restraint on anticipation from the mortgagee, her interest in the property is not affected by the fraud, and the mortgagee will acquire no title against her, either at law or in equity (*r*).

Nor can the doctrine of estoppel be applied so as to deprive a married woman of her right to property which is subject to a restraint on anticipation (*s*).

A covenant in a marriage settlement to settle after-acquired property does not apply to property which is subject to a restraint on anticipation (*t*).

Property subject to a restraint on anticipation may be bound by a *bonâ fide* compromise of an action in relation thereto (*a*).

The charging lien of a solicitor for costs on property recovered

(44 & 45 Vict. c. 41), s. 40, by which *Kenrick* v. *Wood* (1869), L. R. 9 Eq. 333, is superseded.

(*q*) *Stanley* v. *Stanley* (1878), 7 Ch. D. 589; *Bateman* (*Lady*) v. *Faber*, [1898] 1 Ch. 144, C. A. As to the power of the court to dispense with the restraint, see p. 372, *post*.

(*r*) *Stanley* v. *Stanley*, *supra* (husband and wife joined in mortgage, both fraudulently concealing the restraint, and the mortgagee obtained judgment against her on the covenant, and an order charging the next accruing dividend; charging order discharged on appeal); *Thomas* v. *Price* (1877), 46 L. J. (CH.) 761 (fund in court fraudulently charged; order directing payment of the first dividends to the person in whose favour the charge was given discharged); *Jackson* v. *Hobhouse* (1817), 2 Mer. 483; *Arnold* v. *Woodhams* (1873), L. R. 16 Eq. 29.

(*s*) *Bateman* (*Lady*) v. *Faber*, *supra* (married woman entitled to certain rents etc. subject to a restraint on anticipation, with a proviso that her interest should cease in the event of her succeeding to an income of a specified amount, by deed poll admitted that her interest had determined and released all claim to the property, and a mortgagee of the husband entered into certain arrangements on the faith of the deed poll. Held, that she was not estopped, she not having in fact succeeded to an income of the specified amount). See also titles EQUITY, Vol. XIII., p. 168; ESTOPPEL, Vol. XIII., pp. 327, 371, 380; EVIDENCE, Vol. XIII., p. 456.

(*t*) *Re Currey*, *Gibson* v. *Way* (1886), 32 Ch. D. 361; *Smith* v. *Lucas* (1881), 18 Ch. D. 531; *Re Sarel* (1864), 10 Jur. (N. S.) 876. But where a restraint clause was ineffective as regards a legacy because no trustees were appointed, and the testator did not express an intention that the executors should retain the principal and pay only the income to the legatee, it was held that the legacy was subject to the after-acquired property clause (*Russell* v. *Lawder*, [1904] 1 I. R. 328).

(*a*) *Wilton* v. *Hill* (1855), 25 L. J. (CH.) 156 (action by next friend against the trustees of the will under which a wife claimed for an account. Held, that a compromise entered into in good faith bound the *corpus* of the property notwithstanding a restraint on anticipation); and see *Heath* v. *Wickham* (1880), 5 L. R. Ir. 285, C. A.; and as to the removal of a restraint by the court in order to give effect to a compromise, *Musgrave* v. *Sandeman* (1883), 48 L. T. 215; and p. 372, *post*.

or preserved by his instrumentality (*b*) has priority to a restraint on anticipation affecting the property (*c*).

Disposition by will.

735. A restraint on anticipation does not affect the power of testamentary disposition, even by a will made during coverture, because such a disposition does not take effect until the coverture ceases (*d*).

Powers under Settled Land Acts.

Nor does it affect the powers of sale, exchange and leasing given by the enactments relating to settled estates and settled land (*e*), any rents due under leases, and capital moneys, and lands purchased or taken in exchange under those enactments being subject to the restraint in the same manner as the land with respect to which the powers were exercised (*f*).

Powers given by the settlement.

Notwithstanding a restraint on anticipation, a married woman may exercise any powers expressly given to her by the instrument from which her title to the property is derived (*g*).

Restraint as regards income only.

736. A married woman may be restrained from anticipation as regards the income of property to which she is entitled, and not as regards the *corpus*. In such case the restraint does not affect her power of disposition of the *corpus*, even during coverture (*h*), nor does it affect the liability of the *corpus*, after her death, for her debts and engagements during the marriage (*i*).

Ante-nuptial debts.

737. No restraint against anticipation contained in a settlement or agreement for a settlement of a woman's own property made or entered into by herself on or after the 1st January, 1883, has any

(*b*) Under the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28, as to the nature of which see title SOLICITORS.

(*c*) *Re Keane, Lumley* v. *Desborough* (1871), L. R. 12 Eq. 115. Formerly there was no power to order the costs of the opposite party in proceedings relating to a fund subject to a restraint on anticipation to be paid out of the fund (*Re Glanvill, Ellis* v. *Johnson* (1886), 31 Ch. D. 532, C. A.); but see now on this point, p. 350, *post*.

(*d*) *Hodges* v. *Hodges* (1882), 20 Ch. D. 749; *Re Hernando, Hernando* v. *Sawtell* (1884), 27 Ch. D. 284, 294; *Cooper* v. *Macdonald* (1877), 7 Ch. D. 288, C. A.; *Bishop* v. *Wall* (1876), 3 Ch. D. 194. If a married woman by her will directs her debts to be paid, property which was subject to a restraint on anticipation becomes assets for payment of her debts and obligations (*Sprange* v. *Lee*, [1908] 1 Ch. 424). *Semble*, the same rule applies without any such direction (*ibid.*, at p. 432).

(*e*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 50; Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 61 (6); and see titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*f*) See the Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 22 (5), 24.

(*g*) *Skinner* v. *Todd* (1881), 51 L. J. (CH.) 198. In this case it was held that a married woman, tenant for life, restrained from anticipation, who was given power to direct the trustees of the settlement to do repairs and charge the estate, was entitled herself to employ a builder to do necessary repairs, and that a builder so employed had a charge on the estate for the cost.

(*h*) *Cooper* v. *Macdonald, supra; Alexander* v. *Young* (1848), 6 Hare, 393 (a married woman, tenant for life, subject to a restraint on anticipation, with power to appoint the remainder by deed or will, may appoint the remainder by irrevocable deed during the marriage).

(*i*) *Hodges* v. *Hodges, supra* (entitled to income for life for separate use without power of anticipation, then as she should appoint, and in default of appointment for herself absolutely. Held, that the fund after her death was liable for her debts contracted during coverture).

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validity against debts contracted by her before marriage (*k*). The liability of a woman as a devisee for the debts of the testator (*l*), or her liability as a judgment debtor on a judgment obtained against her (*m*), is a debt contracted by her within the meaning of this provision.

A restraint on anticipation which is not contained in a settlement or agreement for a settlement of the woman's own property made or entered into by herself is effectual to protect the property against ante-nuptial debts and obligations (*n*).

Debts and engagements during coverture.

738. Property subject to a restraint on anticipation is not liable for debts or obligations contracted by a married woman during coverture, whether the property was acquired before or after the making of the contract; nor does property which, at the date of a contract made during coverture or at any time after that date, was subject to a restraint on anticipation become available to satisfy her liability under the contract by the death of her husband or the dissolution of the marriage and the consequent removal of the restraint (*o*).

As regards debts and obligations contracted during coverture, a restraint on anticipation is equally a protection, whether it is contained in a settlement made by the woman of her own property or not (*o*).

(*k*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 19. This provision does not apply to settlements made before the commencement of the Act (*Smith* v. *Whitlock* (1886), 55 L. J. (Q. B.) 286). As to the validity of post-nuptial settlements against ante-nuptial creditors, see *Hewison* v. *Negus* (1853), 16 Beav. 594. And see *Kirk* v. *Murphy* (1892), 30 L. R. Ir. 508.

(*l*) *Re Hedgely, Small* v. *Hedgeley* (1886), 34 Ch. D. 379 (married woman devisee settled the property devised to her with a restraint on anticipation. Held, subject to the testator's debts). This case was decided under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 12.

(*m*) *Jay* v. *Robinson* (1890), 25 Q. B. D. 467, C. A. (judgment obtained against a married woman; the marriage was dissolved, and she remarried, her property being settled on her on her remarriage subject to a restraint on anticipation. Held, that the property was liable on the judgment, notwithstanding the restraint).

(*n*) *Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35, C. A. (judgment obtained against a married woman for an ante-nuptial debt; separation deed by which husband covenanted to pay her a monthly sum subject to a restraint on anticipation. Held, that the money payable under the deed was not liable to satisfy the judgment). Under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 12, property subject to a restraint on anticipation was liable for ante-nuptial debts, whether it was settled by herself or not (*Sanger* v. *Sanger* (1871), L. R. 11 Eq. 470; *London and Provincial Bank* v. *Bogle* (1878), 7 Ch. D. 773; *Re Hedgely, Small* v. *Hedgely, supra*; *Axford* v. *Reid* (1889), 22 Q. B. D. 548, C. A.), but that Act was repealed by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 22, and the cases cited are of no authority on the construction of the repealing Act.

(*o*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 19; Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1. The removal of the restraint on anticipation by the death of the husband or the dissolution of the marriage does not render the property liable in respect of debts contracted during coverture, whether the judgment is obtained in the husband's lifetime or after his death (*Brown* v. *Dimbleby*, [1904] 1 K. B. 28, C. A.; *Barnett* v. *Howard*, [1900] 2 Q. B. 784, C. A.; *Pelton Brothers* v. *Harrison*, [1891] 2 Q. B. 422, C. A.; *Softlaw* v. *Welch*, [1899] 2 Q. B. 419, C. A.; *Pike* v. *Fitzgibbon*, *Martin* v. *Fitzgibbon* (1881), 17 Ch. D. 454, C. A.; *Roberts* v. *Watkins and*

provided the settlement is not void or voidable as against the creditors on the ground of fraud or otherwise (*p*).

Where, however, a married woman carries on a trade separately from her husband, and is made bankrupt, any property which, while she is still an undischarged bankrupt, becomes free from any restraint on anticipation by the death of her husband or otherwise will pass to the trustee in bankruptcy (*q*).

Breach of trust etc.

739. Property subject to a restraint on anticipation is not liable to make good any loss occasioned by a breach of trust or other wrongful act on the part of the woman entitled thereto (*r*), even in the case of a fraudulent breach of trust (*s*), nor can she release her trustees from liability incurred by them through their having disregarded the restraint (*t*).

Arrears of income.

740. A restraint on anticipation ceases to attach to income as soon as it becomes due and payable to the married woman under the trusts of the instrument under which she is entitled (*a*).

Although, therefore, in respect of a judgment against a married woman in the ordinary form (*b*), a receiver cannot be appointed of arrears of income subject to a restraint on anticipation which have accrued due after the date of the judgment, or of future income (*c*),

Howells (1877), 46 L. J. (Q. B.) 552; *Stroud* v. *Edwards* (1897), 77 L. T. 280, C. A.). In *Beckett* v. *Tasker* (1887), 19 Q. B. D. 7, property had been settled subject to a restraint on anticipation before the 1st January, 1883, and a promissory note had been given during the coverture after that date. Held, that the property was not liable to satisfy a judgment on the promissory note. In *Hemingway* v. *Braithwaite* (1889), 61 L. T. 224, an infant married woman contracted a debt, being then entitled to property free from any restraint on anticipation. The property was subsequently settled in 1884 under the Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), her interest being subject to a restraint on anticipation, and the settlement was duly approved by the Chancery Division. Held, that the restraint was effective against the creditor, the debt not being an ante-nuptial one.

(*p*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 19. See title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 77 *et seq.*

(*q*) *Re Wheeler's Settlement Trusts, Briggs* v. *Ryan*, [1899] 2 Ch. 717 (bankrupt in 1891; husband died in 1899, she being still undischarged. Held, that on his death property which had been subject to a restraint on anticipation during his lifetime vested in the trustee). See the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (5), and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 10, 146, 147.

(*r*) *Clive* v. *Carew* (1859), 1 John. & H. 199; *Wainford* v. *Heyl* (1875), L. R. 20 Eq. 321; *Pemberton* v. *M'Gill* (1860), 1 Drew. & Sm. 266.

(*s*) *Arnold* v. *Woodhams* (1873), L. R. 16 Eq. 29.

(*t*) *Dickson* v. *Hook* (1866), 14 W. R. 552.

(*a*) *Hood Barrs* v. *Heriot*, [1896] A. C. 174, overruling *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559, C. A., and *Pillers and Pershouse* v. *Edwards* (1894), 71 L. T. 788, C. A.

(*b*) As to the form of judgment, see p. 455, *post*.

(*c*) *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48, C. A.; *Bolitho & Co., Ltd.* v. *Gidley*, [1905] A. C. 98; *Re Lumley, Ex parte Hood Barrs*, [1896] 2 Ch. 690, C. A.; *Lowry* v. *Derham*, [1895] 2 I. R. 123, C. A. A married woman cannot be committed under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, for default in payment of a judgment debt where the only evidence of her ability to pay is that, since the date of the judgment, she has received sufficient income of property subject to a restraint on anticipation (*Draycott* v. *Harrison* (1886), 17 Q. B. D. 147). See also title EXECUTION, Vol. XIV., pp. 14, 92, 120.

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a receiver may be appointed of arrears already due and payable at the date of the judgment (*d*).

So, a writ of sequestration issued against a married woman for contempt, although it is not enforceable against future income subject to a restraint on anticipation, extends to arrears which were due at the time when the order was made (*e*).

Similarly, the arrears of an annuity to which a married executrix is entitled, subject to a restraint on anticipation, are liable to make good her *devastavit* (*f*).

Judicial separation.

741. Where a married woman is judicially separated from her husband, she is considered as a *feme sole* with respect to all property acquired by or devolving on her after the date of the decree, and while the separation continues, including property to which she was entitled for an estate in remainder or reversion at the date of the decree, and may dispose of any such property as if she were a *feme sole* (*g*). A restraint on anticipation attached to any such property is therefore inoperative so long as the separation continues (*h*), but the decree does not affect a restraint on anticipation attached to property already belonging to her, otherwise than in remainder or reversion, at the date of the decree (*i*).

Protection order.

A married woman who obtains a protection order on the ground of desertion, or a separation order in a court of summary jurisdiction (*k*), is in the same position with respect to property acquired by or devolving upon her after the commencement of the desertion, or date of the separation order, as the case may be, and while the order continues in force, as if she had obtained a decree of judicial separation (*l*), and a restraint on anticipation attached to any such property is therefore inoperative (*m*). But a protection or separation order

(*d*) *Hood Barrs* v. *Heriot*, [1896] A. C. 174. But where leave was given under R. S. C., Ord. 14, to enter judgment against a married woman, and the plaintiff refrained from entering judgment for three months because he knew that arrears would then just have become due, it was held that under such circumstances an order for the appointment of a receiver ought not to be made (*Colyer* v. *Isaacs* (1897), 77 L. T. 198, C. A.).

(*e*) *Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A. Where a fund had been paid to a married woman under an order of the court, and the Court of Appeal reversed the order and declared that she was liable to refund, on the ground that the fund was subject to a restraint on anticipation, it was held that so much income as had accrued due to her before the order to refund must be retained in part satisfaction of her liability to refund (*Re Dixon, Dixon* v. *Smith* (1887), 35 Ch. D. 4, C. A.).

(*f*) *Pemberton* v. *M'Gill* (1860), 1 Drew. & Sm. 266.

(*g*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 25; Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 8.

(*h*) *Munt* v. *Glynes* (1872), 41 L. J. (CH.) 639 (legacy to a married woman who had been judicially separated and was living apart from her husband, to be settled in such a way as to secure it to her separate use without power of anticipation. Held, that she was entitled to payment of the legacy).

(*i*) *Waite* v. *Morland* (1888), 38 Ch. D. 135, C. A.

(*k*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (a); see pp. 596 *et seq.*, *post*.

(*l*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (a); Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21; Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 8.

(*m*) *Cooke* v. *Fuller* (1858), 26 Beav. 99 (bequest of fund to married woman, who had been deserted by her husband, for her separate use without power of

does not affect a restraint on anticipation attached to property already belonging to the wife, otherwise than in remainder or reversion, at the commencement of the desertion or the date of the separation order, as the case may be (*n*).

SUB-SECT. 3.—*Rule against Perpetuities.*

Violation of perpetuity rule.

742. When a gift or settlement of property subject to a restraint on anticipation violates the rule against perpetuities, which prohibits the tying up of property, real or personal, so as to render it inalienable, or possibly inalienable, for a longer period than existing lives and twenty-one years (*o*), the restraint on anticipation is void, and the married woman will take the estate or interest limited or given to her free from the restraint, whether the gift is by appointment under a general or special power or otherwise (*p*).

Operation of the rule.

743. A restraint on anticipation is void as regards both income and *corpus*, if it is attached to property given to any person who is not in existence at the time when the instrument imposing the restraint takes effect (*q*).

In the case of an appointment under a special power, a restraint on anticipation is void unless the person in whose favour the appointment is made was in existence at the time when the instrument creating the power took effect (*r*).

A restraint on anticipation is valid if the person restrained was in existence at the time when the instrument imposing the restraint, or, in the case of an appointment under a special power, at the time when the instrument creating the power, took effect (*s*).

Gifts to a class.

744. In the case of a gift or appointment to a class of persons, some of whom were born and some unborn, at the time when the instrument imposing the restraint or creating the power, as the case may be, took effect, and there is a general restraint on anticipation

anticipation. She subsequently obtained a protection order on the ground of the desertion. Held, that she was entitled to payment of the fund).

(*n*) *Hill* v. *Cooper*, [1893] 2 Q. B. 85, C. A. (a married woman, who was entitled to a life interest subject to a restraint on anticipation, was deserted, and obtained a protection order, and subsequently purported to mortgage her life interest. Held, that the restraint still attached to the property and that a receiver could not be appointed in favour of the mortgagee).

(*o*) As to perpetuities generally, see title PERPETUITIES.

(*p*) *Fry* v. *Capper* (1853), Kay, 163; *Re Teague's Settlement* (1870), L. R. 10 Eq. 564; *Re Cunynghame's Settlement* (1871), L. R. 11 Eq. 324; *Re Ridley, Buckton* v. *Hay* (1879), 11 Ch. D. 645.

(*q*) *Re Millward, Steedman* v. *Hobday* (1902), 87 L. T. 476; *Re Ridley, Buckton* v. *Hay, supra*; *Cooper* v. *Laroche* (1881), 17 Ch. 368; *Re Ferneley's Trusts*, [1902] 1 Ch. 543.

(*r*) *Fry* v. *Capper, supra*; *Re Teague's Settlement, supra*; *Re Cunynghame's Settlement, supra* (appointments under special powers; restraint attached to shares of married daughters who were unborn at the time when the instruments creating the powers took effect, held void).

(*s*) *Cooper* v. *Laroche, supra* (gift by will of property in trust to pay the income to two persons for life, and after the death of the survivor to divide the capital between the children of A. B. and C. D., as to daughters without power of anticipation. A. B. died before the testator, and at the testator's death C. D. was past childbearing. Held that, as all the children of A. B. and C. D. were necessarily in existence at the testator's death, the restraint was valid). And see the cases cited in note (*t*), p. 372, *post*.

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clause with respect to the shares of females, the restraint is valid as regards those who were born, and void as regards those who were unborn at the time aforesaid (*t*).

Void restraint not rendered valid by marriage.

745. Where a restraint on anticipation attached to a gift to a single woman is void as offending against the perpetuity rule, her marriage does not operate as an adoption of the trust so as to render it valid (*a*).

SUB-SECT. 4.—*Power of Court to dispense with Restraint.*

For the benefit of the married woman.

746. Where it appears to the court to be for the benefit of a married woman, the court may, by judgment or order, with her consent, bind her interest in any property, notwithstanding that she is restrained from anticipation (*b*).

The court has no general power of removing a restraint on anticipation under this provision, but merely of making a particular disposition of the property binding, where it appears to be for the benefit of the married woman (*c*).

It is a discretionary power to be exercised with great caution, and only when a strong case is made out (*d*), and it must appear that it is for the married woman's own benefit (*e*), though not necessarily for her pecuniary benefit (*f*).

(*t*) *Re Ferneley's Trusts*, [1902] 1 Ch. 543 (general clause in will imposing restraint on the shares of daughters of the testator's children, held valid as to the shares of those born in the testator's lifetime, and void as to the shares of those born after his death); followed in *Re Game, Game* v. *Tennent*, [1907] 1 Ch. 276; *Herbert* v. *Webster* (1880), 15 Ch. D. 610 (settlement of property in trust for the husband and wife successively for life, and after the death of the survivor, in trust for their children as they or the survivor should appoint, and in default of appointment, for all the children who being sons attained twenty-one, or being daughters attained that age or married, in the case of daughters without power of anticipation. There were two married daughters who were living at the date of the settlement, and no other children were born. Held, that the daughters took, in default of appointment, subject to the restraint, although the class might have included others with respect to whose shares the restraint would have been void). The contrary decisions in *Re Michael's Trusts* (1877), 46 L. J. (CH.) 651 (restraint in case of gift to a class which might contain unborn persons, held wholly void); *Re Ridley, Buckton* v. *Hay* (1879), 11 Ch. D. 645 (gift in trust for A. for life, and then for her children living at her death, and the issue then living of any child then dead, as regards females without power of anticipation. A. survived the testator, and died leaving two married daughters who were born in the testator's lifetime. Held, that they took free from the restraint); and *Armitage* v. *Coates* (1865), 35 Beav. 1, would probably not now be followed. In *Re Ridley, Buckton* v. *Hay, supra*, the previous decisions on this point were followed reluctantly.

(*a*) *Re Teague's Settlement* (1870), L. R. 10 Eq. 564.

(*b*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 39.

(*c*) *Re Warren's Settlement* (1883), 52 L. J. (CH.) 928, C. A.

(*d*) *Re Little, Harrison* v. *Harrison* (1889), 40 Ch. D. 418, C. A.; *Re Jordan, Kino* v. *Picard* (1886), 55 L. J. (CH.) 330; *Re Wood, Wood* v. *Kimber* (1885), 1 T. L. R. 192, C. A.

(*e*) *Thomson* v. *Thomson*, [1896] P. 263, C. A.

(*f*) *Re Pollard's Settlement*, [1896] 2 Ch. 552, C. A. In *Re Milner's Settlement*, [1891] 3 Ch. 547, where the married woman was entitled to a life interest, the restraint was removed to the extent of allowing the income to be applied in payment of premiums in respect of policies on the life of the husband, and in keeping down the interest on mortgages in which she had joined with her

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The mere fact that the income of the married woman may be increased by means of a change of investments is not sufficient ground to justify the court in removing a restraint on anticipation (*g*).

Where there is a proviso for the forfeiture of the married woman's interest in the event of an attempted alienation, the court may refuse to exercise the power because of the risk of forfeiture (*h*).

A restraint on anticipation will not be dispensed with in order to give effect to a release by the donee of a special power of appointment for her own benefit (*i*).

For purpose of discharging debts or liabilities.

747. The power of the court to bind a married woman's interest in property notwithstanding a restraint on anticipation may be exercised for the purpose of discharging her debts or liabilities (*k*)

husband, the mortgagees undertaking to reduce the rate of interest, and not to enforce payment of the principal without leave of the court. In *Re Currey, Gibson* v. *Way* (No. 2) (1887), 32 Ch. D. 361, where two married women were tenants in common of certain houses of which desirable leases could not be granted owing to the restraint on anticipation, the court sanctioned a partition and resettlements for their lives without power of anticipation, with remainder to their husbands for life, and then for their children. In *Musgrave* v. *Sandeman* (1883), 48 L. T. 215, an action was brought in which it was questioned whether a covenant to pay an annuity to a married woman subject to a restraint on anticipation was binding on the estate of the covenantor, and the court sanctioned a compromise, as being for her benefit, by which a lump sum was paid to her in discharge of the covenant. *Re Flood's Trusts* (1883), 11 L. R. Ir. 355 (restraint removed in order that wife might accept advantageous offer for purchase of the estate); *Re Wright's Trusts* (1885), 15 L. R. Ir. 331; *Re Segrave's Trust* (1886), 17 L. R Ir. 373 (restraint removed to enable mortgage to be paid off, there being a danger of eviction for non-payment of head-rent); *Re Millar* (1890), 25 L. R. Ir. 107 (restraint removed to enable wife to release an annuity charged on a partnership business which it was intended to convert into a company, the wife to take preference shares in consideration of her interest); *Re Tennant's Estate* (1890), 25 L. R. Ir. 522 (loan for completing advantageous purchase of an estate); *Re Sawyer's Trusts*, [1896] 1 I. R. 40 (money raised to establish son in business).

(*g*) *Re Blundell*, [1901] 2 Ch. 221, C. A. (fund in court; wife desired that it should be transferred to the trustees, and become subject to the trusts of her marriage settlement, which allowed of a wider range of investments than in the case of funds in court, the main object being that she might have a larger income).

(*h*) *Re Jordan, Kino* v. *Picard* (1886), 55 L. J. (CH.) 330.

(*i*) *Re Little, Harrison* v. *Harrison* (1889), 40 Ch. D. 418, C. A. (the married woman entered into an arrangement with her son, who was entitled to one-fifth of the property in default of appointment by her, that that share should be applied in a particular way for her own benefit, and that she should release the power of appointment. The court refused to remove the restraint in order to give effect to the arrangement). See also *Re Warren's Settlement* (1883), 52 L. J. (CH.) 928, C. A., where, the husband being fifty-three, and the wife fifty, years of age, an application was made to remove a restraint on anticipation so as to make the property available for the husband and wife, and the court refused to grant the application, merely on the ground that it ought not to be assumed that there would be no children, although the parties had been married for twenty-eight years and had had no issue.

(*k*) *Re Wilson-Stewart, Keown-Boyd* v. *Gilmour* (1896), 75 L. T. 381, C. A. (life interest under marriage settlement charged for payment of wife's debts); *Hodges* v. *Hodges* (1882), 20 Ch. D. 749 (life interest subject to restraint on anticipation, with power of appointment, and in default of appointment, for wife absolutely in default of children; past child-bearing. The *corpus* would have been liable

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or those of her husband (*l*), if, regard being had to the circumstances of the case, the scheme proposed appears to be for her benefit. But a restraint on anticipation will not be removed merely to raise money for the payment of debts incurred through the extravagance of the husband or wife (*m*), and there must be strong grounds to induce the court to dispense with the restraint for the benefit of the husband (*n*).

Application, how made.

748. An application to the court to bind the interest of a married woman notwithstanding a restraint on anticipation, on the ground that it is for her benefit, must be made by summons in chambers, and not by petition (*o*), and, as a general rule, it is necessary that she should be separately examined before the judge, in order that the court may be satisfied as to her consent (*p*), but, in special circumstances, the separate examination may be dispensed with (*q*).

Removal of restraint for payment of costs.

749. In any action or proceeding instituted by a woman, the court before which the action or proceeding is pending has jurisdiction, by judgment or order from time to time (*r*), to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver (*s*) and by the sale of the property or otherwise (*t*).

after her death for her debts in any case, and the creditors were pressing and causing her great annoyance. A portion of the fund was paid to her, notwithstanding the restraint, for the purpose of paying the debts); *Re C——'s Settlement* (1887), 56 L. J. (CH.) 556 (husband bankrupt; wife, who was living with him, had given acceptances to his creditors, and was harassed with proceedings, in consequence of which her health suffered; order made relieving a portion of the property subject to restraint for the purpose of raising a sum to satisfy the creditors). In *Sedgwick* v. *Thomas* (1883), 48 L. T. 100, an action had been brought by the married woman for the rectification of certain instruments on the ground of mistake, and she had undertaken to pay the costs of all parties. The court, on the application of the defendant, with her consent charged the costs on the property notwithstanding a restraint on anticipation.

(*l*) *Paget* v. *Paget*, [1898] 1 Ch. 470, C. A.

(*m*) *Re Pollard's Settlement*, [1896] 2 Ch. 552, C. A.

(*n*) *Tamplin* v. *Miller* (1882), 30 W. R. 422.

(*o*) *Re Lillwall's Settlement Trusts* (1882), 30 W. R. 243.

(*p*) *Musgrave* v. *Sandeman* (1883), 48 L. T. 215.

(*q*) *Hodges* v. *Hodges* (1882), 20 Ch. D. 749. In this case the court was satisfied with the evidence of her consent afforded by her affidavit in support of the application, coupled with a letter to her solicitors strongly urging the removal of the restraint.

(*r*) The order may be made at a date subsequent to the judgment or order dismissing the action or proceeding (*Hood Barrs* v. *Cathcart*, [1895] 1 Q. B. 873). As to the form of judgment where the action is dismissed with costs, see *Davies* v. *Treharris Brewery Co.* (1894), 13 R. 219; and as to the sufficiency of service of notice of motion, such service being made on the solicitor who appeared in the action, see *Bagley* v. *Maple & Co., Ltd.* (1911), 27 T. L. R. 284.

(*s*) As to the appointment of a receiver, see *Pawley* v. *Pawley*, [1905] 1 Ch. 593.

(*t*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2. Where an action by a married woman was dismissed with costs, the court appointed a receiver of her share of an estate notwithstanding a restraint on anticipation, though the taxation of the costs had not been completed by the granting of a certificate (*Cummins* v. *Perkins*, [1899] 1 Ch. 16, C. A.). In *Re Godfrey, Thorne-George* v. *Godfrey* (1894), 63 L. J. (CH.) 854, where an action was brought by a married woman charging wilful default against her trustees, and she withdrew the charges at the trial and consented to a dismissal of the action, the

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750. The following have been held to be actions or proceedings instituted by a woman within the meaning of this provision :— In what actions or proceedings.

An unsuccessful appeal from a decision in an action by husband and wife, the wife being the party really interested (*a*), or in an action in which she alone was plaintiff (*b*).

An unsuccessful application for a new trial by a married woman in an action in which she was plaintiff (*c*).

A counterclaim by a married woman (*d*).

An intervention and the delivery of a pleading by a married woman in a probate action in which she obtained leave to intervene on her own application (*e*).

A claim made by a married woman to goods taken in execution (*f*).

But the only proceedings contemplated by this provision are those which initiate litigation (*g*), and therefore a petition presented by a woman (*h*), or other interlocutory proceeding taken by her (*g*), or an appeal from an order made against her (*g*), in an action in which she is defendant, is not a proceeding instituted by her within the meaning of the statute. Nor is an application by a wife in a divorce suit, in which she is the respondent, after the final decree, to vary previous orders, as to the custody of a child of the marriage (*i*).

The entry of a caveat in respect of a will by a married woman, the result of which is a probate action in which she is made defendant is not an action or proceeding instituted by her, a probate action being commenced by the issue of the writ, and not by the entry of a caveat (*k*).

Instigating breach of trust.

751. Where a trustee commits a breach of trust at the instigation or request, or with the consent in writing, of a beneficiary, the court may, if it thinks fit, notwithstanding that the beneficiary is a married woman restrained from anticipation, make such order as seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee (*l*).

SUB-SECT. 5.—*Removal of Restraint in case of Spinster or Widow.*

Acts of spinster or widow discharging restraint.

752. An unmarried woman or widow, entitled to property subject to a restraint on anticipation, may discharge the property from the

defendants' costs as between solicitor and client were charged on her property notwithstanding a restraint on anticipation. The court has no power to order costs to be paid out of property which is subject to a restraint on anticipation, apart from the provisions of this section (*Re Glanvill, Ellis* v. *Johnson* (1886), 31 Ch. D. 532, C. A.; *Gordon* v. *Gordon*, [1904] P. 163, C. A.).

(*a*) *Huntly* (*Marchioness*) v. *Gaskell*, [1905] 2 Ch. 656, C. A.

(*b*) *Paget* v. *Paget*, [1898] 1 Ch. 470, C. A.

(*c*) *Dresel* v. *Ellis*, [1905] 1 K. B. 574, C. A.

(*d*) *Hood Barrs* v. *Cathcart*, [1895] 1 Q. B. 873.

(*e*) *Crickitt* v. *Crickitt*, [1902] P. 177, C. A.; compare *Moran* v. *Place*, [1896] P. 214, C. A.

(*f*) *Nunn & Co.* v. *Tyson*, [1901] 2 K. B. 487 (costs of execution creditor).

(*g*) *Hood Barrs* v. *Heriot*, [1897] A. C. 177.

(*h*) *Hollington* v. *Dear*, [1895] W. N. 35.

(*i*) *Gordon* v. *Gordon*, [1904] P. 163, C. A.

(*k*) *Moran* v. *Place*, [1896] P. 214, C. A.

(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 45. The power given by this section is very rarely exercised in the case of a married woman restrained from anticipation. See also title TRUSTS AND TRUSTEES.

SECT. 1. Restraint on Anticipation.

restraint by any alienation or disposition thereof which is inconsistent with the continuance of the restraint (*m*), or by actually receiving the property and treating it as her own absolute property (*n*), or by a deed releasing the property from the restraint and declaring her intention to hold or enjoy it discharged therefrom (*o*).

SECT. 2.—*Dispositions of Wife's Property.*

SUB-SECT. 1.—*Non-separate Property.*

(i.) *Freeholds, Copyholds and Leaseholds.*

Power of disposition.

753. The husband alone can dispose of his own interest in his wife's non-separate freehold or copyhold estates, but the interest of the wife can only, generally speaking, be disposed of by deed acknowledged, or, in the case of copyholds, by surrender with the concurrence of the husband (*p*).

The chattels real of a wife may be disposed of by act *inter vivos* by the husband alone, though he cannot defeat her right of survivorship by a testamentary disposition (*p*).

(ii.) *Chattels Personal and Choses in Action.*

Chattels personal.

754. Chattels personal of a wife, not being her equitable or statutory separate property, belong absolutely to the husband, and may be disposed of by him accordingly (*q*). The wife has no power of disposition, except by assent of the husband (*r*), even in the case of chattels acquired by her while living apart from him, unless she has obtained a judicial separation or a protection order (*s*), but a renunciation by the husband of his marital right by deed before marriage will enable the wife to dispose of personal chattels as if she were a *feme sole* (*t*).

(*m*) *Tullett* v. *Armstrong* (1838), 1 Beav. 1; *Wright* v. *Wright* (1862), 2 John. & H. 647. A covenant to settle the property is a sufficient disposition for this purpose (*Re Wood*, *Wood* v. *Hooper* (1889), 61 L. T. 197); or an assignment to a trustee for herself.

(*n*) *Woodmeston* v. *Walker* (1831), 2 Russ. & M. 197; *Wright* v. *Wright*, *supra* (unmarried woman, entitled to stock subject to a restraint on anticipation, obtained transfers in her own name, and subsequently sold the stock, and having spent a portion of the proceeds, invested the remainder in the purchase of shares. Held, that the restraint was discharged by the sale of the stock, and that it did not attach to the shares which were bought with a portion of the purchase-money).

(*o*) For form of such a deed, see Encyclopædia of Forms and Precedents, Vol. XV., p. 43.

(*p*) See titles COPYHOLDS, Vol. VIII., pp. 96, 108; REAL PROPERTY AND CHATTELS REAL. For form of conveyance of freeholds applicable to such a case, see Encyclopædia of Forms and Precedents, Vol. XII., p. 518. As to deeds acknowledged, see p. 381, *post*. As to non-separate property generally, see p. 322, *ante*.

(*q*) See p. 325, *ante*.

(*r*) *Ibid*.

(*s*) *Bourne* v. *Fosbrooke* (1865), 18 C. B. (N. S.) 515. As to a decree of judicial separation or protection order, see p. 346, *ante*.

(*t*) *Walrond* v. *Goldmann* (1885), 16 Q. B. D. 121 (bill of sale by wife alone held effective to pass the property in chattels which the husband by deed before marriage declared should continue to belong to the wife for her sole and separate use).

SECT. Dispositions of Wife's Property.

755. Choses in action recoverable immediately, not being separate property of the wife, may be assigned by the husband, subject to the wife's equity to a settlement (*a*).

Choses in action.

The future or reversionary interest, whether vested or contingent, of a married woman in personal estate (*b*), acquired under any instrument made after the 31st December, 1857 (*c*), other than a marriage settlement, may be disposed of by deed acknowledged (*d*), the effect of an assignment by such a deed being to transfer the interest of the wife, free from the rights of the husband and all persons claiming under him, as if the wife had been a *feme sole* (*e*).

Subject to this provision, the reversionary non-separate choses in action of a married woman cannot by any means be disposed of so as to defeat her right by survivorship in the event of their not having been reduced into possession during the husband's lifetime (*f*).

SUB-SECT. 2.—*Separate Property.*

Equitable separate property.

756. Subject to any restraint on anticipation (*g*), a married woman may dispose, without the concurrence of her husband, either *inter vivos* or by will, as if she were a *feme sole*, of the equitable interest in any real or personal property held to her separate use (*h*).

(*a*) See pp. 326, 334, *ante*.

(*b*) Including life policies and other legal choses in action of a future or reversionary nature (*Witherby* v. *Rackham* (1891), 60 L. J. (CH.) 511; *Re Turner, Turner* v. *Fitzroy* (1892), 66 L. T. 758); and an interest in the proceeds of realty devised on trust for sale (*Briggs* v. *Chamberlain* (1853), 11 Hare, 69; *Re Jakeman's Trusts* (1883), 23 Ch. D. 344).

(*c*) *Re Elcom, Layborn* v. *Grover Wright*, [1894] 1 Ch. 303, C. A. (reversionary interest bequeathed to married woman by a will made in 1856; codicil giving her an additional legacy in 1864; testator died in 1866. Held, not entitled under an instrument made after 31st December, 1857, and that the reversionary interest did not pass by her deed acknowledged); and see *Re Newton's Trusts* (1882), 23 Ch. D. 181. But where a wife joined in assigning by deed acknowledged a reversionary interest acquired under an instrument made before that date, it was held that by so joining she raised an equity against herself setting up her equity to a settlement against the assignee (*Roberts* v. *Cooper*, [1891] 2 Ch. 335, C. A.).

(*d*) Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57), ss. 1, 2, 4. For form of such a deed, see Encyclopædia of Forms and Precedents, Vol. III., p. 557; and see p. 381, *post*.

(*e*) *Re Batchelor, Sloper* v. *Oliver* (1873), L. R. 16 Eq. 481 (legacy in reversion; husband indebted to testator; legacy assigned by deed acknowledged for value. Held, that the executors had no right to retain the debt due from the husband as against the assignee).

(*f*) See pp. 326, 333, *ante; Re Turner, Turner* v *Fitzroy, supra* (life policy); *Re Elcom, Layborn* v. *Grover Wright, supra;* but see *Roberts* v. *Cooper, supra*.

(*g*) As to the effect of a restraint on anticipation, see pp. 363 *et seq.*, *ante*.

(*h*) *Bishop* v. *Wall* (1876), 3 Ch. D. 194; *Pride* v. *Bubb* (1871), 7 Ch. App. 64 (realty); *Gore* v. *Knight* (1706), 2 Vern. 535 (the produce of property held to separate use may be disposed of by will); *Fettiplace* v. *Gorges* (1789), 1 Ves. 46 (same point); *Headen* v. *Rosher* (1825), M'Cle. & Yo. 89; *Tullett* v. *Armstrong* (1838), 1 Beav. 1; *Peacock* v. *Monk* (1751), 2 Ves. Sen. 190 (disposition by will); *Taylor* v. *Meads* (1865), 4 De G. J. & Sm. 597; *Lechmere* v. *Brotheridge* (1863), 32 Beav. 353; *Rich* v. *Cockell, Rich* v. *Hull* (1804), 9 Ves. 369 (Consols; disposition by will); *Wagstaff* v. *Smith* (1804), 9 Ves. 520 (dividends on stock for life; married woman joined with her husband in an assignment for securing an annuity. Held, bound by the assignment); *Wright* v. *Cadogan* (*Lord*) (1766), 1 Bro. Parl. Cas. 486 (after the wife's death, the heir-at-law, taking the legal estate,

SECT. 2. Dispositions of Wife's Property.

This power of disposition is incident to the estate of the married woman (*i*), and extends to vested reversionary interests in either realty or personalty (*k*), but it does not extend to the legal estate or title, whether vested in the husband or not (*l*). The legal estate or interest, when vested in the husband, can be conveyed or transferred by deed acknowledged, but not otherwise (*m*).

An agreement for valuable consideration is a sufficient disposition in equity to bind the wife's separate estate or interest, whether in realty or personalty, and will bind her heir-at-law taking the legal estate (*n*). If she borrows money on the security of the property, her admissions as debtor are evidence against her (*o*); and if, after notice of a charge, the trustees of the property make payments to her, they are personally liable to the incumbrancer, even though the validity of the charge is disputed by her (*p*).

A married woman may grant leases of realty held for her separate use (*q*).

Barring estate tail.

757. An equitable estate tail in freeholds or copyholds limited to the separate use of a married woman can only be barred by deed acknowledged (*r*), and the statutory provisions with respect to enrolment and otherwise regarding disentailing assurances must be duly observed (*s*).

will be deemed a trustee for the person in whose favour the disposition is made); *Hulme* v. *Tenant* (1778), 1 Bro. C. C. 16 (leaseholds for years; bound by married woman's joint bond with husband); *Walrond* v. *Goldmann* (1885), 16 Q. B. D. 121 (chattels personal; assignment by bill of sale without concurrence of husband held valid); *Compton* v. *Collinson* (1790), 1 Hy. Bl. 334 (copyholds; married woman's sole disposition by surrender held valid); *Major* v. *Lansley* (1831), 2 Russ. & M. 355 (rentcharge for life in reversion devised to married woman for life for separate use without the intervention of trustees; she joined her husband in assigning by deed unacknowledged for valuable consideration. Held, bound by the assignment after the husband's death, and the legal title devolving on her, that she was a trustee for the assignee). As to property held to a wife's separate use, see pp. 341 *et seq.*, *ante*. As to dispositions of paraphernalia, see p. 356, *ante*.

(*i*) *Bishop* v. *Wall* (1876), 3 Ch. D. 194.

(*k*) *Sturgis* v. *Corp* (1806), 13 Ves. 190 (considered as a *feme sole*; no separate examination necessary); *Stead* v. *Nelson* (1839), 2 Beav. 245 (reversionary interest in chose in action; bound by her agreement to mortgage).

(*l*) *Lynn* v. *Ashton* (1830), 1 Russ. & M. 188. As to separate property under the Married Women's Property Acts, see pp. 379 *et seq.*, *post*.

(*m*) As to deeds acknowledged, see p. 381, *post*.

(*n*) *Wright* v. *Cadogan* (*Lord*) (1766), 1 Bro. Parl. Cas. 486 (heir considered a trustee); *Rippon* v. *Dawding* (1769), Amb. 565; *Stead* v. *Nelson*, *supra* (agreement by husband and wife to mortgage her interest; husband died before mortgage executed; agreement held binding on wife surviving); *Hulme* v. *Tenant*, *supra*; *Thackwell* v. *Gardiner* (1851), 5 De G. & Sm. 58 (deposit of bond with bankers to secure husband's overdraft).

(*o*) *Peacock* v. *Monk* (1751), 2 Ves. Sen. 190.

(*p*) *Hodgson* v. *Hodgson* (1837), 2 Keen, 704.

(*q*) *Allen* v. *Walker* (1870), L. R. 5 Exch. 187. For form of lease, see Encyclopædia of Forms and Precedents, Vol. VII., p. 648.

(*r*) As to deeds acknowledged, see p. 381, *post*.

(*s*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 41, 50, 53; *Cooper* v. *Macdonald* (1877), 7 Ch. D. 288, C. A. (freeholds); *Green* v. *Paterson* (1886), 32 Ch. D. 95, C. A.; *Honywood* v. *Foster* (No. 1) (1861), 30 Beav. 1 (copyholds; deed must be acknowledged and entered on the court rolls within six months).

Enlargement of term into fee simple.

758. But the statutory power of enlarging a term of years into the fee simple may, in the case of a term limited to the separate use of a married woman, whether subject to a restraint on anticipation or not, be exercised by her alone, without the husband's concurrence (*t*).

Contingent interest.

759. Where a married woman is entitled to an equitable estate or interest in real or personal property, to arise on a contingency, she cannot dispose otherwise than by deed acknowledged (*u*) of the estate or interest until the contingency happens (*a*).

Judicial separation or protection order.

760. A married woman judicially separated from her husband, or who has obtained a protection order, may, during the separation, dispose by act *inter vivos* or by will, as if she were a *feme sole*, of property acquired by, or devolving upon, her after the date of the decree, or the commencement of the desertion, as the case may be (*b*).

Statutory separate property.

761. A married woman may, without the concurrence of her husband, transfer or join in transferring any annuity, or any deposit in any savings or other bank, or any sum forming part of the public stocks or funds or of any other stocks or funds transferable in the books of the Bank of England or any other bank, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or interest of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which is standing in her sole name, or in the joint names of her and any other person not being her husband (*c*).

Married Women's Property Act, 1870.

762. The equitable estate or interest in property acquired by a married woman on or after the 9th August, 1870, and before the

(*t*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 65 (2). For forms of enlargement of long term, see Encyclopædia of Forms and Precedents, Vol. V., pp. 559 *et seq.* As to disentailing assurances, see also title REAL PROPERTY AND CHATTELS REAL.

(*u*) As to the power of disposition of contingent interests by deed acknowledged, see pp. 336, 337, *ante*. The provisions there referred to extend to property held to the wife's separate use (*Re Smallman's Estate* (1873), 8 I. R. Eq. 249). As to deeds acknowledged, generally, see p. 381, *post*.

(*a*) *Mara* v. *Manning* (1845), 2 Jo. & Lat. 311 (trustees lent part of a fund in which wife had a contingent interest to husband at her request. Held, her interest was not liable to make good the breach of trust, not being an interest she could bind); *Bestall* v. *Bunbury* (1862), 13 I. Ch. R. 318 (realty settled to separate use in the event of husband's insolvency. Held, that the separate use did not arise, and she had no power of disposition till the contingency happened); *King* v. *Lucas* (1883), 23 Ch. D. 712, C. A. (policies on life of husband settled in trust to receive and pay the income to the wife for her separate use independently of any future husband she might marry. Held, that a contract during the life of the first husband did not bind her interest, because the trust for her separate use did not arise until after his death).

(*b*) *In the Goods of Elliott* (*Ann*) (1871), L. R. 2 P. & D. 274; and see pp. 345, 346, *ante*.

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 6, 9, superseding the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), ss. 2—5; and see p. 349, *ante*. These provisions extend to cases where the married woman is a trustee or executrix alone or jointly with any other person or persons (Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 18).

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1st January, 1883, and made her separate property by virtue of the provisions already referred to (*d*), may be disposed of by her, *inter vivos* or by will, as if she were a *feme sole*, but this power of disposition does not extend to the legal estate or interest in any such property (*e*).

Married Women's Property Act, 1882.

763. A woman married on or after the 1st January, 1883, may dispose, by will or otherwise, of all her real and personal property, whenever acquired, in the same manner as if she were a *feme sole*, and a woman married before that date may so dispose of all real and personal property, her title to which accrued on or after that date (*f*).

This power extends to the legal as well as the equitable estate or interest of a married woman in any such property (*f*).

Disposition by will.

764. The will of a married woman is construed as extending to all property which she may at her death be entitled to dispose of, including property which she may have acquired after the determination of the coverture, whether she was entitled to any separate property at the time of the making of the will or not, and a will made during coverture does not require re-execution or republication after the death of her husband (*g*).

(*d*) See p. 351, *ante*.

(*e*) *Howard* v. *Bank of England* (1875), L. R. 19 Eq. 295 (Consols. Held, that the bank was not compellable to permit a transfer without the concurrence of the husband, who had deserted his wife, the stock not having been placed in the name of the wife as a married woman entitled for her separate use under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 3); *Johnson* v. *Johnson* (1887), 35 Ch. D. 345 (not entitled to dispose of realty descending on her as the heiress of an intestate, except by deed acknowledged).

(*f*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1 (1), 2, 5. The power of disposition as a *feme sole*, without the concurrence of the husband, is extended by the Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 1, to cases where a married woman is a trustee or personal representative, either alone or jointly with any other person, and this provision applies to all dispositions made after 31st December, 1882, subject to any right or title acquired before 1st January, 1908, through or with the concurrence of the husband. A married woman mortgagee can reconvey as a *feme sole* under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), independently of the Married Women's Property Act, 1907 (7 Edw. 7, c. 18) (*Re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647). Alimony payable to the wife under a decree of judicial separation is not separate property which can be assigned or charged by her (*Anderson* v. *Hay* (*Lady*) (1890), 7 T. L. R. 113).

(*g*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3, applying the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24. It was held under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), that the will of a married woman was only effective to dispose of separate property within the meaning of that Act, that is to say, property acquired during the coverture, unless it was re-executed or republished after the husband's death (*Re Price, Stafford* v. *Stafford* (1885), 28 Ch. D. 709; *Re Young, Trye* v. *Sullivan* (1885), 28 Ch. D. 705; *Re Cuno, Mansfield* v. *Mansfield* (1889), 43 Ch. D. 12, C. A.). The Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), applies to wills executed before as well as after it came into operation (*Re Wylie, Wylie* v. *Moffat*, [1895] 2 Ch. 116), and a will made before 1st January, 1883, by a married woman then having property to dispose of, as, for instance, property limited to her separate use, will be effectual to dispose of separate property under the Married Women's Property Act, 1882 (45 & 45 Vict. c. 75), without any re-execution after that date (*Re Bowen, James* v. *James*, [1892] 2 Ch. 291); and see title WILLS.

SECT. 2. Dispositions of Wife's Property.

Barring estate tail.

765. The estate tail of a married woman can, however, only be barred by a deed acknowledged, even if acquired after the 31st December, 1882 (*h*), but a base fee created by a married woman tenant in tail by the execution of a disentailing deed without the consent of the protector of the settlement, may, after the death of the protector, be converted into a fee simple by an unacknowledged deed, and without the concurrence of her husband (*i*).

Married woman as protector of a settlement.

766. Where a married woman would, if single, be the protector of a settlement in respect of an estate which, in pursuance of the foregoing provisions, is her legal separate property, she alone, in respect of such estate, is the protector of the settlement (*j*).

SUB-SECT. 3.—*Deed Acknowledged.*

Husband must concur.

767. Every deed acknowledged (*k*) requires the concurrence of the husband, unless his concurrence is dispensed with by the court in pursuance of the provisions hereafter referred to (*l*). A husband, though an undischarged bankrupt, may concur in a deed acknowledged by his wife, and such concurrence is binding and effectual against his trustee in bankruptcy to bar any claim he may have in respect of the property disposed of (*m*).

Who can take acknowledgment.

768. The deed must be acknowledged by the wife as her act and deed before a judge of the High Court (*n*), or one of the perpetual commissioners (*o*), or a special commissioner, duly appointed in

(*h*) *Cooper* v. *Macdonald* (1877) 7 Ch. D. 288, C. A. This case was decided before 1st January, 1883, with reference to an equitable estate tail, but the grounds of the decision are equally applicable to separate property under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). The only power to bar an estate tail is given by the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), which requires a deed acknowledged in the case of a married woman. See title REAL PROPERTY AND CHATTELS REAL.

(*i*) *Re Drummond and Davie's Contract*, [1891] 1 Ch. 524 (a single woman in 1884 barred an estate tail without the consent of the protector of the settlement, and so conveyed a base fee to A.; she having married and the protector having died, it was held that an unacknowledged deed by her was effectual to convert the base fee into a fee simple in favour of A.). For form of such a deed, see Encyclopædia of Forms and Precedents, Vol. V., p. 448 *et seq.*

(*j*) Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 3. This applies to all disentailing assurances and surrenders made after 31st December, 1882. The consent of a married woman protector in the case of property, other than separate property under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), requires the concurrence of the husband, but it is not necessary that the deed should be acknowledged (Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 79). See also title REAL PROPERTY AND CHATTELS REAL.

(*k*) For the various purposes for which a deed acknowledged is necessary, see pp. 322 *et seq.*, *ante*.

(*l*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 77. See p. 384, *post*, as to dispensing with the husband's concurrence.

(*m*) *Cooper* v. *Macdonald*, *supra*; *Re Jakeman's Trusts* (1883), 23 Ch. D. 344.

(*n*) The acknowledgment cannot be taken by a master or registrar (R. S. C., Ord. 54, r. 12; Ord. 55, r. 16). For form of memorandum and acknowledgment, see Encyclopædia of Forms and Precedents, Vol. I., p. 216.

(*o*) For form of memorandum and acknowledgment, see Encyclopædia of Forms and Precedents, Vol. I., p. 217. As to the appointment of perpetual commissioners, see title SOLICITORS.

SECT. 2. Dispositions of Wife's Property.

that behalf (*p*), or a county court judge (*q*). There is no limit of time for taking the acknowledgment (*r*).

Separate examination.

769. Before receiving the acknowledgment, the judge or commissioner must examine the wife apart from her husband touching her knowledge of the deed, and ascertain whether she freely and voluntarily (*s*) consents thereto, and unless she does, must not permit her to acknowledge it, in which case the deed, so far as her execution thereof is concerned, is void (*t*).

Duty of person taking acknowledgment.

The object of the separate examination is, in the first place, to protect the wife against the influence of her husband (*a*), and secondly, to ascertain how the purchase-money or consideration is to be applied (*b*). It is the duty of a commissioner, at the separate examination, to inquire of the wife, and also to inquire of the solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her, and if it appears to him that it is intended that provision is to be made for her, the commissioner ought not to take the acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him, or, if the provision has not been actually made, he must require the terms of the intended provision to be shortly reduced into writing, and verify the same by his signature in the margin, at the foot, or at the back thereof (*c*).

If the wife consents to payment being made to her husband, and refuses any provision for herself, she must be regarded as having given up all claim to the purchase-money or other consideration, and has no further interest therein, either at law or in equity (*d*).

Memorandum of acknowledgment.

770. The judge or commissioner, on taking the acknowledgment, must sign a memorandum (*e*) to be indorsed on, or written at the

(*p*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 79, as amended by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7 (1), and the Statute Law Revision (No. 2) Act, 1888 (51 & 52 Vict. c. 57). Before 1st January, 1883, it was necessary that the acknowledgment should be taken by two commissioners. As to the appointment of a special commissioner, see p. 383, *post*.

(*q*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 184.

(*r*) *Re London Dock Act*, 1853 (1855), 25 L. J. (CH.) 45, where an acknowledgment taken two years after the execution of the deed was held good. In the case of the barring of an estate tail, it is not necessary that the deed should be acknowledged within the six months appointed by the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), for its enrolment (*ibid.*).

(*s*) The consent must be voluntary (*Jordan* v. *Jones* (1846), 2 Ph. 170).

(*t*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 80.

(*a*) *Goodchild* v. *Dougal* (1876), 3 Ch. D. 650.

(*b*) *Tennent* v. *Welch* (1888), 37 Ch. D. 622.

(*c*) Conveyancing and Fines and Recoveries Acts Rules, r. 2 (Statutory Rules and Orders Revised, Vol. XII., Supreme Court, England, p. 550). The non-observance of this provision does not affect the validity of the acknowledgment (*ibid.*, r. 6).

(*d*) *Tennent* v. *Welch*, *supra*. This is so, even though part of the purchase-money is left outstanding in trustees by way of an indemnity fund against charges on the estate. The wife cannot, in such a case, in the event of the husband's death, claim the amount outstanding as a chose in action not reduced into possession (*ibid.*); *Williams* v. *Cooke* (1863), 4 Giff. 343 (wife's equity to a settlement is barred by her disposition by deed acknowledged).

(*e*) The memorandum should be in the following form :—"This deed was this

foot or in the margin of, the deed, of the separate examination and consent and acknowledgment of the wife (*f*).

Where the memorandum of acknowledgment purports to be signed by a person duly authorised to take the acknowledgment (*g*), the deed, as regards the execution thereof by the married woman, takes effect at the time of the acknowledgment, and is conclusively deemed to have been duly acknowledged (*h*).

Commissioner etc. must not be interested.

771. No judge or commissioner may take an acknowledgment if he is interested or concerned, either as a party, or as solicitor or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment, and when the acknowledgment is taken by a commissioner, a declaration that he is not so interested or concerned must be added to the memorandum of acknowledgment (*i*).

But no deed acknowledged is impeachable by reason only that the judge or commissioner taking the acknowledgment was so interested or concerned, or that no such declaration was added to the memorandum of acknowledgment (*k*).

Special commissioner.

772. Where, by reason of residence abroad, or ill-health, or any other sufficient cause, a married woman is prevented from acknowledging a deed before a judge or perpetual commissioner, a commission may be issued in the High Court specially appointing

day produced before me, and acknowledged by , therein named to be her act and deed [*or* their several acts and deeds], previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed, and her [*or* their] consent thereto, and [each of them] declared the same to be freely and voluntarily executed by her" (Conveyancing and Fines and Recoveries Acts Rules, r. 3).

(*f*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 84. Before 1st January, 1883, a certificate of taking the acknowledgment was also necessary (*ibid.*), but is no longer required in the case of deeds executed on or after that date (Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7 (4), (5); Statute Law Revision (No. 2) Act, 1888 (51 & 52 Vict. c. 57)). An index is, however, kept in the Supreme Court of all certificates lodged in respect of deeds acknowledged before 1st January, 1883, and an office copy of any such certificate is receivable as evidence of the due acknowledgment of the deed to which it relates (Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7 (7) (8)).

(*g*) A memorandum purporting to be signed according to any of the following forms is deemed to be a memorandum purporting to be signed by a person authorised:—"(Signed) A. B., A judge of the high court of justice in England, *or* A Judge of the county court of , *or* A perpetual commissioner for taking acknowledgment of deeds by married women, *or* The special commissioner appointed to take the aforesaid acknowledgment." But this rule does not derogate from the effect of any memorandum purporting to be signed by a duly authorised person, though not in accordance with any such forms (Conveyancing and Fines and Recoveries Acts Rules, r. 5).

(*h*) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7 (2). As to the identity of the person by whom the memorandum is signed, see *Re Howard, Re Ashcroft* (1874), L. R. 9 C. P. 347; *Re Edsall, Re Thomas* (1875), L. R. 10 C. P. 472.

(*i*) Conveyancing and Fines and Recoveries Acts Rules, rr. 1, 4.

(*k*) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7 (3); Conveyancing and Fines and Recoveries Acts Rules, r. 6. As to the previous law, see *Ex parte Menhennet* (1869), L. R. 5 C. P. 16.

SECT. 2. Dispositions of Wife's Property.

any person to take the acknowledgment, the commission to be made returnable within a time therein expressed (*l*).

No acknowledgment by attorney.

773. A married woman cannot appoint an attorney to acknowledge a deed on her behalf. The separate examination and acknowledgment must be personal (*m*).

Dispensing with husband's concurrence.

774. Where the husband, in consequence of his being a lunatic, an idiot, or of unsound mind, whether so found by inquisition or not, or from any other cause (*n*), is incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence is not known, or if he is in prison, or living apart from his wife, either by mutual consent or by decree of judicial separation (*o*), the High Court (*p*), by an order made in a summary way on the application of the wife (*p*), and on such evidence as to the court seems meet, may dispense with the concurrence of the husband to any deed acknowledged (*q*).

Order.

Evidence.

An order dispensing with the husband's concurrence will only be made in reference to a particular contemplated transaction (*r*), and the application must in all cases be supported by an affidavit of the

(*l*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 83, as amended by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7 (1). Every such commission must be returned to the office of the registrar of certificates of acknowledgments of deeds by married women, and be there filed (Conveyancing and Fines and Recoveries Acts Rules, r. 7). Where an acknowledgment was taken by a special commissioner in Melbourne, and by mistake the documents were returned without the commission, the court, on being satisfied by affidavit that the acknowledgment had been properly taken, allowed the documents to be filed, and permitted the omission of one of the christian names of the commissioner to be rectified by an affidavit of identity (*Re Edsall, Re Thomas* (1875), L. R. 10 C. P. 472; and see *Re Howard, Re Ashcroft* (1874), L. R. 9 C. P. 347).

(*m*) *Re Stables* (1864), 33 L. J. (CH.) 422, a case decided under the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86) (now repealed), where it was held that a provision empowering the Lord Chancellor to appoint a committee to convey property on behalf of a lunatic did not apply so as to enable the committee of a married woman lunatic to convey by deed acknowledged.

(*n*) *E.g.*, where the husband is a minor (*Re Haigh* (1857), 2 C. B. (N. S.) 198). As to lunatics and persons of unsound mind, see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*o*) See *Ex parte Duffill* (1843), 5 Man. & G. 378; *Re a Married Woman* (1887), 3 T. L. R. 322.

(*p*) In ordinary circumstances the application must be made to the King's Bench Division. The Chancery Division may have jurisdiction to make an order, and might exercise it under special circumstances, but will not do so in an ordinary case (*Re Giles (Ellen) and the Fines and Recoveries Act*, 1833 (1894), 70 L. T. 757). Such applications are heard by a judge at chambers, and must in the first instance be made *ex parte*, but subject to any direction by the judge as to notice or otherwise (R. S. C., Ord. 54, r. 12 B). They cannot be heard by a master (R. S. C., Ord. 54, r. 12; Ord. 55, r. 16).

(*q*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 91. The section does not apply where the Lord Chancellor or the Chancery Division or a committee is a protector of a settlement in lieu of a husband found lunatic (*ibid.*). It applies to contingent and reversionary interests in personalty disposed of under the Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57) (*Re Rogers (Alice)* (1865), L. R. 1 C. P. 47; *Re Williams (Mary)* (1840), 1 Man. & G. 881).

(*r*) *Re Graham (Mary)* (1865), 19 C. B. (N. S.) 370.

wife herself (*s*), showing that she concurs in the transaction, and accounting for the husband's non-concurrence (*t*).

Where the application is made on the ground of the husband's unsoundness of mind, the affidavit in support must show that he is *non compos mentis* at the time when the application is made (*a*), and the court will require an explanation as to his property, and whether it contributes to the wife's support (*b*).

Where husband and wife living apart.

Where husband and wife are living apart it must, as a general rule, be shown that application has been made to the husband to concur and he has refused (*c*), and that they are separated by mutual consent or under a decree of judicial separation (*d*), or that he has deserted her (*e*), and in any such case that he does not contribute to her support (*f*). But an order may be made if he, having no interest in the property, refuses to concur unless a sum of money, or part of the purchase-money, is paid to him as a consideration for his concurrence, though he may to some extent have contributed to the wife's support (*g*).

Where husband abroad.

Where the husband is beyond the seas, the affidavit must disclose such circumstances as will induce the court to infer that he has no intention to return, and an order will not be made if he is in correspondence with the wife, and remitting money for her support, however small the remittances may be (*h*). But it is sufficient if it is shown that he has absconded and has not been heard of for some years (*i*).

(*s*) This will not be dispensed with (*Ex parte Bruce* (1841), 9 Dowl. 840).

(*t*) *Re Williams* (*Mary*) (1840), 1 Man. & G. 881. An affidavit describing the wife as a widow is not in proper form, though the husband has not been heard of for twenty years (*Re Noy* (*Mary*) (1843), 7 Scott (N. R.), 434).

(*a*) *Re Turner* (1846), 3 C. B. 166.

(*b*) *Re Cloud* (1864), 15 C. B. (N. S.) 833.

(*c*) *Mirfin's Wife to* —— (1842), 4 Man. & G. 635 (wife a trustee, neither she nor her husband having any interest in the property; husband, who was living apart, was nervous and excitable, so as to render it difficult to procure his concurrence; the court refused to dispense with his concurrence until application had been made to him to concur without success).

(*d*) See *Ex parte Duffill* (1843), 5 Man. & G. 378.

(*e*) *Re Price* (*Sarah*) (1862), 13 C. B. (N. S.) 286 (affidavit merely stating that she had left him in consequence of his violence and was living apart, held insufficient).

(*f*) *Ex parte Robinson* (1869), L. R. 4 C. P. 205; *Ex parte Fish* (*Mackarinah*) (1861), 9 C. B. (N. S.) 715.

(*g*) *Re Caine* (1883), 10 Q. B. D. 284 (desertion; contribution to small extent to her support; husband refused to concur unless he received a sum of money for doing so); *Re Perrin* (1854), 14 C. B. 420 (separation by mutual consent; husband without interest, the property being limited to the wife's separate use); *Re Woodcock* (*Sarah*) (1845), 1 C. B. 437 (separation by mutual consent; property held to separate use of wife; husband refused to concur unless part of purchase-money paid to him).

(*h*) *Re Squires* (*Emma*) (1855), 17 C. B. 176; *Ex parte Gilmore* (1847), 3 C. B. 967 (affidavit that the husband had joined a Government steamer in January, 1844, and that the last the wife heard of him was that in January, 1845, he was on board another Government steamer in New Zealand, and that she believed it was his intention never to return, held insufficient); *Re Kelsey* (1855), 16 C. B. 197 (affidavit that, falling into distressed circumstances, the husband had about two months before left England for Australia with the intention of never returning, and had since lived apart, held sufficient).

(*i*) *Ex parte Gill* (1834), 1 Bing. (N. C.) 168; *Re Yarnall* (*Susannah*) (1855), 17

SECT. 2. Dispositions of Wife's Property.

Effect of dispensing with husband's concurrence.

775. Where the concurrence of the husband is dispensed with, any deed or surrender in pursuance of the order may be executed or made by the wife, without acknowledgment or examination, in the same manner as if she were a *feme sole*, and is as valid as if the husband had concurred, but without prejudice to his rights as then existing (*k*).

Order obtained by fraud etc.

776. If an order dispensing with the husband's concurrence is obtained by fraud or the suppression of facts which ought to have been disclosed, it will be set aside (*l*), except, as a general rule, as against a purchaser for value who has acted on the order in good faith (*m*).

SECT. 3.—*Powers of Appointment.*

Married woman may exercise power over realty or personalty.

777. A married woman has always been able to execute a power of appointment limited or reserved to her, over either real or personal estate, whether the power is to be executed *inter vivos* or by will (*n*), the form of instrument required depending on the terms of the power (*o*). A power to appoint by deed only cannot be exercised by will (*p*), nor can a power to appoint by will only be exercised by deed (*q*). A will executed and attested as required by law in ordinary cases is, however, a sufficient execution by a married woman of a power to appoint by will, though the formalities required by the instrument creating the power may not have been complied with (*r*).

Power to *feme sole* not suspended by marriage.

778. Marriage does not operate to suspend a power of appointment given to a *feme sole* (*a*); and where a general power is given

C. B. 189, where the wife, not having heard of her husband for seventeen years, had married again, and the order was made, though without prejudice to the necessity of the concurrence of the second husband.

(*k*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 91; *Goodchild* v. *Dougal* (1876), 3 Ch. D. 650; *Fowke* v. *Draycott* (1885), 29 Ch. D. 996 (held, that the husband's right to the rents during spouses' joint lives was not affected by a sale and conveyance of the wife's freeholds without his concurrence, which was dispensed with, but that his right was subject to her equity to a settlement (see pp. 334 *et seq.*, *ante*), whether her estate was legal or equitable, and, in the circumstances, the whole of the rents were settled on her).

(*l*) *Ex parte Cockerell* (*Alice*) (1878), 4 C. P. D. 39.

(*m*) *Re Rogers* (*Alice*) (1865), L. R. 1 C. P. 47.

(*n*) *Peacock* v. *Monk* (1751), 2 Ves. Sen. 190; *Downes* v. *Timperon* (1828), 4 Russ. 334; *Doe* d. *Blomfield* v. *Eyre* (1848), 5 C. B. 713, Ex. Ch.; *Pride* v. *Bubb* (1871), 7 Ch. App. 64; *Guire* v. *Small* (1793), 1 Anst. 277.

(*o*) Nothing in the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 78, or the Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57), s. 3, as to dispositions by deed acknowledged, interferes with the execution by a married woman of any power of appointment. For forms of disposition by married woman in exercise of power, see Encyclopædia of Forms and Precedents, Vol. I., pp. 641, 642, 660, 662, 666, Vol. XII., p. 522.

(*p*) *Darlington* (*Earl*) v. *Pulteney* (1775), 1 Cowp. 260; *Bushell* v. *Bushell* (1803), 1 Sch. & Lef. 90.

(*q*) *Reid* v. *Shergold* (1805), 10 Ves. 369; *Sockett* v. *Wray* (1793), 4 Bro. C. C. 483; *Anderson* v. *Dawson* (1808), 15 Ves. 532.

(*r*) In this respect the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), though it did not alter the capacity of a married woman to make a will, applies to the wills of married women made during coverture (*Bernard* v. *Minshull* (1859), John. 276).

(*a*) *Burnet* v. *Mann* (1748), 1 Ves. Sen. 156.

to a single woman under a settlement of her property, with trusts in default of appointment for herself and any future husband, the power may be exercised by her during coverture (*b*). But a power in a marriage settlement to appoint at any time during and notwithstanding the coverture cannot be exercised during widowhood or a second marriage (*c*).

Infancy.

779. The minority of a married woman does not affect her capacity to exercise a power of appointment with regard to personal estate either by deed or will, if it appears to have been the intention of the donor that the power should be exercisable during infancy (*d*). But an infant married woman cannot exercise a power of appointment over real estate if it is coupled with an interest, that is to say if the exercise of the power will affect her own freehold interest (*e*).

A will made by a married woman in exercise of a power of appointment does not require the assent of the husband (*f*).

Appointment by will.

If a married woman, having a general power of appointment by will (*g*), expresses an intention by her will that it shall operate (*h*) on all property over which she has a power of appointment, she thereby makes the property her own and prevents it from going as in default of appointment, though the will may fail effectively to dispose of the property by reason of the death of the residuary devisee or legatee in her lifetime (*i*).

May appoint to husband or self.

A wife may exercise a general power of appointment in favour of herself for her own separate use or for her separate property (*k*); or in favour of her husband (*l*), or of herself and her husband jointly (*m*); and if any appointment to the husband is impeached on the ground of his undue influence, the burden of proving its invalidity lies on the party impeaching it (*n*).

(*b*) *Wood* v. *Wood* (1870), L. R. 10 Eq. 220.

(*c*) *Horseman* v. *Abbey* (1819), 1 Jac. & W. 381; *Morris* v. *Howes* (1845), 4 Hare, 599.

(*d*) *Re D'Angibau, Andrews* v. *Andrews* (1880), 15 Ch. D. 228, C. A.; *Re Cardross's Settlement* (1878), 7 Ch. D. 728.

(*e*) *Hearle* v. *Greenbank* (1749), 3 Atk. 695. Coverture does not remove the disabilities of infancy (*ibid.*).

(*f*) *Re Anstis, Chetwynd* v. *Morgan, Morgan* v. *Chetwynd* (1886), 31 Ch. D. 596, C. A.; see also *Re James, Hole* v. *Bethune*, [1910] 1 Ch. 157.

(*g*) See Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27; *Re Powell's Trusts* (1869), 39 L. J. (CH.) 188; and titles POWERS; WILLS.

(*h*) As to time from which the exercise of a general power runs, see *Rous* v. *Jackson* (1885), 29 Ch. D. 521; *contra*, *Re Powell's Trusts* (1869), 39 L. J. (CH.) 188; and title PERPETUITIES.

(*i*) *Willoughby Osborne* v. *Holyoake* (1882), 22 Ch. D. 238; *Re Pinède's Settlement* (1879), 12 Ch. D. 667.

(*k*) *Bower* v. *Smith* (1871), L. R. 11 Eq. 279; see also *Fussell* v. *Dowding* (1872), L. R. 14 Eq. 421; *Bond* v. *Taylor* (1861), 2 John. & H. 473. As to separate property, see p. 341, *ante*.

(*l*) *Wood* v. *Wood*, *supra*; *Re D'Angibau, Andrews* v. *Andrews*, *supra*; *Bernard* v. *Minshull* (1859), John. 276; *Allen* v. *Papworth* (1748), 1 Ves. Sen. 163 (bill by husband and wife submitting that the property subject to the power should be applied in payment of his debts, held equivalent to an appointment by her, and decreed accordingly).

(*m*) *Wood* v. *Wood*, *supra*.

(*n*) *Nedby* v. *Nedby* (1852), 5 De G. & Sm. 377 (income given to wife for life for her separate use, with power to appoint the remainder by deed or will; it

SECT. 3. Powers of Appointment.

A defective appointment by a husband in favour of his wife will be remedied in equity (*o*), but equity will not aid a defective appointment by a wife in favour of her husband (*p*), unless it is made for valuable consideration (*q*).

Judicial separation or protection order.

780. A protection order or decree for judicial separation does not prevent the wife from joining at any time during the separation in the exercise of any joint power given to her and her husband (*r*).

Release of, or contract not to exercise, power.

781. A married woman may by deed release or contract not to exercise any power, whether coupled with an interest or not, and, in the case of personal property, it is not necessary that the husband should concur or the deed be acknowledged (*s*).

Contract to exercise testamentary power.

782. Where a married woman has a general power of appointment by will, a contract by her to exercise it in favour of a particular person will not be specifically enforced, but the breach of such a contract gives rise to a claim for damages against her estate, and, if the power of appointment is exercised, the appointed property forms part of her assets (*t*).

Defective execution.

783. A defective execution of a power in favour of creditors or purchasers for valuable consideration will be remedied in equity (*a*), provided there was an attempt to exercise it in their favour (*b*).

Effect of exercise of power.

784. The execution by will of a general power of appointment by a married woman makes the property appointed liable for her debts and other liabilities in the same manner as her statutory

was sought to set aside an appointment by deed in favour of the husband on the ground of ignorance and want of professional advice, the deed having been prepared by the husband's solicitor; appointment upheld). See also title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 80, 96, 110.

(*o*) *Tollet* v. *Tollet* (1728), 2 P. Wms. 489.

(*p*) *Moodie* v. *Reid* (1816), 1 Madd. 516, 521; (1817), 2 Madd. 156; *Watt* v. *Watt* (1796), 3 Ves. 244.

(*q*) *Sergeson* v. *Sealey* (1742), 2 Atk. 412. As, for instance, in consideration of the marriage (*ibid.*).

(*r*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 26.

(*s*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 52. This provision applies also to women married before 1882 (*Re Chisholm's Settlement, Re Hemphill's Settlement, Hemphill* v. *Hemphill*, [1901] 2 Ch. 82 (life interest in personalty subject to restraint on anticipation, with power of appointment. Held, that the power could be released by deed without acknowledgment)). See *Re Onslow, Plowden* v. *Gayford* (1888), 39 Ch. D. 622; *Re Davenport, Turner* v. *King* [1895] 1 Ch. 361. Whether a deed acknowledged is necessary in the case of realty or money to be invested in the purchase of realty (see Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 77) is doubtful.

(*t*) *Re Parkin, Hill* v. *Schwartz*, [1892] 3 Ch. 510 (covenant by wife in favour of the trustees of her marriage settlement to exercise any power of appointment which might become vested in her; she became the donee of a general testamentary power and exercised it in favour of others. Held, that the trustees of the settlement were not entitled to specific performance, but that they had a claim for damages against her executors to the extent of her assets, the measure of the damages being the value of the appointed property, which formed part of her assets).

(*a*) *Hughes* v. *Wells* (1852), 9 Hare, 749; *Sergeson* v. *Sealey*, *supra*, at p. 415; *Tollet* v. *Tollet*, *supra*; *Cotter* v. *Layer* (1731), 2 P. Wms. 623; and see titles EQUITY, Vol. XIII., p. 27; POWERS.

(*b*) *Bull* v. *Vardy* (1791), 1 Ves. 270.

separate property (*c*). This provision does not extend to those debts or liabilities incurred before the 5th December, 1893, which do not bind her statutory separate property because she had no such property at the time of contracting them (*d*). But it extends to debts and obligations which the married woman had capacity to contract as if she were a *feme sole* before the 1st January, 1883, and is not confined to debts and liabilities incurred after that date (*e*).

Exercise cannot be compelled.

But a married woman cannot be compelled to exercise a power in favour of her creditors or of her trustee in bankruptcy, and a power of appointment is not separate estate (*f*). Property, therefore, which is subject to a general power given to a married woman is not liable for her debts or obligations unless she actually exercises the power (*f*), except where the property is, in default of appointment, limited to her or to her executors and administrators (*g*).

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 4, rendering obsolete *Vaughan* v. *Vanderstegen* (1854), 2 Drew. 165, 363; and *Shattock* v. *Shattock* (1866), L. R. 2 Eq. 182. There was previously a conflict of authority on the point, and the Act confirms the decision in *Re Harvey's Estate, Godfrey* v. *Harben* (1879), 13 Ch. D. 216; see also *Re De Burgh Lawson, De Burgh Lawson* v. *De Burgh Lawson* (1889), 41 Ch. D. 568; *Re Parkin, Hill* v. *Schwartz*, [1892] 3 Ch. 510. As to the liability of a married woman's property generally for her debts and obligations, see p. 390, *post*. See also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 223.

(*d*) *Re Fieldwick, Johnson* v. *Adamson*, [1909] 1 Ch. 1, C. A., overruling *Re Ann, Wilson* v. *Ann*, [1894] 1 Ch. 549. If, in exercise of a general testamentary power, a married woman gives a legacy in satisfaction of a debt due from her husband to the legatee, and the debt is after her death paid by the husband, the amount of the legacy is available for her debts as assets (*Re Hodgson, Darley* v. *Hodgson*, [1899] 1 Ch. 666).

(*e*) *Re Hughes, Brandon* v. *Hughes*, [1898] 1 Ch. 529, C. A. (a married woman, having obtained a protection order, in 1880 covenanted by deed to pay certain moneys; in 1894 she became the donee of a general testamentary power, which she exercised by a will made in 1895. Held, that as she had power to contract as if she were a *feme sole*, the funds appointed were assets for payment of the moneys); compare *Re Roper, Roper* v. *Doncaster* (1888), 39 Ch. D. 482, where a wife, having a general testamentary power, in 1881 joined with her husband in certain mortgages, and entered into covenants for payment of interest, and it was held that the execution of the power of appointment did not make the appointed fund liable to satisfy the obligations to the mortgagees. In this case the wife had no general capacity to contract as in *Re Hughes, Brandon* v. *Hughes, supra*. As to the capacity of a married woman to contract, see pp. 411 *et seq.*, *post*.

(*f*) *Hulme* v. *Tenant* (1778), 1 Bro. C. C. 16 (life interest with power to appoint to *corpus* by deed or will, and gift over in default of appointment); *Re Armstrong, Ex parte Gilchrist* (1886), 17 Q. B. D. 167, 521, C. A. (estate for life for separate use, remainder as she should by deed or will appoint, and in default of appointment for a son by a previous marriage in fee simple; carried on a separate trade, and became bankrupt under the Married Women's Property Act, 1882 (45 & 46 Vict. 75), s. 1 (5). Held, that the trustee in bankruptcy had no right to exercise the power, and that she was not obliged to exercise it); *Nail* v. *Punter* (1832), 5 Sim. 555 (stock given in trust for separate use for life, with power to appoint by will; the trustees, at the request of husband and wife, sold out the stock, and paid the proceeds to the husband. Held, that the trustees were liable to replace the stock); and see *Goatley* v. *Jones* (No. 1), *Goatley* v. *Jones* (No. 2), [1909] 1 Ch. 557, where husband and wife had a joint general power.

(*g*) See p. 390, *post*.

SECT. 4. **Liability of Wife's Property for Debts etc.**

SECT. 4.—*Liability of Wife's Property for Debts etc.*

Non-separate property.

785. The non-separate property of a wife (*h*) is not liable for any of her debts or obligations (*i*), and is only liable for the debts and obligations of her husband to the extent of his interest therein (*k*).

Equitable separate property.

786. The equitable separate property of a wife, that is to say, property limited or given for her separate use, is not liable for the debts or obligations of her husband, even if the legal title is vested in him (*l*); but the general debts and obligations of the wife are enforceable against such of her equitable separate property as is not subject to any restraint on anticipation (*m*), provided that she was entitled to the property at the time when the debts or obligations were contracted, and that she contracted with the intention of binding her separate estate (*n*). But the liability is not in the nature of a charge on the property (*o*), and the court will not restrain alienation thereof pending proceedings by creditors (*p*).

Life interest, with remainder to executors and administrators.

Where a married woman is given a life interest in real or personal property, with a power of appointment over the remainder or *corpus*, which, in default of appointment, is limited or given to her, or to her executors and administrators, that vests in her the entire property in equity, and it is accordingly liable for her general debts and obligations contracted in respect of her separate estate, whether she exercises the power or not (*q*).

(*h*) *I.e.*, property of a wife which is neither equitable nor statutory separate property. See pp. 322 *et seq.*, *ante*.

(*i*) Because the wife had no power at common law to contract, and her equitable power of contracting is limited to property held for her separate use, and her statutory power to statutory separate property; see pp. 411 *et seq.*, *post*.

(*k*) See pp. 322 *et seq.*, *ante*.

(*l*) *Jarman* v. *Woolloton* (1790), 3 Term Rep. 618; *Duncan* v. *Cashin* (1875), L. R. 10 C. P. 554.

(*m*) As to the effect of a restraint on anticipation, see pp. 363 *et seq.*, *ante*.

(*n*) *Owens* v. *Dickenson* (1840), Cr. & Ph. 48; *Hulme* v. *Tenant* (1778), 1 Bro. C. C. 16; *Field* v. *Sowle* (1827), 4 Russ. 112 (wife joined in security for moneys advanced to husband); *Pike* v. *Fitzgibbon*, *Martin* v. *Fitzgibbon* (1881), 17 Ch. D. 454, C. A. (debts etc. not enforceable against separate estate to which she subsequently became entitled); *Johnson* v. *Gallagher* (1861), 3 De G. F. & J. 494, C. A., *per* TURNER, L.J. (if living apart from her husband, the court will presume an intention to bind her separate estate); *Matthewman's* (*Mrs.*) *Case* (1866), L. R. 3 Eq. 781 (liability as a shareholder in a joint stock company); *Hodgson* v. *Williamson* (1880), 15 Ch. D. 87 (moneys advanced by stranger to wife living apart from her husband for necessaries). See, however, *Flower* v. *Buller* (1880), 15 Ch. D. 665.

(*o*) *National Provincial Bank of England* v. *Thomas* (1876), 24 W. R. 1013.

(*p*) *Wainford* v. *Heyl* (1875), L. R. 20 Eq. 321; *Robinson* v. *Pickering* (1881), 16 Ch. D. 660, C. A.

(*q*) *Hodges* v. *Hodges* (1882), 20 Ch. D. 749 (wife entitled for life to income of a fund in court for her separate use without power of anticipation; subject to her life interest, the fund was settled in trust for her children, and, in default of children, for such persons as she should by will appoint, and, in default of appointment, for her absolutely; she was past childbearing. Held, that the fund was liable after her death for her debts, whether she exercised the power or not); *London Chartered Bank of Australia* v. *Lemprière* (1873), L. R. 4 P. C. 572; *Re Harvey's Estate*, *Godfrey* v. *Harben* (1879), 13 Ch. D. 216; *Mayd* v. *Field* (1876), 3 Ch. D. 587; *Heatley* v. *Thomas* (1809), 15 Ves. 596. As to the liability for debts of property appointed under, or subject to, a general power, see p. 388, *ante*.

SECT. 4. Liability of Wife's Property for Debts etc.

Statutory separate property.

787. The legal separate property (*r*) of a married woman, or such part as is not subject to any restraint on anticipation (*s*), is liable for all her debts and obligations, both ante-nuptial (*t*) and post-nuptial, including any damages and costs recovered against her, whether in contract (*a*), in tort (*b*), or otherwise (*c*), and including her liability as a contributory whether before or after she is placed on the list of contributories (*d*), and any liability by reason of a breach of trust or *devastavit* (*e*).

The legal personal representative of a married woman is, in respect of her separate estate, under the same liabilities and subject to the same jurisdiction as she would be if living (*f*).

SECT. 5.—*Dispositions between Husband and Wife.*

SUB-SECT. 1.—*In General.*

Conveyances and transfers between husband and wife.

788. A husband may now convey or transfer to his wife, or a wife to her husband, either alone or jointly with any other person (*g*), any kind of property, real or personal, in the same manner as he or she may convey or transfer the same to any other person (*h*).

Conditions required for disposition by wife to husband.

789. Where a wife makes a disposition of her property in favour of her husband, it is necessary for its validity that it should be

(*r*) That is to say, separate property under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75); see p. 348, *ante*. Alimony payable under a decree for judicial separation is not separate property which can be charged by the wife (*Anderson* v. *Hay* (*Lady*) (1890), 7 T. L. R. 113). Damages recovered in respect of personal injuries are separate property (*Beasley* v. *Roney*, [1891] 1 Q. B. 509).

(*s*) As to the effect of a restraint on anticipation, see pp. 363 *et seq.*, *ante*.

(*t*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 13. See p. 407, *post*.

(*a*) See pp. 411 *et seq.*, *post*.

(*b*) See p. 436, *post*.

(*c*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2).

(*d*) *Ibid.*, ss. 7, 13. See *Matthewman's* (*Mrs.*) *Case* (1866), L. R. 3 Eq. 781; *Re Northumberland and Durham District Banking Co., Ex parte Rhodes* (1859), 7 W. R. 510; and p. 413, *post*; and see title COMPANIES, Vol. V., pp. 487 *et seq.*

(*e*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 24; *Re Turnbull, Turnbull* v. *Nicholas*, [1900] 1 Ch. 180, 185. See titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 316 *et seq.*; TRUSTS AND TRUSTEES.

(*f*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 23.

(*g*) As to post-nuptial settlements, see titles FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 82, 110; SETTLEMENTS.

(*h*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 50. They could not convey to one another at common law, owing to the doctrine of the unity of the person, though this difficulty was to some extent obviated by the Statute of Uses (27 Hen. 8, c. 10). Since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), husband and wife are, for all purposes connected with the holding and disposing of property, separate persons in law as well as in equity. But where a wife disposes of property in favour of her husband, the same formalities must be observed as if the disposition were in favour of a third person, see pp. 376 *et seq.*, *ante*. For forms of conveyance by wife to husband and by husband to wife, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 129 *et seq.*, Vol. XII., p. 523. See also, as to when possession by the wife on purchase of chattels from her husband will take the case out of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31); *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, C. A., and titles BILLS OF SALE, Vol. III., p. 17; GIFTS, Vol. XV., p. 400.

SECT. 5. Dispositions between Husband and Wife.

made freely and voluntarily, and without the exercise of any undue influence on his part, and in the case of a large voluntary benefit, where the wife is not separately examined (*i*), the burden of proving that there was no undue influence, if any question is raised as to the validity of the transaction, lies on the husband (*k*).

Protection of creditors.

790. Dispositions between husband and wife are subject to the ordinary law as regards defrauding creditors (*l*). A purchase for valuable consideration by a wife from her husband of articles of peculiar value, which it is desired to preserve for the family, is valid as against creditors of the husband, if in fact made in good faith, though the price may be inadequate (*m*). The question of *bona fides* in such a case is purely one of fact (*m*).

SUB-SECT. 2.—*Gifts.*

Clear evidence of intention necessary.

791. In order to establish a gift from husband to wife, or from wife to husband, there must be clear evidence that a gift was intended, whether in the case of a *donatio inter vivos* or of a *donatio mortis causâ*, and this rule applies more particularly when the claim is made after the death of the alleged donor (*n*).

(*i*) As to when a separate examination is necessary, see pp. 374, 382, *ante*.

(*k*) *Willis* v. *Barron*, [1902] A. C. 271 (deeds by which a wife surrendered her rights without consideration set aside on the ground of want of independent advice); *Turnbull & Co.* v. *Duval*, [1902] A. C. 429, P. C. (deed executed by wife as security for husband's debt set aside on the ground of pressure, want of independent advice and concealment of material facts); *Chaplin & Co., Ltd.*, v. *Brammall*, [1908] 1 K. B. 233, C. A.; *Bischoff's Trustee* v. *Frank* (1903), 89 L. T. 188, reversed in the Court of Appeal, but not reported. See *Howes* v. *Bishop*, [1909] 2 K. B. 390, C. A.; *Knight* v. *Knight* (1865), 11 Jur. (N. S.) 617 (money belonging to wife for her separate use lent on mortgage, the deed, which was prepared by the solicitor to the mortgagor on instructions given by him and the husband, falsely reciting that the money belonged to the wife before marriage and was not subject to any settlement, and the money being made repayable to the husband and wife and the survivor); *Talbot* v. *Von Boris* (1910), 27 T. L. R. 95; affirmed (1911), 27 T. L. R. 266, C. A.; the wife, who had no separate advice, executed the deed without its being read over. It was set aside as against the husband, and a new deed ordered in favour of the wife alone); compare *Bank of Africa, Ltd.* v. *Cohen*, [1909] 2 Ch. 129, C. A.; *Bank of Montreal* v. *Stuart*, [1911] A. C. 120, P. C. See also title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 110.

(*l*) See FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 77 *et seq.*

(*m*) *Arundell (Lady)* v. *Phipps and Taunton* (1804), 10 Ves. 139. A settlement by a husband of moneys of the wife not belonging to her for her separate use, in consideration of the waiver by her of her equity to a settlement, and the loan of the moneys to him for the purposes of his business, was held valid against the husband's trustee in bankruptcy and creditors, the transaction having taken place before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and therefore not being affected by s. 3 (*ibid.*) as to loans by a wife to her husband (*Re Home, Ex parte Home* (1885), 54 L. T. 301).

(*n*) *M'Lean* v. *Longlands* (1799), 5 Ves. 71; *Rich* v. *Cockell*, *Rich* v. *Hull* (1804), 9 Ves. 369; *Milnes* v. *Busk* (1794), 2 Ves. 488; *Hoyes* v. *Kindersley* (1854), 2 Sm. & G. 195; *Re Flamank, Wood* v. *Cock* (1889), 40 Ch. D. 461; *Grant* v. *Grant* (1865), 34 L. J. (CH.) 641; *Walter* v. *Hodge* (1818), 2 Swan. 92; *Re Curtis, Hawes* v. *Curtis* (1885), 52 L. T. 244 (wife's shares transferred to husband's name; he received the dividends, and did not pay them over to the wife. Held, not sufficient evidence of a gift of the shares); *Mews* v. *Mews* (1852), 15 Beav. 529 (a farmer's wife deposited the proceeds of surplus butter, eggs and poultry, with the sanction of her husband, with a firm in her own name, and

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792. Delivery is essential to complete a gift of chattels personal at law (*o*), unless they are transferred by deed (*p*), and this rule applies with equal force whether the gift is between husband and wife or between strangers (*q*). Provided, however, that some act is done showing an intention to change the ownership, there may be a sufficient delivery, although the chattels continue to be used by husband and wife in common (*r*), such use not being inconsistent with a change of ownership, nor with the legal possession being in either of them (*s*).

Gifts of chattels requires deed or delivery;

In equity a gift from husband to wife may be effected, without any transfer of the legal title, by a declaration of trust, and in the case of chattels personal such a declaration may be made by word of mouth (*t*), but it must be express, clear and definite (*u*), and in the case of realty and chattels real, it must be evidenced by writing signed by him (*v*): an attempted gift which is incomplete at law for want

or declaration of trust.

the husband referred to it from time to time as her money. Held, not sufficient evidence to establish a gift); *Slanning* v. *Style* (1734), 3 P. Wms. 334, 337 (a similar case, but the husband borrowed a portion of the money, which he called the wife's pin money, from the wife, and promised to repay it. Held that there was sufficient evidence that a gift was intended). In *Re Whittaker*, *Whittaker* v. *Whittaker* (1882), 21 Ch. D. 657, a wife alleged, after her husband's death, that he had authorised her to continue to carry on, on her own account, a farming business which belonged to her before marriage, and to treat the proceeds as her separate property, but, there being no corroboration of her statement, the court refused to admit her claim as to proceeds of the business which had been invested by the husband in his own name. The court always regards the uncorroborated testimony of a claimant against the estate of a deceased person with jealous suspicion, though such testimony will not necessarily be rejected (*Re Garnett, Gandy* v. *Macaulay* (1885), 31 Ch. D. 1, C. A.; see also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 341). As to gifts of paraphernalia, see p. 355, *ante;* and see generally, title GIFTS, Vol. XV., pp. 397 *et seq.*

(*o*) *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57, C. A.; *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551; *Smith* v. *Smith* (1733), 2 Stra. 955; and see title GIFTS, Vol. XV., p. 412.

(*p*) As to transfer by deed, see title GIFTS, Vol. XV., p. 410.

(*q*) *Bashall* v. *Bashall* (1894), 11 T. L. R. 152, C. A.; *Re Breton's Estate*, *Breton* v. *Woollven* (1881), 17 Ch. D. 416 (husband, by three letters written and signed by him and handed to the wife, purported to give her furniture etc. for her sole and absolute use. Held, that the letters were ineffectual, and after the death of the husband, that the furniture etc., which had been used by them in common in the ordinary way, formed part of his estate).

(*r*) As, for instance, in the case of furniture used as part of the general furniture of the house where they live together (*Bashall* v. *Bashall, supra*). But the act must be such, or be accompanied by such words, as to show clearly an intention to change the ownership. If, in the case of an alleged gift from husband to wife, the facts are equally consistent with an intention on his part to keep the property as his own, and merely let his wife have the use of it, her case is not made out (*ibid.*); see also *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, C. A.; and title BILLS OF SALE, Vol. III., p. 17.

(*s*) Furniture of the wife's in the house where she and the husband reside together is not in the apparent possession of the husband for the purposes of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31); see title BILLS OF SALE, Vol. III., pp. 17, 57.

(*t*) *Mews* v. *Mews* (1852), 15 Beav. 529. As to declarations of trust, see also titles GIFTS, Vol. XV., pp. 413, 414; TRUSTS AND TRUSTEES.

(*u*) *Mews* v. *Mews, supra; Re Whittaker, Whittaker* v. *Whittaker, supra; Re Whitehead, Ex parte Whitehead* (1885), 14 Q. B. D. 419, C. A.; *Murray* v. *Glasse* (1853), 17 Jur. 816.

(*v*) Statute of Frauds (29 Car. 2, c. 3), s. 7.

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of a deed or delivery will not be construed as a declaration of trust (*a*).

Presumption of gift by husband to wife.

793. Where a husband purchases property or makes an investment in his wife's name, a gift to her is presumed in the absence of evidence of an intention to the contrary (*b*), and there is a similar presumption where the property is purchased or the investment made by the husband in their joint names, the wife in the latter case being entitled in the event of her surviving the husband (*c*). Where the purchase or investment is made by the husband in the joint names of husband and wife and third persons with regard to whom no presumption of gift arises, the third persons will presumably be trustees for the husband and wife and the survivor (*d*).

A gift is also presumed where money is deposited at a bank in the name of the wife (*e*), or shares or stock are transferred into her name (*f*), or where any such deposit or transfer is made in or into the joint names of both husband and wife (*g*), or where a

(*a*) *Mews* v. *Mews* (1852), 15 Beav. 529; *Re Breton's Estate, Breton* v. *Woollven* (1881), 17 Ch. D. 416. *Grant* v. *Grant* (1865), 34 L. J. (CH.) 641, where it was held that a purported gift without delivery would be supported in equity as a declaration of trust, on the ground that, owing to the unity of person, delivery was impossible because the legal possession would remain in the husband, cannot be relied on since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75); see title GIFTS, Vol. XV., p. 413.

(*b*) *Glaister* v. *Hewer* (1803), 8 Ves. 195, 199; *Kingdon* v. *Bridges* (1688), 2 Vern. 67; *Re Eykyn's Trusts* (1877), 6 Ch. D. 115. As to deposits and investments by the husband in his wife's name in fraud of his creditors, see the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 10, and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 181.

(*c*) *Vance* v. *Vance* (1839), 1 Beav. 605 (the husband directed his bankers to make an investment in the joint names of himself and wife, and died after brokers had purchased stock, but before completion of the transfers. Held, that the wife was entitled by survivorship); *Drew* v. *Martin* (1864), 2 Hem. & M. 130 (contract for purchase of realty in joint names, the husband dying before purchase completed); *Re Eykyn's Trusts, supra* (railway debentures purchased by husband in the names of himself and wife and one of the trustees of their marriage settlement, and stock in the names of himself and wife and two of such trustees. Held, in the absence of any evidence of intention, that the wife was entitled by survivorship); *Dunbar* v. *Dunbar*, [1909] 2 Ch. 639 (conveyance to husband and wife jointly of house purchased by husband; decree of nullity of marriage obtained by wife. Held, that the wife was entitled as joint tenant in fee with the husband).

(*d*) *Re Eykyn's Trusts, supra.*

(*e*) *Mews* v. *Mews, supra; Parker* v. *Lechmere* (1879), 12 Ch. D. 256; *Re Whitehead, Ex parte Whitehead* (1885), 14 Q. B. D. 419, C. A. (verbal agreement on marriage that money on deposit at a bank in the wife's name should be her separate property; nothing further was done, the money remaining on deposit in her maiden name, and she received interest for two years. Held, evidence of a gift by the husband after marriage, and that he was a trustee for her separate use).

(*f*) *George* v. *Bank of England* (1819), 7 Price, 646; *Rider* v. *Kidder* (1805), 10 Ves. 360; *Hoyes* v. *Kindersley* (1854), 2 Sm. & G. 195 (presumption rebutted by evidence of mode of dealing with dividends).

(*g*) *Re Young, Trye* v. *Sullivan* (1885), 28 Ch. D. 705 (railway stock in joint names); *Dummer* v. *Pitcher* (1833), 2 My. & K. 262 (stock transferred to joint names. Held, wife's by survivorship; presumption of gift not rebutted by the circumstance that the husband by his will gave legacies in excess of the value

mortgage (*h*) or other security (*i*) for money lent by the husband is taken in their joint names.

Where a current account at a bank is kept in the joint names of husband and wife, into which the moneys of both or either of them are paid, the question whether a gift to the survivor is to be inferred depends upon the intention of the parties to be ascertained from the circumstances of each particular case (*k*), and the same rule applies where the moneys of the husband are paid into a current account kept in the sole name of the wife (*l*).

Current account at bank.

794. There is no presumption of a gift where property is purchased by a man in the name of a woman with whom he lives as his wife, but to whom he is not legally married, or where he purchases property in their joint names. In such case it must be affirmatively proved that a gift was intended (*m*).

No presumption of gift, if no legal marriage.

795. Furniture and chattels bought by a husband and transferred to the exclusive possession of the wife will be presumed

Chattels in wife's exclusive possession.

of the rest of his estate, whether the transfer took place before or after the date of the will); *Re Carpenter, Carpenter* v. *Disney* (1884), 51 L. T. 773 (Consols transferred to joint names; husband by his will gave all his money in the public funds, whether standing in his name alone or jointly with his wife, to her for life, and then over, and also gave her a legacy of £3,000; the wife died without dealing with the stock. Held, that as she was entitled thereto by survivorship, the doctrine of election applied, and her representatives were bound to compensate the residuary legatees under the husband's will to the extent of the £3,000 legacy); and see *George* v. *Bank of England* (1819), 7 Price, 646; *Rider* v. *Kidder* (1805), 10 Ves. 360; *Re Eykyn's Trusts* (1877), 6 Ch. D. 115; *Talbot* v. *Cody* (1875), 10 I. R. Eq. 138; *Re Gadbury* (1863), 32 L. J. (CH.) 780.

(*h*) *Re Scott* (*William*), *Re Scott* (*Mary*), *Palmer* v. *Vickers* (1907), 97 L. T. 537 (mortgage by husband and wife on joint account; no evidence who advanced the money. Held, wife surviving entitled).

(*i*) *Watts* v. *Thomas* (1726), 2 P. Wms. 364; *Gosling* v. *Gosling* (1855), 3 Drew. 335.

(*k*) *Re Young, Trye* v. *Sullivan* (1885), 28 Ch. D. 705 (account in joint names; moneys of both paid in, but chiefly moneys held to the wife's separate use. Held, that she was entitled by survivorship); *Marshal* v. *Crutwell* (1875), L. R. 20 Eq. 328 (husband, being in failing health, transferred his account to joint names, and directed the bank to pay cheques drawn by either; considerable sums belonging to the husband were paid in, and all cheques after the transfer of the account were drawn by the wife for household expenses. There being no declaration of intention by the husband, held, that no gift was intended, the joint account being merely a convenient mode of managing his affairs, and that the wife was not entitled by survivorship).

(*l*) *Parker* v. *Lechmere* (1879), 12 Ch. D. 256 (wife, having received a cheque for £995 in respect of a legacy, she and the husband went to his bank, and with his assent she told the manager to open an account in her name, and credit £800 to that account and the balance of £195 to the husband's account; the husband never interfered with her account, she alone drew cheques, sometimes in his favour for purposes of his business. Held, a gift by the husband of the £800 to the wife); *Lloyd* v. *Pughe* (1872), 8 Ch. App. 88 (wife, being the executrix of her father, opened an account in her own name as executrix; the husband paid moneys of his own to this account, and the wife drew cheques thereon for his debts and household expenses. The husband having died, held, that the wife must be deemed to have acted as his agent, and that the balance of the account belonged to his estate). And see *Re Pattinson, Graham* v. *Pattinson* (1885), 1 T. L. R. 216; *Hunt* v. *Hunt* (1908), 25 T. L. R. 132.

(*m*) *Soar* v. *Foster* (1858), 4 K. & J. 152 (marriage with deceased wife's sister).

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to have been given to her in the absence of evidence to the contrary (*n*).

The expenditure by a husband of money on improvements of his wife's property is presumed to be by way of gift, unless a contrary intention is shown (*o*); but there is no such presumption where a husband pays off incumbrances on his wife's estate (*p*).

Expenditure on improvements.

Gift from wife to husband.

796. A gift from a wife to her husband, in order to be valid, must be made by her freely and voluntarily, with a full knowledge and understanding of the nature of the transaction, and without any pressure or the exercise of undue influence on the part of the husband (*q*). Where the gift is of a large amount, or of property of considerable value, and any question is raised as to its validity, the burden of proving the absence of undue influence lies on the husband (*r*). A separate examination of the wife is only necessary where it would be required in the case of any other disposition of the property by her (*a*).

No presumption of gift by wife to husband.

797. No presumption of a gift from a wife to her husband arises from a transfer into his name (*b*), or into their joint

(*n*) *Barrack* v. *M'Culloch* (1856), 3 K. & J. 110 (houses which were settled to the separate use of the wife were let by her furnished, and she received the rents. Held, that the furniture was presumably hers, though it may have been bought by the husband).

(*o*) *Campion* v. *Cotton* (1810), 17 Ves. 263. And see *Hamer* v. *Tilsley* (1859), John. 486; *Wiles* v. *Cooper* (1846), 9 Beav. 294; *Neesom* v. *Clarkson* (1845), 4 Hare, 97; and p. 403, *post*.

(*p*) *Outram* v. *Hyde* (1875), 24 W. R. 268; *Pitt* v. *Pitt* (1823), Turn. & R. 180; *Gooch* v. *Gooch* (1851), 15 Jur. 1166.

(*q*) *Hughes* v. *Wells* (1852), 9 Hare, 749; *Bischoff's Trustee* v. *Frank* (1903), 89 L. T. 188; *Willis* v. *Barron*, [1902] A. C. 271 (deeds by which the wife surrendered her rights under a post-nuptial settlement without consideration set aside, the solicitor who prepared them being one of the trustees, and having failed to make her understand the real nature of the transaction or to see that she had advice independent of her husband); *Chaplin & Co., Ltd.* v. *Brammall*, [1908] 1 K. B. 233, C. A. (guarantee for husband's debts obtained by him from wife without sufficiently explaining the nature of the transaction); *Talbot* v. *Von Boris* (1910), 27 T. L. R. 95; (1911) 27 T. L. R. 266, C. A.; *Turnbull & Co.* v. *Duval*, [1902] A. C. 429; *Milnes* v. *Busk* (1794), 2 Ves. 488; *Essex* v. *Atkins* (1808), 14 Ves. 542. Where, however, on a disposition by deed acknowledged (see p. 381, *ante*) the wife consents to payment of the purchase-money being made to the husband, she cannot dispute the validity of the gift (*Tennent* v. *Welch* (1888), 37 Ch. D. 622).

(*r*) *Bischoff's Trustee* v. *Frank*, *supra*. Compare *Howes* v. *Bishop*, [1909] 2 K. B. 390, C. A.; *Bank of Africa, Ltd.* v. *Cohen*, [1909] 2 Ch. 129, C. A.; *Bank of Montreal* v. *Stuart*, [1911] A. C. 120, P. C. See also title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 110.

(*a*) *Pawlet* v. *Delaval* (1755), 2 Ves. Sen. 662. As to when a disposition by deed acknowledged is necessary, see pp. 323 *et seq.*, *ante*. As to the payment out to the husband of a fund in court at the request or with the consent of the wife, see *Wordsworth* v. *Dayrell* (1856), 4 W. R. 689; *Lane* v. *Oakes* (1874), 30 L. T. 726; and p. 459, *post*.

(*b*) *Carnegie* v. *Carnegie* (1874), 31 L. T. 7 (money belonging to the wife was invested in colonial bonds, and the husband induced her to sign a document requesting the bankers to transfer the bonds to his account, at the foot of which he directed the bankers to pay the interest to the separate account of the wife till further directions. Held, that there was no gift, and that the bonds were held by the husband for the wife's separate use); *Re Curtis, Hawes* v. *Curtis* (1885), 52 L. T. 244 (shares belonging to wife transferred into husband's name; he received the dividends and did not pay them over to her. Held, not sufficient evidence of a gift of the shares).

names (*c*), of shares or stock belonging to her; or from a purchase of property with her money (*d*), or an investment of her money (*e*) in his name or in their joint names. In all such cases the husband is presumed to be a trustee for the wife in the absence of evidence of a contrary intention (*f*).

Receipt by husband of wife's income.

798. Where a husband, who is living with his wife and maintaining her, receives her separate income with her knowledge and consent, a gift of such income from the wife to the husband will be presumed unless a contrary intention is proved, and she will only be entitled to claim an account from him in respect of one year's arrears (*g*).

The same presumption arises where a husband is in similar circumstances permitted to retain interest due from him to the wife or her trustees, in respect of moneys charged on his estate (*h*), or otherwise payable by him (*i*).

(*c*) *Darkin* v. *Darkin* (1853), 17 Beav. 578. But where a wife, under a power, appointed that certain stock of the value of some £10,000 should be transferred to herself and her husband, and, the husband having sold the stock, she joined in the transfers, and he received the proceeds and applied them for his own benefit, it was held that there was sufficient evidence of a gift (*Hale* v. *Sheldrake* (1889), 60 L. T. 292).

(*d*) *Darkin* v. *Darkin*, *supra* (moneys of the wife invested in joint names, and applied in purchase of realty, which was conveyed to the husband alone. Held, after his death, that he was a trustee for her); *Mercier* v. *Mercier*, [1903] 2 Ch. 98, C. A. (joint banking account kept by husband and wife, on which each had power to draw; substantially the whole of the moneys paid into the account belonged to the wife; house purchased and conveyed to the husband alone, the purchase-money being paid out of the joint account, and the parties residing therein together till the husband's death. Held, no gift, and that there was a resulting trust for the wife). See, however, *Williams* v. *Hudson* (1889), 5 T. L. R. 576.

(*e*) *Re Dearmer, James* v. *Dearmer* (1885), 53 L. T. 905 (a portion of the wife's earnings, being her separate property under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93) (see p. 350, *ante*), invested by the husband in his own name. Held, her separate property).

(*f*) See notes (*b*) to (*e*), *supra*.

(*g*) *Dixon* v. *Dixon* (1878), 9 Ch. D. 587 (husband received wife's dividends with her assent for six years. Held, that the wife was not entitled to an account against him or the trustee); *Carter* v. *Anderson* (1830), 3 Sim. 370 (wife entitled to an annuity charged on A.'s estate; the husband, with the knowledge of the wife, received the rents of the estate under a power of attorney from A., and the wife made no demand on A. for payment of the annuity for many years. Held, that she had no claim on A. for the arrears); *Payne* v. *Little* (1858), 26 Beav. 1 (wife's separate income received by husband and applied for their common benefit); *Squire* v. *Dean* (1793), 4 Bro. C. C. 326 (wife's dividends applied for general purposes of the family); *Bartlett* v. *Gillard* (1827), 3 Russ. 149 (trustee held discharged by payments to the use of the husband, and sums allowed him in account, with the wife's acquiescence); *Ridout* v. *Lewis* (1738), 1 Atk. 269; *Leach* v. *Way* (1835), 5 L. J. (CH.) 100; *Arthur* v. *Arthur* (1848), 11 I. Eq. R. 511; *Alexander* v. *Barnhill* (1888), 21 L. R. Ir. 511 (in case of income, except as to one year's arrears, the onus is on the wife of proving that it was not a gift); *Hale* v. *Sheldrake*, *supra*.

(*h*) *Corbally* v. *Grainger* (1854), 4 I. Ch. R. 173; *Re Hawes, Re Burchell, Burchell* v. *Hawes* (1892), 62 L. J. (CH.) 463 (mortgage by husband to wife's trustees; husband did not pay interest as mortgagor. Gift of interest presumed).

(*i*) *Re Dixon, Heynes* v. *Dixon*, [1900] 2 Ch. 561, C. A. (moneys belonging to wife for separate use lent to the husband at interest on his bond; no interest paid. Gift of interest presumed); *Re Flamank, Wood* v. *Cock* (1889), 40 Ch. D. 461 (wife's money applied by husband to his own use without her assent.

SECT. 5. **Dispositions between Husband and Wife.**

The presumption applies where the husband is the trustee or one of the trustees for the wife, if it appears that the wife consented to his receiving or retaining her income in the character of a husband, and not of a trustee (*k*).

Foundation of presumption.

The foundation of the presumption is that the wife has consented (*l*) to the application of her income for her maintenance, or for the general purposes of the family by the husband, and it does not arise unless the parties are living together and she is being maintained by him (*m*), nor is there any presumption of a gift where her income is accumulated and invested in the name of the husband (*n*); nor where the wife is *non compos mentis*, because in such case she has no power to give her consent (*o*).

Receipt by husband of wife's capital

799. The assent of a wife to the receipt by her husband of a capital sum belonging to her for her separate use or separate property raises no presumption of a gift thereof to the husband (*p*). The presumption in the case of capital is that the husband receives it as a trustee for the wife, and the burden of proving a contrary intention lies on him (*p*).

Wife, after his death, permitted to claim as a creditor in respect of the capital sum, but her claim for interest during his lifetime disallowed).

(*k*) *Caton* v. *Rideout* (1849), 1 Mac. & G. 599 (husband one of the trustees; wife for some years permitted dividends to be paid to his account at his bank, and he treated them as his own moneys. Held, that the course of dealing showed that they were paid to him as husband, and not as trustee, and a gift therefore presumed); *Rowley* v. *Unwin* (1855), 2 K. & J. 138; *Edward* v. *Cheyne* (No. 2) (1888), 13 App. Cas. 385 (husband one of the trustees; income at first paid into bank to the wife's separate account, then to the joint account of both, and subsequently, for many years, both before and after the husband became sole trustee, to the husband's account, and mixed with his own moneys. Gift inferred); *Leach* v. *Way* (1835), 5 L. J. (CH.) 100.

(*l*) It must appear that the wife consented to his receiving the income with full knowledge of her right (*Parker* v. *Brooke* (1804), 9 Ves. 583).

(*m*) *Dixon* v. *Dixon* (1878), 9 Ch. D. 587; *Woodward* v. *Woodward* (1863), 3 De J. & Sm. 672; *Foss* v. *Foss* (1864), 15 I. Ch. R. 215 (the presumption does not apply against a purchaser for value of the wife's separate estate). Where a wife by deed directed that the rents and profits of her separate property should be paid to the husband during her life for his own use and benefit, it was held that her intention was merely to allow him to administer the property without accounting during the coverture, and that on his death she was entitled to all future rents, as well as to arrears which had not been received by him in his lifetime (*Milnes* v. *Busk* (1794), 2 Ves. 488).

(*n*) *Mercier* v. *Mercier*, [1903] 2 Ch. 98, C. A.; *Re Dearmer, James* v. *Dearmer* (1885), 53 L. T. 905. In *Beresford* v. *Armagh* (*Archbishop*) (1844), 13 Sim. 643, where the rents of the wife's separate property were paid to the husband's account with her assent, and were applied by him partly for his own purposes, and partly for keeping down incumbrances, and at his death there was a large balance, it was held that the balance belonged to his estate, because on the evidence it appeared that she intended him to have the absolute right to the rents.

(*o*) *A.-G.* v. *Parnther* (1793), 4 Bro. C. C. 409 (but held, that in accounting for the income received, consideration should be had to the husband's extra expenditure on her maintenance in consequence of her insanity). But see *Digby* (*Earl*) v. *Howard* (1831), 4 Sim. 588. As to the application of the income of an insane wife, see also *Edwards* v. *Abrey* (1846), 2 Ph. 37; *Re Spiller* (1860), 6 Jur. (N. S.) 386, C. A.; *Re Baker's Trusts* (1871), L. R. 13 Eq. 168; and title LUNATICS AND PERSONS OF UNSOUND MIND.

(*p*) *Alexander* v. *Barnhill* (1888), 21 L. R. Ir. 511; *Rowe* v. *Rowe* (1848), 2 De

800. In order to complete a gift from husband to wife, or from wife to husband, it is necessary that there should be an acceptance, express or implied, on the part of the donee (*q*).

Acceptance necessary.

801. No gift by a husband to his wife is valid if it is made in fraud of his creditors; nor is any such gift valid as against his creditors if the property remains after the gift in his order and disposition or reputed ownership (*r*).

Gift in fraud of creditors.

SUB-SECT. 3.—*Life Assurance Policies.*

802. A married woman may effect a policy of assurance on her own life or on the life of her husband for her separate use, and all benefit thereof enures accordingly, the contract being as valid as if made with an unmarried woman (*s*).

Wife may assure for her separate use.

803. Where a policy is effected by a married woman on her own life for her separate use, and the husband pays the premiums, he is not, nor are his representatives after his death, entitled to any lien on the policy for the premiums so paid in the absence of a contract between him and his wife giving him such a lien (*t*).

Payment of premiums by husband.

804. Any policy effected on or after the 9th August, 1870, and before the 1st January, 1883, by a husband on his own life, and expressed on the face of it to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, enures and is deemed a trust for the benefit of the wife for her separate use, and

Policies effected under Married Women's Property Act, 1870.

G. & Sm. 294 (concurrence by wife in receipt by her husband of a legacy bequeathed to her for her separate use); *Green* v. *Carlill* (1877), 4 Ch. D. 882 (banker's draft for legacy bequeathed to wife for separate use sent to wife, who indorsed it, and handed it to husband: the husband lodged it with his banker, and the amount was placed to his deposit account; a few days afterwards the husband died suddenly. Held, no gift); *Mercier* v. *Mercier*, [1903] 2 Ch. 98, C. A.; *Re Flamank, Wood* v. *Cock* (1889), 40 Ch. D. 461 (husband, as mortgagee, sold property mortgaged to the wife, and applied the proceeds to his own use; the husband and wife lived together in amity, and no proceedings were taken by her, nor did she receive any interest from him. Held, after his death, that there was not sufficient evidence of a gift to him of the capital sum, and that she was entitled to rank as a creditor in respect thereof). A gift was inferred where a husband, with the wife's assent, used money which he held as trustee for her separate use in his business and for general household expenditure (*Gardner* v. *Gardner* (1859), 1 Giff. 126).

(*q*) *Re Blake, Blake* v. *Power* (1889), 60 L. T. 663 (husband, who was a trustee for the wife, applied capital belonging to her to his own use; the wife wished to give him the money, but he refused to accept it, and always spoke of it as hers. Held, that he was a trustee for her, and that she was entitled, after his death, to prove against his estate for the amount, with interest from the time of his death). As to acceptance of gifts, see title GIFTS, Vol. XV., p. 418.

(*r*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 10. See titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 10; BILLS OF SALE, Vol. III., p. 57.

(*s*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11, re-enacting the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 10; repealed, with savings, by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 22. As to insurance generally, see title INSURANCE.

(*t*) *Re Leslie, Leslie* v. *French* (1883), 48 L. T. 564; and see *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, C. A.; compare also *Burridge* v. *Row* (1844), 13 L. J. (CH.) 173.

SECT. 5. Dispositions between Husband and Wife.

of the children, according to the intention so expressed, and is not, so long as any object of the trust remains, subject to the control of the husband, nor does it form part of his estate (*u*). But the interest of the husband in such a policy is an interest which is capable of assignment by him during his wife's lifetime (*a*).

Whether such a policy so effected for the benefit of a wife, or wife and children, enures for the benefit of an after-taken wife or the children of a subsequent marriage depends upon its terms, and is a question of construction (*b*).

Where the policy is expressed to be for the benefit of the wife and children, they take as joint tenants in the absence of an indication of intention to the contrary (*c*).

Appointment of trustee.

805. A trustee may be appointed of any such policy, either before or after the sum secured thereby becomes payable, either by the Chancery Division of the High Court or by the county court judge of the district in which the assurance office is situated, and the receipt of a trustee so appointed is a good discharge to the office (*d*).

(*u*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 10. Where the husband effected a policy to be paid to the wife for her sole use if she survived him, and if not, to the children, and failing children, to the executors or assigns of the husband, and paid the premiums until 1883, when he became bankrupt, the wife subsequently paying them out of her separate estate until 1886, when she withdrew the value of the policy according to the conditions. Held, that the husband's contingent interest was a mere possibility which did not pass to his trustee in bankruptcy (*Re Suse and Sibeth, Ex parte Dever* (1887), 18 Q. B. D. 660, C. A.). In *Holt* v. *Everall* (1876), 2 Ch. D. 266, C. A., a husband had given up a policy effected before the 9th August, 1870, and received in lieu thereof after that date a new policy at the same premium, payable to the separate use of his wife, if she survived, and otherwise to himself. Held, that it must be taken as having been effected under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), and that the wife surviving was entitled, whether the premiums were paid out of her moneys or not. In *Re Mellor's Policy Trusts* (1877), 7 Ch. D. 200, where a policy had been effected for the benefit of the wife and children, and the husband died insolvent, the policy moneys were distributed as if he had died intestate, the widow being in poor circumstances and the income being insufficient for the support of her and the children.

(*a*) *Robb* v. *Watson*, [1910] I. R. 243 (policy for sole benefit of wife for separate use; assignment in 1901 by husband of all his property for benefit of creditors. Held, on the death of the wife in 1907, that the husband's interest in the policy had passed under the deed of assignment).

(*b*) *Re Parker's Policies*, [1906] 1 Ch. 526 (held that the policy enured for the benefit of an after-taken wife, and that the husband was entitled to exercise in her favour a power in the policy to appoint to his widow); *Re Griffiths' Policy*, [1903] 1 Ch. 739 (policy for the benefit of the wife, and on her death then for the children equally, held not to include an after-taken wife, but to extend to all children, whether born before or after the issue of the policy, including those by the subsequent marriage); and compare p. 401, *post*.

(*c*) *Re Seyton, Seyton* v. *Satterthwaite* (1887), 34 Ch. D. 511; followed in *Re Davies' Policy Trusts*, [1892] 1 Ch. 90: *Re Adam's Policy Trusts* (1883), 23 Ch. D. 525, *contra*, where it was held that the wife took for life and then the children, not followed. See also *Re Mellor's Policy Trusts, supra*.

(*d*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 10. Policies effected under this Act are not affected by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11 (see *infra*), so as to enable the sum secured to be paid to the personal representatives of the husband; a good discharge can

Fraud of creditors.

806. If it is proved that any such policy was effected and the premiums paid by the husband with intent to defraud his creditors, they are entitled to receive out of the sum secured an amount equal to the premiums so paid (*e*).

Policies effected under Married Women's Property Act, 1882.

807. A policy effected after the 31st December, 1882, by a man on his own life and expressed to be for the benefit of his wife, or children, or wife and children, or any of them, or by a woman on her own life, and expressed to be for the benefit of her husband, or children, or husband and children, or any of them, creates a trust in favour of the objects therein named, and the moneys payable under the policy do not, so long as any object of the trust remains unperformed, form part of the estate of the assured, and are not subject to his or her debts, provided that, if it is proved that the policy was effected and premiums paid with intent to defeat the creditors of the assured, they are entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid (*f*).

Where the objects of the trust created by any such policy fail, the insurance money forms part of the estate of the assured, and may be recovered by his or her personal representatives (*g*).

A policy for the benefit of wife and children extends to an after-taken wife and the children of a subsequent marriage, and the wife and children take as joint tenants unless a contrary intention appears (*h*).

only be given by a trustee duly appointed (*Re Turnbull, Turnbull* v. *Turnbull*, [1897] 2 Ch. 415). A petition for the appointment of a trustee should be intituled "In the matter of the Married Women's Property Act, 1870" only, and not in the matter of the Act of 1882, or of the Trustee Act, 1893 (*Re Kuyper's Policy Trusts*, [1899] 1 Ch. 38: *Re Soutar's Policy Trusts* (1884), 26 Ch. D. 236, *contra*, not followed). Where a policy was effected for the benefit of wife and children, and the husband became bankrupt and insane, and was unable to pay the premiums, the court appointed two trustees under its general jurisdiction, with authority to exchange the policy for one of smaller amount fully paid up (*Schultze* v. *Schultze* (1887), 56 L. J. (CH.) 356).

(*e*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 10.

(*f*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11. A joint policy by husband and wife for the benefit of the survivor on the death of either is, when the husband survives, a policy on the life of the wife "expressed to be for the benefit of her husband" within the meaning of the section (*Griffiths* v. *Fleming*, [1909] 1 K. B. 805, C. A.). See also *Re A Policy of the Equitable Life Assurance Society of the United States and Mitchell* (1911), 27 T. L. R. 213 (assignment by husband for benefit of creditors before expiration of tontine period when options exercisable. Held, options exercisable only for benefit of persons for whom trust created).

(*g*) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147, C. A. (policy for benefit of wife, who murdered her husband. Held, that the trust in her favour having failed by reason of her felonious act on the ground of public policy, the husband's representatives were entitled to recover the policy moneys). Where a policy was effected by a wife for the benefit of her husband, the moneys to be paid to him, his executors, administrators, or assigns on her death, and the husband paid the premiums and died before her, it was held that the trust in his favour was not dependent on his surviving, and that his representatives were entitled to the policy as against the widow (*Prescott* v. *Prescott*, [1906] 1 I. R. 155).

(*h*) *Re Browne's Policy*, *Browne* v. *Browne*, [1903] 1 Ch. 188 (wife and five children at the time of effecting the policy; wife died and husband remarried,

SECT. 5. Dispositions between Husband and Wife.

Appointment of trustees.

808. In the case of any such policy effected on and after the 1st January, 1883, the assured may, by the policy, or by any memorandum in writing, appoint a trustee or trustees of the moneys payable under the policy and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of new trustees and for the investment of the moneys payable under the policy (*i*).

In default of any such appointment, the policy immediately on its being effected vests in the assured and his or her legal representatives in trust for the objects named in the policy (*i*).

If, at the death of the assured, or at any time subsequently, there is no trustee, or it is expedient to appoint a new trustee or trustees, such appointment may be made by any court having jurisdiction in that behalf (*k*).

The receipt of a trustee or trustees duly appointed, or in default of any such appointment or of notice thereof to the insurance office, the receipt of the legal personal representatives of the assured, is a good discharge to the office for the sum secured by the policy, or for the value thereof in whole or in part (*i*).

Payment of premiums not a settlement within Bankruptcy Act.

809. The payment by a husband of premiums on policies settled by him by a post-nuptial settlement on his wife and children does not constitute a settlement within the provisions of the bankruptcy law, avoiding certain voluntary settlements as against the trustee in bankruptcy of the settlor (*l*).

SUB-SECT. 4.—*Dealings by Husband with Wife's Money or Property.*

Husband, when accountable as trustee.

810. Where a husband receives separate property or money of his wife's, and the circumstances are not such as to establish a gift (*m*) or loan (*n*) to him, he is accountable as a trustee for her (*o*), and, so long as he retains the property or money, or if he converts it to his own use, is not entitled to the benefit of any statute of limitation (*p*).

and had one child by the second marriage. Held, on his dying intestate, that the widow and the six children took as joint tenants); and compare p. 400, *ante*.

(*i*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11.

(*k*) *I.e.*, by any court having jurisdiction under the Trustee Act, 1893 (56 & 57 Vict. c. 53), repealing and superseding the Trustee Act, 1850 (13 & 14 Vict. c. 60); see title TRUSTS AND TRUSTEES.

(*l*) *Re Harrison and Ingram, Ex parte Whinney*, [1900] 2 Q. B. 710, C. A.; see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47, and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 275 *et seq.*

(*m*) See pp. 392, 396, *ante*.

(*n*) See *Woodward* v. *Woodward* (1863), 3 De G. J. & Sm. 672; and p. 433, *post*.

(*o*) *Dixon* v. *Dixon* (1878), 9 Ch. D. 587 (a trustee of stock for the separate use of the wife transferred it into the joint names of himself and the husband, and the husband, after receiving the dividends for six years, sold the stock and applied the proceeds to his own use. Held, that the wife was entitled to have the stock replaced by the husband, and to an account against him of the arrears of income from the time of the wrongful sale); *Parker* v. *Brooke* (1804), 9 Ves. 583. As to the liability of a third person who, with notice of a wife's claim to goods or chattels, deals with them on the instructions of the husband in a manner inconsistent with her title, see *Davis* v. *Artingstall* (1880), 49 L. J. (CH.) 609 (auctioneer entrusted by husband with goods for sale).

(*p*) *Wassell* v. *Leggatt*, [1896] 1 Ch. 554 (husband took possession by force in

811. If a husband takes a renewal of a lease belonging to his wife for her separate use or separate property, he is deemed to do so for her benefit, and as her trustee or agent, and though there may be no written declaration of trust the lease will, by operation of law, become subject to a trust in her favour (*q*).

Renewal of wife's lease.

812. Where the husband is the person liable to pay interest to a wife or her trustees in respect of her separate estate, and the circumstances are such that a gift of the wife's income to the husband is presumed (*r*), the period of limitation does not run in favour of the husband during the time the presumption continues (*s*).

No limitation of time where gift of income presumed.

813. Whether a husband is entitled to reimbursement of expenditure in respect of improvements of his wife's estate depends upon the circumstances. If the money was expended by him in the belief that the property was his own, he is entitled to charge for improvements, but must account for the rents received by him (*t*). If he has an interest in the property, and incurs the expenditure in respect of that interest, he is not entitled to reimbursement, though his interest may determine sooner than he expected (*a*), nor can he claim for money expended on improvements of the wife's estate if he has been permitted to receive the rents and profits (*b*). In any case the burden of proving that the circumstances are such as to entitle him to reimbursement lies on him (*c*).

Expenditure by husband on improvements.

814. Where a husband pays off incumbrances on his wife's separate estate he is entitled, in the absence of proof of an intention to the contrary, to a lien on the property for the sums so paid (*d*).

Discharge of incumbrances.

1876 of a legacy to which his wife was entitled, and died in 1894 without having repaid any portion of it, though she demanded repayment from time to time. Held, that he was a trustee and his executors were accountable). See the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, and title LIMITATION OF ACTIONS.

(*q*) *Re Lulham, Brinton* v. *Lulham* (1885), 53 L. T. 9, C. A.

(*r*) See p. 397, *ante*.

(*s*) *Re Hawes, Re Burchell, Burchell* v. *Hawes* (1892), 62 L. J. (CH.) 463 (wife's trustees lent her money to the husband on mortgage; they lived together, and the husband did not pay interest on the mortgage. Held, that the circumstances being such that a gift of her income to the husband was presumed (see p. 397, *ante*), the statute did not run in his favour while they were living together); *Re Dixon, Heynes* v. *Dixon* [1900] 2 Ch. 561, C. A. (income to be paid to wife for life for separate use, then to husband for life; the money was lent to the husband at interest on his bond; they lived together for twenty-four years, and he survived her twenty years; no interest paid during the forty-four years. Held, that the trustees were entitled to recover the money against his estate, with interest from the date of his death).

(*t*) *Neesom* v. *Clarkson* (1845), 4 Hare, 97.

(*a*) *Hamer* v. *Tilsley* (1859), John. 486 (husband tenant *pur autre vie*, remainder to wife; the wife's interest not being settled to her separate use, the husband, in the expectation of receiving the rents for her life (see p. 323, *ante*), expended money in repairs and improvements. The marriage having been dissolved on the ground of the wife's adultery, and the tenancy *pur autre vie* having determined, it was held that the husband had no right to charge his expenditure on the estate).

(*b*) *Wiles* v. *Cooper* (1846), 9 Beav. 294.

(*c*) *Campion* v. *Cotton* (1811), 17 Ves. 263.

(*d*) *Outram* v. *Hyde* (1875), 24 W. R. 268; *Pitt* v. *Pitt* (1823), Turn. & R. 180. See also titles LIEN; MORTGAGE.

SECT. 5. Dispositions between Husband and Wife.

815. Where property is bought with the separate money of a wife and conveyed to the husband, there is a resulting trust in favour of the wife, in the absence of proof of a contrary intention on her part (*e*).

Employment of wife's money in payment for property conveyed to husband.

If the separate money of a wife is employed, with or without her consent, in part payment of the purchase-money of property conveyed to the husband, she is entitled to a lien on the property for the amount, unless it is proved that she intended a gift thereof to the husband, the burden of proof being on him (*f*). The same rule applies where her money is employed in paying off incumbrances on the husband's property (*g*).

Where a husband completes a contract for the purchase of property made by his wife and takes a conveyance to himself, he is a trustee for the wife, subject to a lien for any portion of the purchase-money he may have paid out of his own moneys (*h*).

SUB-SECT. 5.—*Dealings by Wife with Husband's Money or Property.*

Investment of husband's money by wife.

816. Where any investment is made by a wife in her own name by means of moneys of her husband, without his consent, any judge of the High Court or the judge of the county court of the district in which either party resides, on an application in a summary way, may order the investment and dividends, or any part thereof, to be transferred or paid to the husband (*i*).

(*e*) *Darkin* v. *Darkin* (1853), 17 Beav. 578; *Mercier* v. *Mercier*, [1903] 2 Ch. 98, C. A. See also title EQUITY, Vol. XIII., p. 155.

(*f*) *Scales* v. *Baker* (1859), 28 Beav. 91 (separate estate of wife invested in shares registered in their joint names; the husband induced her to join in selling the shares, promising to re-invest the proceeds in their joint names, but, without her knowledge, he applied the proceeds in part payment of the purchase-money of realty conveyed to him alone. Held, that she was entitled to a lien on the realty for the amount); and see *Rowley* v. *Unwin* (1855), 2 K. & J. 138, where calls on shares allotted to the trustees of the marriage settlement were paid out of the wife's separate income, and, the shares having been sold and stock bought with the proceeds, it was held that the wife had a lien on the stock for the amount paid for calls on the shares.

(*g*) *Outram* v. *Hyde* (1875), 24 W. R. 268.

(*h*) *Maddison* v. *Chapman* (1861), 1 John. & H. 470 (a single woman contracted for the purchase of property, and married while part of the purchase-money remained unpaid; the husband paid the balance of the purchase-money and took a conveyance to himself. Held, that he was a trustee for the wife, subject to a lien for the amount paid by him); *Neesom* v. *Clarkson* (1845), 4 Hare, 97 (similar case). See also titles LIEN; MORTGAGE.

(*i*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 10, superseding the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), ss. 2—5. See, further, as to proceedings between husband and wife in regard to the title to any money or property, p. 460, *post*. As to the investment by a wife in her own name of savings etc., see *Barrack* v. *M'Culloch* (1856), 3 K. & J. 110, and p. 358, *ante*. In *Re Williams*, *Williams* v. *Stratton* (1881), 50 L. J. (CH.) 495, where a husband was of unsound mind not so found, and the wife sold certain chattels belonging to him, and applied the proceeds to her own use, it was held, after the death of both, that the husband's representatives were entitled to maintain an action against the representatives of the wife for the proceeds, whether the sale was rightful or wrongful. In *Calland* v. *Loyd* (1840), 6 M. & W. 26, a husband received a legacy bequeathed to his wife, not for her separate use, and therefore his property, and gave it to her to take care of. She, without his consent, deposited the amount in a bank in the name of an infant son by a former marriage, and took a receipt in the son's name. Held,

SUB-SECT. 6.—*Equity of Exoneration.*

SECT. 5. Dispositions between Husband and Wife.

817. Where the property of a wife is mortgaged or charged in order to raise money for the payment of her husband's debts, or otherwise for his benefit, it is presumed, in the absence of evidence showing an intention to the contrary, that she meant to charge her property merely by way of security, and in such case she is in the position of a surety (*k*), and is entitled to be indemnified by the husband, and to throw the debt primarily on his estate to the exoneration of her own (*l*).

Right of indemnity where wife's property charged for husband's benefit.

In the application of this principle it is immaterial whether the property of the wife belongs to her for her separate use or is her separate property or not (*m*). The right of the wife to indemnity or exoneration is merely a presumptive one, and depends on the intention of the parties to be ascertained from the circumstances of each particular case (*n*).

818. If the money is raised for the purpose of discharging her ante-nuptial debts or obligations, or otherwise for her own benefit, she has no right to be indemnified (*o*), and where the mortgage of the wife's estate is contemporaneous with a settlement thereof, the whole will be presumed to be one transaction, so as to exclude her claim to indemnity, especially if the money is raised for the purpose

Cases where no such indemnity.

that the husband was entitled to recover the amount from the bankers as money had and received to his use.

(*k*) Where a wife's reversionary interest in personalty, held for her separate use, was assigned to trustees for a banking company, on trust to receive the same and retain and pay the moneys due from her husband, there being no proviso for redemption or power of sale, it was held that the company was not entitled to foreclosure, but only to retain the moneys due from the husband when the wife's interest fell into possession (*Stamford, Spalding and Boston Banking Co.* v. *Ball* (1862), 31 L. J. (CH.) 143).

(*l*) *Huntingdon* (*Earl*) v. *Huntingdon* (*Countess Dowager*) (1703), 2 Bro. Parl. Cas. 1 (wife joined with husband in mortgage of her freeholds of inheritance; the husband paid off the mortgage and took an assignment thereof in trust for himself. Held, that the wife's heir was entitled to the property as against the devisee of the husband); *Pocock* v. *Lee* (1707), 2 Vern. 604 (wife joined husband in mortgage, the equity of redemption being reserved to husband and wife and their heirs; the husband having died, held that the mortgage must be discharged out of his estate in exoneration of that of the wife); *Hudson* v. *Carmichael* (1854), Kay, 613; *Parteriche* v. *Powlet* (1742), 2 Atk. 383 (estates of both husband and wife mortgaged. Held, that she was entitled to stand in the place of the mortgagee as against his estate); *Aguilar* v. *Aguilar* (1820), 5 Madd. 414 (wife's estate charged with annuity for husband's debt. Held that she was entitled as against the husband and his assignee in bankruptcy to have his estate applied first in payment of the debt); *Gee* v. *Smart* (1857), 8 E. & B. 313; *Tate* v. *Austin* (1714), 1 P. Wms. 264. The wife's creditors, after her death, are entitled to claim the benefit of her right of exoneration, but interest will not, as a general rule, be allowed on the sum which she is entitled to be repaid (*Lancaster* v. *Evors* (1847), 10 Beav. 154, 266). See also title GUARANTEE, Vol. XV., p. 523.

(*m*) *Hudson* v. *Carmichael*, *supra*; *Alexander* v. *Barnhill* (1888), 21 L. R. Ir. 511.

(*n*) *Paget* v. *Paget*, [1898] 1 Ch. 470, C. A. See also *Noyes* v. *Pollock* (1886), 32 Ch. D. 53, C. A.; *Skottowe* v. *Williams*, *Williams* v. *Skottowe* (1861), 7 Jur. (N. S.) 665.

(*o*) *Kinnoul* (*Earl*) v. *Money* (1767), 3 Swan. 202, n.; *Gray* v. *Dowman* (1858), 27 L. J. (CH.) 702; *Bagot* v. *Oughton* (1717), 1 P. Wms. 347.

SECT. 5. Dispositions between Husband and Wife.

of discharging any of the wife's debts or charges on the estate, even though more money may be raised than is sufficient for that purpose (*p*).

The presumption in the wife's favour may be rebutted by evidence showing that she intended to make a gift of the property to her husband (*q*), and there is no presumption of a right to indemnity where the money is raised to pay debts contracted by reason of the extravagant mode of living of both parties (*r*).

Joint mortgage by husband and wife.

819. Where a wife joins in a mortgage with her husband, and he covenants for repayment, it is presumed, in the absence of evidence to the contrary, that the money was received by the husband and for his benefit (*s*), but parol evidence is admissible to show the contrary (*t*).

Charge of wife's property partly for husband's benefit.

820. If the wife's property is mortgaged or charged partly for the husband's benefit and partly for the discharge of her ante-nuptial debts or otherwise for her benefit, she is entitled to exoneration *pro tanto* (*a*).

Mortgage of estates of both for wife's benefit.

821. Where the estates of both husband and wife are mortgaged or charged for the wife's debt or for her benefit, the husband is *primâ facie* entitled to throw the mortgage debt primarily on the wife's property (*b*).

Charge of property subject to general power.

822. The presumptive right of the wife to exoneration extends to cases where she joins in mortgaging property over which she has a general power of appointment (*c*), or over which she and her husband have a joint power of appointment, if the property in default of appointment is limited to her for her separate use (*d*).

(*p*) *Lewis* v. *Nangle* (1752), 1 Cox, Eq. Cas. 240.

(*q*) *Clinton* v. *Hooper* (1791), 3 Bro. C. C. 201.

(*r*) *Paget* v. *Paget*, [1898] 1 Ch. 470, C. A. (in this case the debts were charged on the wife's property notwithstanding a restraint on anticipation, under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 39; see pp. 372 *et seq.*, *ante*).

(*s*) *Hudson* v. *Carmichael* (1854), Kay, 613. Husband and wife may sue jointly for money received in respect of an advance to them both on the security of the wife's property (*Jones* v. *Cuthbertson* (1873), L. R. 8 Q. B. 504, Ex. Ch.).

(*t*) *Gray* v. *Dowman* (1858), 27 L. J. (CH.) 702.

(*a*) *Gee* v. *Smart* (1857), 8 E. & B. 313, 319.

(*b*) *Bagot* v. *Oughton* (1717), 1 P. Wms. 347; *Gray* v. *Dowman* (1858), 27 L. J. (CH.) 702; and see *Pitt* v. *Pitt* (1823), Turn. & R. 180.

(*c*) *Thomas* v. *Thomas* (1855), 2 K. & J. 79.

(*d*) *Re Trueman, Ex parte Trueman* (1872), 42 L. J. (BCY.) 1 (wife joint tenant; on a partition, property conveyed to such uses as she and her husband should appoint, and in default of appointment to her for her separate use during their joint lives, remainder to the survivor for life, remainder to her in fee; mortgage under the joint power; the husband having become bankrupt, held, that she was entitled, as against the trustee in bankruptcy, to throw the mortgage debt primarily on the husband's contingent life estate). Compare *Scholefield* v. *Lockwood* (1863), 4 De G. J. & Sm. 22 (property limited to husband for life, remainder as he and his wife should jointly appoint for the purpose of raising money by mortgage or otherwise, and subject thereto to wife for life, with ultimate remainder to husband and wife in moieties; joint power exercised to raise money for husband. Held, wife not entitled to exoneration, there having been no mortgage or charge on her estate).

But a wife has no right of exoneration or indemnity where she joins in mortgaging the property of the husband merely for the purpose of releasing her dower (*e*).

Equity of exoneration not affected by bankruptcy law.

823. The statutory provision excluding a wife from proving in her husband's bankruptcy in respect of a loan for the purpose of his trade or business until all other creditors for valuable consideration have been satisfied (*f*) does not apply to a wife's right of exoneration in respect of a mortgage or charge of her property for his benefit (*g*).

Waiver of equity of exoneration.

824. A wife's equity of exoneration may be waived by her, and is barred, if she disclaims and thehusband's executors pay legacies on the faith of the disclaimer (*h*).

Part VI.—Liability for Ante-nuptial Obligations of Wife.

Liability of wife.

825. Every woman married on or after the 1st January, 1883 (*i*), continues liable after her marriage in respect and to the extent of her separate property for all debts contracted and all contracts entered into or wrongs committed by her before marriage, including any sums for which she may be liable as a contributory, either

(*e*) *Dawson* v. *Bank of Whitehaven* (1877), 6 Ch. D. 218, C. A.

(*f*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3. See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 159.

(*g*) *Re Cronmire, Ex parte Cronmire*, [1901] 1 Q. B. 480, C. A.; *Alexander* v. *Barnhill* (1888), 21 L. R. Ir. 511.

(*h*) *Clinton* v. *Hooper* (1791), 3 Bro. C. C. 201.

(*i*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 13. Nothing in the section increases or diminishes the liability of any woman married before 1st January, 1883, in respect of any ante-nuptial obligation, except as to separate property which she may become entitled to by virtue of this Act, and to which she would not have been entitled for her separate use if it had not been passed (*ibid.*). As to the liability for ante-nuptial obligations of property which is subject to a restraint on anticipation, see p. 367, *ante*.

The law relating to a wife's liability for ante-nuptial obligations in the case of marriages before 1st January, 1883, is not referred to in the text, because such obligations must, in almost every case, be barred by the Statutes of Limitation (see *Re Hastings* (*Lady*), *Halletti* v. *Hastings* (1887), 35 Ch. D. 94, C. A., and title LIMITATION OF ACTIONS). The following is a historical summary of the law on the subject:—

If a woman married before 9th August, 1870, was sued alone in respect of an ante-nuptial debt or obligation, and she did not plead coverture, or, having pleaded it, offered no evidence in support of the plea, judgment could be obtained against her personally, on which she could be taken in execution on a *ca. sa.* as if she were a *feme sole*, and she could not subsequently set up her coverture in order to obtain a discharge from imprisonment (*Poole* v. *Canning* (1867), L. R. 2 C. P. 241; *Benyon* v. *Jones* (1846), 15 M. & W. 566; and see *Dillon* v. *Cunningham* (1872), L. R. 8 Exch. 23, as to proceedings under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5). If, on being sued alone, she pleaded her coverture, that was only a plea in abatement, and her husband could be added as defendant. If husband and wife were sued, a joint judgment could be obtained, on which they were both liable to be taken in execution, but

PART VI. Liability for Ante-nuptial Obligations of Wife.

before or after she has been placed on the list of contributories (*j*); and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, are payable out of her separate property (*k*).

Liability of husband.

826. The husband, in the case of a marriage on or after the 1st January, 1883, is liable for debts contracted by, and for all contracts entered into and wrongs committed by, his wife before marriage, including any liability as a contributory (*l*), to

the court would discharge the wife on being satisfied that she had no separate property (*Scott* v. *Morley* (1887), 20 Q. B. D. 120, C. A., *per* BOWEN, L.J., at p. 128; *Edwards* v. *Martyn* (1851), 17 Q. B. 693; *Ivens* v. *Butler* (1857), 7 E. & B. 159). The rule that the wife was entitled to be discharged on satisfying the court that she had no separate property applied where the husband, having obtained the benefit of the Insolvent Debtors Act, was not liable to be taken in execution, and the wife alone was arrested, or where, both having been arrested, the husband was discharged in pursuance of that Act (*Ivens* v. *Butler*, *supra*). But the court would not discharge her unless it was shown that she had no property settled to her separate use, whether the judgment was obtained against her before marriage or during coverture, and although the husband might have been discharged under the Insolvent Debtors Act (*Re Jay* v. *Amphlett*, *Ex parte Butler* (1862), 1 H. & C. 637; *Evans* v. *Chester* (1837), 2 M. & W. 847; *Sparkes* v. *Bell* (1828), 8 B. & C. 1). Property which a wife herself settled on marriage to her own separate use continued liable for her ante-nuptial obligations (*Chubb* v. *Stretch* (1870), L. R. 9 Eq. 555), and she was not permitted to assert her equity to a settlement (see p. 334, *ante*), if there were ante-nuptial debts, until those debts were provided for (*Barnard* v. *Ford*, *Carrick* v. *Ford* (1869), 4 Ch. App. 247). On the death of the husband, the liability in respect of all ante-nuptial obligations, whether judgment had been obtained or not, survived against the wife (*Woodman* v. *Chapman* (1808), 1 Camp. 189).

In the case of marriages on or after 9th August, 1870, and before 30th July, 1874, the wife was alone liable to be sued for her ante-nuptial debts, and any property belonging to her for her separate use was liable to satisfy them, as if she had continued unmarried (Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 12). It was not necessary to join the husband as defendant (*Williams* v. *Mercier* (1882), 9 Q. B. D. 337, C. A.; affirmed (1884), 10 App. Cas. 1), but a judgment did not render the wife liable to the bankruptcy law (*Re Grissell*, *Ex parte Jones* (1879), 12 Ch. D. 484, C. A.). Under this Act the property liable included property subject to a restraint on anticipation (see p. 368, *ante*).

In the case of marriages between 30th July, 1874, and 31st December, 1882, inclusive, the wife might be sued alone, or jointly with the husband, in respect of her ante-nuptial obligations, the husband being liable only to a limited extent (see note (*o*), p. 409, *post*), and the wife's separate estate was liable, notwithstanding a restraint on anticipation (see p. 368, *ante*), to satisfy the judgment, whether it was against her separately, or against her and the husband jointly (Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), ss 1, 4). It was not necessary, in order to maintain the action against the wife, to prove that she had separate estate, at the time either of the commencement of the action or of the judgment (*Downe* v. *Fletcher* (1888), 21 Q. B. D. 11).

The above-mentioned Acts of 1870 and 1874 are both repealed by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 22, but without prejudice to any liability accrued against either husband or wife while either of the repealed Acts was in force.

(*j*) See p. 413, *post*, and title COMPANIES, Vol. V., pp. 487, 489 *et seq.*

(*k*) See note (*i*), p. 407, *ante*.

(*l*) See note (*j*), *supra*, and the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 128.

the extent of all property whatsoever belonging to his wife which he has acquired or become entitled to from or through her (*m*), after deducting any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceedings in respect of any such ante-nuptial debts, contracts, or wrongs; but he is not liable further or otherwise (*n*); and any court in which the husband is sued for any such debt may direct any inquiry or proceedings which may be thought proper for the purpose of ascertaining the nature, amount, or value of any such property (*o*).

(*m*) A husband does not now, by virtue of the marriage, acquire any interest in his wife's property during her lifetime, and the property contemplated by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), appears to be such as may be acquired by him under a marriage settlement. A wife is under no liability in respect of the ante-nuptial obligations of her husband.

(*n*) Where a domiciled Englishman is married in England to a woman who has contracted obligations abroad, the extent of his liability when sued in the English courts in respect of such obligations is governed by English law, and not by the law of the place where the obligations were contracted (*De Greuchy* v. *Wills* (1879), 4 C. P. D. 362 (debts contracted in Jersey, by the law of which the husband was fully liable for the wife's ante-nuptial obligations. Held, that his liability was confined to the assets specified in the Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50) (see note (*o*), *infra*), though that Act did not extend to Jersey).

(*o*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 14. Nothing in the Act operates to increase or diminish the liability of any husband married before 1st January, 1883, in respect of any such debts or obligations (*ibid.*). The following is a summary of the previous law, which it is not considered necessary to deal with in the text owing to the operation of the Statutes of Limitation (see *Beck* v. *Pierce* (1889), 23 Q. B. D. 316, C. A., referred to in note (*p*), p. 410, *post*:—A husband married before 9th August, 1870, was liable jointly with his wife for all her ante-nuptial obligations, whether arising from contract, tort, breach of trust, or otherwise, and it was immaterial whether he received any fortune with her or not (*Paris* v. *Stroud* (1745), Barnes, 95; *Heard* v. *Stamford* (1736), 3 P. Wms. 409; *Adair* v. *Shaw* (1803), 1 Sch. & Lef. 243, 263; *Palmer* v. *Wakefield* (1840), 3 Beav. 227). But his liability was joint only. He could not be sued alone, and was not liable after her death, unless judgment was recovered in her lifetime, even though she brought a portion to him, except to the extent of assets vesting in him as her administrator (*Mitchinson* v. *Hewson* (1797), 7 Term Rep. 348; *Bell* v. *Stocker* (1882), 10 Q. B. D. 129, 130; *Heard* v. *Stamford*, *supra*; *Garrard* v. *Guibilei* (1862), 11 C. B. (N. S.) 616, 625). In an action against the husband as administrator, the declarations of the wife were admissible in evidence against him (*Humphreys* v. *Boyce* (1831), 1 Mood. & R. 140). A husband married between 9th August, 1870, and 29th July, 1874, inclusive, was not liable for his wife's ante-nuptial debts at all (Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 12; it may be noted that the section uses only the words "debts contracted before marriage"). The liability of a husband to be sued jointly with his wife in respect of all ante-nuptial obligations was restored, in the case of a marriage on or after July 30th, 1874, by the Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), ss. 1, 2, but his liability was limited by ss. 2, 5 (*ibid.*) to certain specified assets, namely, the value of (1) her personal estate in possession vesting in him; (2) her choses in action reduced into possession, or which might with reasonable diligence have been reduced into possession, by him; (3) her chattels real vesting in him and her; (4) the rents and profits of her real estate received, or which might with reasonable diligence have been received, by him; (5) his estate or interest in any property, real or personal, transferred by the wife to him or any other person in contemplation of the marriage; (6) any property transferred by the wife in contemplation of the

PART VI. Liability for Ante-nuptial Obligations of Wife.

Suits against husband and wife.

827. A husband and wife may be sued separately in respect of any ante-nuptial obligation of the wife (*p*), or may be sued jointly if the plaintiff seeks to establish his claim, either wholly or in part, against both of them; and if in any such joint action, or in any action against the husband alone, it is not found that he is liable in respect of any property of the wife acquired by him or to which he has become entitled, he will have judgment for his costs of defence, whatever may be the result of the action against the wife, if jointly sued with him; and in any such joint action, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable will be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of the debt or damages, the judgment will be a separate judgment against the wife as to her separate property only (*q*).

Wife's separate property primarily liable.

828. As between the husband and the wife, the wife's separate property is primarily liable for all ante-nuptial debts, contracts, or wrongs of the wife, and for all damages or costs recovered in respect thereof, unless there is a contract between them to the contrary (*r*).

Unsatisfied judgment against wife.

829. An unsatisfied judgment against the wife in respect of an ante-nuptial obligation is no bar to a subsequent action against the husband (*s*).

marriage, with his consent, to any person with a view of defeating or delaying her creditors. If, after the marriage, the husband paid any ante-nuptial debt of the wife, or had judgment *bonâ fide* recovered against him in respect of any ante-nuptial obligation of the wife, he was discharged from liability in any subsequent action to the extent of the payment or judgment (Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), s. 5). It was not necessary for the plaintiff to plead or prove that the husband had assets in respect of which he was liable; it was for him to show that he had not (*Matthews* v. *Whittle* (1880), 13 Ch. D. 811); but his liability was joint only, and he could not be sued after the wife's death (*Bell* v. *Stocker* (1882), 10 Q. B. D. 129; see Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), ss. 3, 4).

(*p*) See *Beck* v. *Pierce* (1889), 23 Q. B. D. 316, C. A. As the husband may be sued separately, it is probable that he continues liable notwithstanding the wife's death. It was otherwise under the Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50) (see note (*o*), p. 409, *ante*).

(*q*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 15. The Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), ss. 3, 4 (see note (*o*), p. 409, *ante*), contained similar provisions. In *Robinson, King & Co.* v. *Lynes*, [1894] 2 Q. B. 577, it was held that, notwithstanding the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), judgment may be given against a married woman personally in respect of an ante-nuptial obligation, and not merely a judgment with respect to her separate property; and this view is supported by the judgments of Lord ESHER, M.R., and FRY, L.J., in *Scott* v. *Morley* (1887), 20 Q. B. D. 120, C. A., at pp. 124, 130; but it seems inconsistent with the wording of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 13, 15, especially the latter. See further, p. 456, *post*.

(*r*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 13.

(*s*) *Beck* v. *Pierce* (1889), 23 Q. B. D. 316, C. A.

PART VI. Liability for Ante-nuptial Obligations of Wife.

Limitation of actions.

830. For the purpose of the period of limitation, the time is deemed to run, in the case of an ante-nuptial obligation, from the date when the right of action originally accrued against the wife, and not from the date of the marriage, in favour not only of the wife but also of the husband (*t*).

Part VII.—Contracts of Wife during Coverture.

SECT. 1.—*As Principal.*

Contracts on or after 5th December, 1893.

831. Every contract entered into by a married woman, otherwise than as agent, on or after the 5th December, 1893 (*a*), binds all separate property (*b*) which she may at the time of the contract or thereafter be possessed of or entitled to, and also all property which she may thereafter, while discovert, be possessed of or entitled to, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into the contract: provided that her separate property, which at the time of the contract or thereafter she is restrained from anticipating, is not available to satisfy any liability or obligation arising out of any such contract (*c*).

Nature of the liability.

832. The contract of a married woman does not bind her property in the sense of constituting any charge on it (*d*), and the period of limitation runs in her favour in the same manner as if she were unmarried (*e*). No personal liability, on the other hand, is created by such a contract. The only kind of judgment which can be obtained in respect thereof is of a proprietary nature, and execution on such a judgment is similarly restricted (*f*).

(*t*) *Beck* v. *Pierce* (1889), 23 Q. B. D. 316, C. A. See title LIMITATION OF ACTIONS.

(*a*) The contract must be entered into for the first time on or after 5th December, 1893. The acknowledgment of a debt previously due is not a contract entered into after that date within the meaning of the statute (*Re Wheeler, Hankinson* v. *Hayter*, [1904] 2 Ch. 66).

(*b*) Non-separate property can only be bound by a deed acknowledged (see p. 376, *ante*).

(*c*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1. As to property subject to a restraint on anticipation, see p. 368, *ante*. The fact that property subject to a restraint on anticipation at any time during the coverture becomes free from the restraint by the death of the husband or otherwise does not render it liable to satisfy obligations contracted during coverture (*Brown* v. *Dimbleby*, [1904] 1 K. B. 28, C. A. (action against widow); *Barnett* v. *Howard*, [1900] 2 Q. B. 784, C. A. (income received after the coverture had ceased).

(*d*) *Hemingway* v. *Braithwaite* (1889), 61 L. T. 224 (infant married woman contracted a debt and subsequently settled property to which she was entitled, the settlement being approved by the Chancery Division under the Infant Settlements Act, 1855 (18 & 19 Vict. c. 43). Held, that the settlement was good against the creditor); *National Provincial Bank of England* v. *Thomas* (1876), 24 W. R. 1013.

(*e*) *Re Hastings* (*Lady*), *Hallett* v. *Hastings* (1887), 35 Ch. D. 94, C. A. (simple contract debt held barred after six years). See title LIMITATION OF ACTIONS.

(*f*) As to the form of judgment, and as to execution thereon, see pp. 455, 457, *post*.

SECT. 1. As Principal.

"Otherwise than as agent."

833. The question whether a contract entered into by a married woman is to be deemed to have been entered into otherwise than as agent depends partly on the form of the contract, as in the case of deeds, bills of exchange, promissory notes and cheques, and partly on the intention of the parties to be ascertained from the nature and terms of the contract and the circumstances of the particular case (*g*).

Deeds.

834. If a married woman is party to a deed, and executes it in her own name, she will be taken to have contracted otherwise than as agent, though she may in fact have been acting on behalf of her husband or some other person (*h*).

Bills, notes and cheques.

835. Liability on a bill of exchange, promissory note, or cheque (*i*), depends on whose name appears thereon as that of the contracting party, and a married woman will be deemed to have contracted otherwise than as agent if she signs her own name as drawer, indorser, or maker (*k*), unless she qualifies the signature by adding words indicating that she signs on behalf of her husband or another person, or as an agent (*l*), and words merely describing her as a married woman or agent are not a sufficient qualification to exclude liability (*m*).

The liability of a married woman as acceptor of a bill of exchange depends upon whether she is named as the person on whom the bill is drawn. If it is drawn on her in her own name, she is deemed to contract otherwise than as agent by accepting it, even though she may qualify the acceptance and purport to accept as an agent (*n*), and on the other hand, if she is not named as the

(*g*) See *infra*. An agent, though contracting on behalf of and so as to bind his principal, may pledge his own personal credit as well, so as to give the other contracting party the right to sue either the principal or agent at his election, but not to sue both. On principle, there appears to be no reason why this should not be so in the case of a married woman contracting on behalf of her husband or some third person, but there does not seem to be any authority on the point. Although, in one sense, she would in such a case be contracting as agent, she might well be considered to contract otherwise than as agent in respect of the same transaction, if it appeared to be the intention of both parties that she should also bind her separate property. On this subject generally, and the effect of suing the principal or agent to judgment, or otherwise electing to give exclusive credit to one or the other, see title AGENCY, Vol. I., pp. 209, 219 *et seq.*

(*h*) *Cass* v. *Rudele* (1693), 2 Vern. 280, H. L.; *Appleton* v. *Binks* (1804), 5 East, 148; *Hancock* v. *Hodgson* (1827), 4 Bing. 269.

(*i*) See also title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 515 *et seq.*

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1); *Leadbitter* v. *Farrow* (1816), 5 M. & S. 345; *The Elmville*, [1904] P. 319; *Talbot* v. *Von Boris* (1911), 27 T. L. R. 266, C. A.

(*l*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1); *Aggs* v. *Nicholson* (1856), 1 H. & N. 165; *Alexander* v. *Sizer* (1869), L. R. 4 Exch. 102. As to the capacity of a married woman to become an obligee, see title BONDS, Vol. III., p. 83.

(*m*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1); *The Elmville*, *supra*; *Jones* v. *Jackson* (1870), 22 L. T. 828.

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (2); *Mare* v. *Charles* (1856), 5 E. & B. 978; *Jones* v. *Jackson*, *supra*; *Nicholls* v. *Diamond* (1853), 9 Exch. 154; *Herald* v. *Connah* (1876), 34 L. T. 885.

SECT. 1. As Principal.

drawee, she can incur no liability as acceptor, whatever may be the form of the acceptance (*o*).

In no case does a married woman incur any liability on a bill of exchange, promissory note, or cheque, unless her name appears on the instrument (*p*).

Written contract.

836. In the case of any other contract in writing entered into by a married woman, the question whether she is to be taken to have contracted otherwise than as agent depends on the intention of the parties ascertained from the terms of the written agreement when construed as a whole with reference to the surrounding circumstances, the construction of the contract being a matter of law for the court (*q*).

If, on the construction of the contract, she is to be taken as having contracted otherwise than as agent, parol evidence cannot be given to show that she did not in fact intend to bind her property, and that the other contracting party was so aware, because parol evidence is not admissible to contradict the terms of a written agreement (*r*); but evidence may in such case be given, by way of equitable defence, of an express oral agreement between her and the other contracting party that she should incur no liability on the contract, notwithstanding its terms (*s*).

Liability as a contributory.

837. There is nothing in the nature of a joint-stock company which, in the absence of a special clause in the regulations by which the company is governed, prevents a married woman from being a shareholder in her own right so as to bind her property in respect of any liability on the shares (*t*); and if a married woman contracts to take shares in her own name, or if shares are with her consent transferred to her and registered in her name, she alone is liable in respect of her property as a contributory, whether it is so expressed in the document by which her title to the shares is created or certified, or in the books or register in which her title is entered or recorded, or not (*a*), unless the regulations by which the company is governed expressly prohibit married women from being shareholders (*b*).

Verbal contracts.

838. Where a contract entered into by a married woman is not reduced to writing, the question whether she is to be deemed to have

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (2); *Okell* v. *Charles* (1876), 34 L. T. 822, C. A.; *Dermatine Co.* v. *Ashworth* (1905), 21 T. L. R. 510.

(*p*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23; *Wilson* v. *Barthrop* (1837), 2 M. & W. 863.

(*q*) *Bowes* v. *Shand* (1877), 2 App. Cas. 455; *Young* v. *Schuler* (1883), 11 Q. B. D. 651, C. A.; *Southwell* v. *Bowditch* (1876), 1 C. P. D. 374, C. A.

(*r*) *Higgins* v. *Senior* (1841), 8 M. & W. 834; *Holding* v. *Elliott* (1860), 5 H. & N. 117. See title CONTRACT, Vol. VII., p. 523.

(*s*) *Wake* v. *Harrop* (1862), 1 H. & C. 202, Ex. Ch.; *Cowie* v. *Witt* (1874), 23 W. R. 76.

(*t*) *Matthewman's* (*Mrs.*) *Case* (1866), L. R. 3 Eq. 781.

(*a*) *Ibid.*; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 7.

(*b*) *Re Northumberland and Durham District Banking Co., Ex parte Rhodes* (1859), 7 W. R. 510. In this case the deed of settlement did not contemplate married women as shareholders, and a married woman into whose name shares were transferred was held not liable as a contributory, though she had paid calls and received dividends, which she had acknowledged in her own name.

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contracted otherwise than as agent is one of fact, and depends on the circumstances of the particular case (*c*).

Separate trading.

If the contract is made in the course of or for the purposes of a separate trade or business carried on by her (*d*), or if it relates solely to her own separate property (*e*), she will be taken to have contracted otherwise than as agent unless a contrary intention plainly appears.

Contract for necessaries.

If, on the other hand, a wife, while living with her husband, orders necessaries with his authority (*f*), and nothing is said by her, and no inquiries are made by the tradesman, as to whether she is contracting on her husband's behalf or her own, she will be taken to have contracted as the agent of her husband, and the tradesman as having given credit to him, even though he did not know that she was a married woman (*g*). It is not necessary, in order to exclude liability, that she should profess to contract as an agent: it is sufficient if she does so in fact (*h*).

But where things ordered by a wife are not necessaries for which it is presumed that she has her husband's authority to pledge his credit (*i*), either because they are not suitable to his style of living (*k*), or are ordered in extravagant or excessive quantities (*l*), she will be deemed to contract on her own behalf, especially if she has separate means (*m*), in the absence of clear proof of an intention to the contrary.

The mere fact that goods are booked, and accounts sent in, in the name of the wife, is only a very slight indication that the tradesman intended to give credit to her as a principal (*n*). But if it is coupled with the circumstance that she paid for a portion of the goods, or has previously paid for goods of a similar kind, out of her own moneys, it becomes almost conclusive evidence of such an intention (*o*).

Where living apart.

839. Where a wife is living apart from her husband she will be presumed to contract otherwise than as agent unless a contrary

(*c*) *Bentley* v. *Griffin* (1814), 5 Taunt. 356; *Metcalfe* v. *Shaw* (1811), 3 Camp. 22. A contract for necessaries may be made by a married woman as the agent of a person other than her husband, as where a married woman who was separated from her husband lived with her uncle, and, he having previously paid for necessaries supplied to her, it was held that the tradesman must be taken to have given credit to him (*Harvey* v. *Norton* (1840), 4 Jur. 42).

(*d*) *Re Shepherd, Ex parte Shepherd* (1879), 10 Ch. D. 573, C. A. As to what constitutes separate trading, see p. 353, *ante*.

(*e*) *Warne* v. *Routledge* (1874), L. R. 18 Eq. 497 (contract in respect of copyright to which the wife was entitled for her separate use).

(*f*) See pp. 420 *et seq.*, *post*.

(*g*) *Paquin, Ltd.* v. *Beauclerk*, [1906] A. C. 148; *Freestone* v. *Butcher* (1840), 9 C. & P. 643.

(*h*) *Paquin, Ltd.* v. *Beauclerk*, *supra*.

(*i*) See p. 420, *post*.

(*k*) *Harrison* v. *Grady* (1865), 13 L. T. 369.

(*l*) *Debenham* v. *Mellon* (1880), 6 App. Cas. 24; *Freestone* v. *Butcher*, *supra*; *Lane* v. *Ironmonger* (1844), 13 M. & W. 368; *Metcalfe* v. *Shaw*, *supra*.

(*m*) *Freestone* v. *Butcher*, *supra*.

(*n*) *Jewsbury* v. *Newbold* (1857), 26 L. J. (EX.) 247; *Paquin, Ltd.* v. *Beauclerk*, *supra*.

(*o*) *Bentley* v. *Griffin*, *supra*; *Freestone* v. *Butcher*, *supra*.

intention appears (*p*); and if she is separated from him under a decree of judicial separation, or has obtained a protection order or separation order, she is during the continuance of the separation or protection order considered a *feme sole* for the purposes of contracts, and of suing and being sued thereon (*q*).

Implied warranty of authority.

840. Any person who professes to contract as an agent is deemed to warrant that he has in fact the principal's authority to make the contract (*r*). If, therefore, a married woman enters into a contract professedly on behalf of her husband or a third person, not being in fact duly authorised to make the contract, she may, although she is not liable to be sued on the contract itself, be liable in respect of her property as a principal in an action for breach of an implied warranty of authority (*s*). The fact that the contract was entered into by her in the honest belief that she was duly authorised does not affect this liability (*t*), but there is no implied warranty of the existence or extent of her authority in point of law, where the facts are equally within the knowledge of both the parties to the contract (*a*).

Joint or joint and several contract.

841. A married woman may contract jointly or jointly and severally with her husband or some third person (*b*). If the contract is joint and not several, both ought to be sued (*c*), and a joint judgment may be obtained, but limited as regards the married woman to property which she is not restrained from anticipating (*b*); and in such case a judgment against one of them, though unsatisfied, is a bar to any subsequent proceedings against the other (*d*), except where they are both sued, and the judgment is entered in default of appearance (*e*), or in default

(*p*) *Hodgson* v. *Williamson* (1880), 15 Ch. D. 87; and see p. 423, *post*.

(*q*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 21, 26; Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (a); *Re Hughes*, [1898] 1 Ch. 529.

(*r*) See title AGENCY, Vol. I., pp. 221, 222.

(*s*) *Collen* v. *Wright* (1857), 8 E. & B. 647, Ex. Ch. As to the measure of damages in such an action, see title AGENCY, Vol. I., pp. 221, 222.

(*t*) *Suart* v. *Haigh* (1893), 9 T. L. R. 488, H. L.; *Brown* v. *Law* (1895), 72 L. T. 779, H. L. But if she knows of her want of authority, she may be sued either in an action of deceit, or for breach of warranty, at the option of the other contracting party (*Randell* v. *Trimen* (1856), 18 C. B. 786; *Polhill* v. *Walter* (1832), 3 B. & Ad. 114).

(*a*) *Beattie* v. *Ebury* (*Lord*) (1874), L. R. 7 H. L. 102; *Smout* v. *Ilbery* (1842), 10 M. & W. 1; *Jones* v. *Hope* (1880), 3 T. L. R. 247, n., C. A.; *Eaglesfield* v. *Londonderry* (*Marquis*) (1876), 4 Ch. D. 693, C. A.; affirmed (1878), 38 L. T. 303, H. L.

(*b*) See *French* v. *Howie*, [1906] 2 K. B. 674, C. A.

(*c*) If one only is sued, he or she is entitled as of right to have the other joined as a co-defendant (*Pilley* v. *Robinson* (1887), 20 Q. B. D. 155; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504). As to the effect of non-joinder, see R. S. C., Ord. 16, r. 11; and title PRACTICE AND PROCEDURE.

(*d*) *Hoare* v. *Niblett*, [1891] 1 Q. B. 781; *Kendall* v. *Hamilton*, *supra*. If husband and wife are jointly sued in a case where they are not jointly liable, a judgment against one is a bar to subsequent proceedings against the other, though it may be entered in default of appearance or defence, or be given under R. S. C., Ord. 14 (*Morel Bros. & Co., Ltd.* v. *Westmorland* (*Earl*), [1904] A. C. 11; *French* v. *Howie*, *supra*).

(*e*) *Pim* v. *Coyle*, [1903] 2 I. R. 457.

SECT. 1. As Principal.

of defence (*f*), or is given on an application for summary judgment (*f*). If the contract is joint and several, both or either may be sued (*g*), and an unsatisfied judgment against one is no bar to subsequent proceedings against the other (*h*).

Contracts before 5th December, 1893.

842. A contract entered into by a married woman on or after the 1st January, 1883 (*i*), and before the 5th December, 1893, is not binding on her at all unless she had at the time of the contract some separate property which she might reasonably be deemed to have intended to bind, and it is therefore necessary, in any action on such contract, for the plaintiff to allege and prove that at the time of making it she had some separate property in respect of which she might reasonably be deemed to have contracted (*k*). It is not sufficient to show that she had property which was subject to a restraint on anticipation, because she had and has no power to bind such property by her contracts (*l*), nor is it enough to show that she had such things as wearing apparel purchased with the income of restrained property, because she could not reasonably be deemed to contract with respect thereto (*m*).

If, however, the contract was entered into in the course or for the purposes of a separate trade or business carried on by her, she will be conclusively presumed to have had separate property in respect of which the contract was made (*n*).

Such a contract, assuming the existence of free separate property at the time of making it, binds any separate property subsequently acquired during the coverture (*o*), but it does not bind property

(*f*) *Weall* v. *James* (1893), 68 L. T. 515, C. A.; *Walton* (*Francis*) *& Co.* v. *Topakyan, Kevorkian, and Marler* (1905), 53 W. R. 657, C. A.

(*g*) R. S. C., Ord. 16, r. 11.

(*h*) *Lechmere* v. *Fletcher* (1833), 1 Cr. & M. 623.

(*i*) Before the commencement of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman had no capacity at law to contract, unless she was living apart from her husband under a decree of judicial separation or had obtained a protection order (see p. 346, *ante*), or was carrying on a separate trade in the city of London (see p. 352, *ante*). She merely had power in equity to bind such property as was held to her separate use, and was not subject to a restraint on anticipation, at the time when the contract was made, and remained at the date of the judgment (*Pike* v. *Fitzgibbon*, *Martin* v. *Fitzgibbon* (1881), 17 Ch. D. 454, C. A.; *Owens* v. *Dickenson* (1840), Cr. & Ph. 48; *Collett* v. *Dickenson* (1879), 11 Ch. D. 687; *Durrant* v. *Ricketts* (1881), 8 Q. B. D. 177). She incurred no personal liability in respect of her contracts (*Durrant* v. *Ricketts*, *supra*; *Atwood* v. *Chichester* (1878), 3 Q. B. D. 722, C. A.; *Ortner* v. *Fitzgibbon* (1880), 50 L. J. (CH.) 17; *Re Grissell*, *Ex parte Jones* (1879), 12 Ch. D. 484, C. A.; *Collett* v. *Dickenson*, *supra*), and the Statutes of Limitation did not apply (*Hodgson* v. *Williamson* (1880), 15 Ch. D. 87). A jointure payable to her after her husband's death was not separate estate in respect of which she could contract (*Clarke* v. *Hastie* (1899), 16 T. L. R. 23).

(*k*) *Palliser* v. *Gurney* (1887), 19 Q. B. D. 519; *Re Wheeler*, *Hankinson* v. *Hayter*, [1904] 2 Ch. 66; *Tetley* v. *Griffith* (1887), 57 L. T. 673; *Re Shakespear*, *Deakin* v. *Lakin* (1885), 30 Ch. D. 169; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661, C. A.; *Braunstein* v. *Lewis* (1891), 65 L. T. 449, C. A.

(*l*) *Harrison* v. *Harrison* (1888), 13 P. D. 180, C. A.; *Beckett* v. *Tasker* (1887), 19 Q. B. D. 7, C. A.

(*m*) *Leak* v. *Driffield* (1889), 24 Q. B. D. 98.

(*n*) *Eddowes* v. *Argentine Loan and Mercantile Agency Co.* (1890), 63 L. T. 364, C. A.

(*o*) *Holtby* v. *Hodgson* (1889), 24 Q. B. D. 103; Married Women's Property

acquired after the coverture has ceased by the death of the husband or dissolution of the marriage (*p*), nor property which was subject to a restraint on anticipation during the coverture, and has become discharged therefrom by the cesser of the coverture (*q*). No personal liability is incurred by the married woman in respect of any such contract (*r*).

SECT. 1. AS PRINCIPAL.

SECT. 2.—*As Agent for Husband.*

SUB-SECT. 1.—*In General.*

No inherent authority to bind husband.

843. A wife has no authority, by virtue of the marriage alone, to contract on behalf of her husband (*s*). In order that the husband may be bound, either the contract must be made with his authority, express or implied (*s*), or he must have so conducted himself as to be estopped from denying the authority (*t*), or have ratified the contract (*a*).

In certain cases an authority to pledge the husband's credit for necessaries is presumed until the contrary is proved (*b*), and in other cases an authority of necessity, founded on his duty to maintain his wife, is vested in her by implication of law, and cannot be revoked by him (*c*).

A wife has neither presumed nor implied authority in any case to contract on behalf of her husband and herself jointly (*d*), unless they carry on a business in partnership (*e*).

Express authority.

844. Where a contract made by a wife on her husband's behalf is expressly authorised by him, he is liable, and entitled to sue, on it as in the case of a contract made by any other agent (*f*).

Bills, notes and cheques.

845. It is essential to liability on a bill of exchange, promissory note, or cheque (*g*) that the name of the person to be liable should be written on the instrument as that of the contracting party (*h*), and the only person who can be liable as the acceptor of a bill of exchange, except when it is accepted for honour, is the drawee (*i*).

Act, 1882 (45 & 46 Vict. c. 75), s. 1 (4), repealed by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 4.

(*p*) *Beckett* v. *Tasker* (1887), 19 Q. B. D. 7, C. A.

(*q*) *Harrison* v. *Harrison* (1888), 13 P. D. 180, C. A.; *Beckett* v. *Tasker*, *supra*.

(*r*) *Draycott* v. *Harrison* (1886), 17 Q. B. D. 147; *Scott* v. *Morley* (1887), 20 Q. B. D. 120, C. A. As to the form of judgment, and execution thereon, see pp. 455, 457, *post*.

(*s*) *Debenham* v. *Mellon* (1880), 6 App. Cas. 24.

(*t*) See p. 430, *post*.

(*a*) See p. 431, *post*.

(*b*) See p. 420, *post*.

(*c*) See p. 426, *post*.

(*d*) *Morel Bros. & Co., Ltd.* v. *Westmorland* (*Earl*), [1904] A. C. 11.

(*e*) See title PARTNERSHIP.

(*f*) *Stevenson* v. *Hardie* (1773), 2 Wm. Bl. 872 (loan to wife at husband's request). Where a wife placed her niece at school, the fact that the husband had paid for articles ordered by her for use in their own house was held to be some evidence, though very slight, that she had done so with his authority and at his expense (*M'George* v. *Egan* (1839), 5 Bing. (N. C.) 196).

(*g*) See title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 515 *et seq*.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23.

(*i*) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114; *Davis* v. *Clarke* (1844), 6 Q. B. 16; and see p. 412, *ante*.

SECT. 2. As Agent for Husband.

If a bill of exchange is drawn on a husband, and is accepted by his wife with his authority, express or implied (*j*), he is liable as acceptor though the acceptance may be in the name of the wife (*k*); and on the other hand, if the husband is not named as the drawee, he is not liable as acceptor, even if the acceptance is in his name or is expressed to be on his behalf, and it is proved that he expressly authorised it (*l*).

Where a bill of exchange, promissory note, or cheque is signed by a wife as drawee, indorser, or maker, with her husband's authority, express or implied (*m*), he is liable if the signature is in his name or is expressed to be written on his behalf (*n*), but not otherwise (*o*).

Husband an undisclosed principal.

846. Except in the case of bills of exchange, promissory notes and cheques, a husband is liable, and entitled to sue, on a contract which is in fact made by his wife on his behalf, and with his express or implied authority, although it is made by the wife in her own name and without disclosing that she is a married woman (*p*); and parol evidence may be given, whether the contract is in writing or not, in order to show that it was made on the husband's behalf, so as to render him liable or to entitle him to sue thereon (*q*).

Exclusive credit given to wife.

847. But a husband is not liable on a contract made by his wife on her own behalf on the credit of her separate property (*r*), or made on the credit of a third person (*s*), nor in any case where the

(*j*) Where a wife had the general management of her husband's business, and was in the habit of drawing and indorsing bills and notes for the purposes of the business, it was held that the question whether the indorsement of a note in his name was within the scope of her authority was one of fact, and that the jury were justified in finding that it was (*Lord* v. *Hall* (1849), 8 C. B. 627). But where, in an action on a bill of exchange accepted in the name of the husband, there was no evidence as to who had written the acceptance, it was held that evidence of the fact of the wife having discounted the bill and applied the proceeds in discharge of the husband's debts was not sufficient proof of his having authorised the acceptance (*Goldstone* v. *Tovey* (1839), 6 Bing. (N. C.) 98). In *Lindus* v. *Bradwell* (1848), 5 C. B. 583, a promise by a husband to pay a bill drawn on him and accepted by his wife in her own name was held sufficient evidence of his having either authorised or ratified the acceptance.

(*k*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (2); *Lindus* v. *Bradwell*, *supra*.

(*l*) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114.

(*m*) See note (*j*), *supra*.

(*n*) *Aggs* v. *Nicholson* (1856), 1 H. & N. 165.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23; *Ducarrey* v. *Gill* (1830), Mood & M. 450.

(*p*) *Paquin, Ltd.* v. *Beauclerk*, [1906] A. C. 148. As to the rights and liabilities of undisclosed principals generally, see title AGENCY, Vol. I., pp. 206 *et seq.*

(*q*) *Bateman* v. *Phillips* (1812), 15 East, 272; *Calder* v. *Dobell* (1871), L. R. 6 C. P. 486, Ex. Ch.

(*r*) *Jewsbury* v. *Newbold* (1857), 26 L. J. (EX.) 247; *Freestone* v. *Butcher* (1840), 9 C. & P. 643; *Taylor* v. *Brittan* (1823), 1 C. & P. 16, n.; *Bentley* v. *Griffin* (1814), 5 Taunt. 356. Where a wife ordered wearing apparel in excessive quantities unsuited to the husband's style of living, and credit was given to her, it was held that the tradesman was not entitled to recover against the husband for such portion of the goods as the jury considered necessaries (*Metcalfe* v. *Shaw* (1811), 3 Camp. 22).

(*s*) *Harvey* v. *Norton* (1840), 4 Jur. 42 (a married woman living with her uncle apart from her husband ordered necessaries from a tradesman on the credit of the uncle, who had previously paid for necessaries supplied to her by

other contracting party elects, with a knowledge of the circumstances, to give exclusive credit to the wife (*a*).

If the other contracting party sues the wife to judgment on the contract, he will be conclusively taken to have elected to give exclusive credit to her (*b*), but in any other case the question whether he has made such an election is one of fact depending on the particular circumstances (*c*).

Separate trading.

848. A husband is not liable, in the absence of proof of express authority or holding out (*d*), on any contracts made by his wife for the purposes of a trade or business carried on by her separately from him (*e*).

Liability as a contributory.

849. A husband is not liable as a contributory in respect of any shares or stock registered or standing in the sole name of his wife (*f*).

Judgment obtained against wife.

850. A judgment entered against a wife on any contract entered into by her, whether as the agent of her husband and with his authority or not, is, although unsatisfied, a bar to any proceedings against the husband on the contract (*g*).

the same tradesman. Held, that the husband was not liable, though he did not make the wife any allowance).

(*a*) *French* v. *Howie*, [1906] 2 K. B. 674, C. A.; *Addison* v. *Gandassequi* (1812), 4 Taunt. 574; *Bentley* v. *Griffin* (1814), 5 Taunt. 356; *Metcalfe* v. *Shaw* (1811), 3 Camp. 22; and see title AGENCY, Vol. I., p. 209.

(*b*) *Morel Bros. & Co., Ltd.* v. *Westmorland* (*Earl*), [1904] A. C. 11; *French* v. *Howie*, *supra*.

(*c*) *Calder* v. *Dobell* (1871), L. R. 6 C. P. 486, Ex. Ch.; *Curtis* v. *Williamson* (1874), L. R. 10 Q. B. 57. As to effect of booking goods, see p. 414, *ante*.

(*d*) As to holding out, see p. 430, *post*.

(*e*) *Re Shepherd, Ex parte Shepherd* (1879), 10 Ch. D. 573, C. A. As to what constitutes separate trading, see p. 353, *ante*.

(*f*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 7; *Re London, Bombay and Mediterranean Bank* (1881), 18 Ch. D. 581 (the husband applied for shares in the name of his wife, who was unable to read or write, and paid the deposit; the shares were allotted accordingly and registered in the name of M., the wife of S. D., and the husband subsequently paid calls, and sold and transferred some of the shares, signing the transfers on his wife's behalf; the wife had no knowledge of any of the transactions, and had no separate property. The company being wound up, it was held on an application by the liquidator to rectify the register by substituting the husband's name, that, as the company had accepted the wife as a shareholder without any misrepresentation or concealment on the part of the husband, he was under no liability, and the application was dismissed); *Re Northumberland and Durham District Banking Co., Ex parte Rhodes* (1859), 7 W. R. 510 (shares were bought in the name of a married woman by her aunt, who afterwards died leaving all her property to the married woman for her separate use; the shares were transferred to the name of the married woman, who was described as the wife of A., her husband, as to some of them, signing the notice of transfer and expressing his approval. Held, that the husband was not liable as a contributory, although, as the deed of settlement of the company did not contemplate married women as shareholders, his wife was not liable either).

(*g*) *Morel Brothers & Co., Ltd.* v. *Westmorland* (*Earl*), *supra*. This rule applies although both husband and wife are sued and the judgment is entered against the wife in default of appearance or defence, or is obtained against her under R. S. C., Ord. 14, if the circumstances are not such as to establish a joint liability (*ibid.*), and although the judgment against the wife is for only a portion of the amount claimed, unless it appears that there were

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Acknowledgment of debt by wife.

851. Where a debt has been contracted by a wife with the authority, express or implied, of her husband, she has implied authority to acknowledge it on her husband's behalf (*h*), but such an acknowledgment, in order to interrupt the operation of the period of limitation (*i*), must be in writing and signed by her as his agent (*k*).

SUB-SECT. 2.—*For Necessaries while Living Together.*

Presumption of authority from cohabitation.

852. Where husband and wife are living together, the wife is presumed to have her husband's authority to pledge his credit for necessaries suitable to their style of living (*l*).

This presumption, which is founded on the mere fact of cohabitation as husband and wife, also arises and is of equal force when a man lives with a woman to whom he is not married, and allows her to pass as his wife, and if necessaries are in such case ordered on his credit by the woman with whom he lives, he is none the less liable because the tradesman supplying them is aware that the man and woman are not married (*m*).

Confined to necessaries.

853. The presumed authority is confined to necessaries (*n*) suitable to the husband's style of living (*o*), and belonging to a

in effect two contracts by her, one on her own behalf in respect of the items for which judgment has been entered against her, and the other as agent for her husband in respect of the residue of the amount claimed (*French* v. *Howie*, [1906] 2 K. B. 674, C. A.).

(*h*) *Gregory* v. *Parker* (1808), 1 Camp. 394 (necessaries ordered by wife); *Anderson* v. *Sanderson* (1817), 2 Stark. 204; *Palethorp* v. *Furnish* (1793), 2 Esp. 511, n.; and *Emerson* v. *Blonden* (1794), 1 Esp. 142 (acknowledgment by wife carrying on husband's business).

(*i*) See title LIMITATION OF ACTIONS.

(*k*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 6; Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 13. Where an unsigned letter acknowledging a debt was written by the wife at the husband's dictation, and was enclosed in the same envelope with another letter signed by her and containing a reference to the unsigned acknowledgment, it was held that there was no sufficient signature by her as her husband's agent to defeat the operation of the Statute of Limitations (*Ingram* v. *Little* (1883), Cab. & El. 186).

(*l*) *Jolly* v. *Rees* (1864), 15 C. B. (N. S.) 628; *Harrison* v. *Grady* (1865), 13 L. T. 369.

(*m*) *Ryan* v. *Sams* (1848), 12 Q. B. 460; *Watson* v. *Threlkeld* (1798), 2 Esp. 637; *Robinson* v. *Nahon* (1808), 1 Camp. 245; *Blades* v. *Free* (1829), 9 B. & C. 167. No presumption of authority arises from the mere circumstance that a man allows a woman to whom he is not married to assume his name, where he does not live with her: it is the fact of cohabitation as man and wife that raises the presumption (*Gomme* v. *Franklin* (1859), 1 F. & F. 465). And the presumption of authority does not continue after the parties have separated (*Munro* v. *De Chemant* (1815), 4 Camp. 215; *Swan and Edgar, Ltd.* v. *Mathieson* (1910), 27 T. L. R. 153), though liability may be incurred subsequently to the separation by estoppel (*Ryan* v. *Sams*, *supra*; and see p. 430, *post*).

(*n*) *Hunt* v. *De Blaquiere* (1829), 5 Bing. 550, 559 (meat, drink, clothes, physic etc.); *Morgan* v. *Chetwynd* (1865), 4 F. & F. 451 (articles of dress); *Harrison* v. *Grady* (1865), 13 L. T. 369, and *Forristall* v. *Lawson*, *Connelly* v. *Lawson* (1876), 34 L. T. 903 (medical attendance); *Shoolbred* v. *Baker* (1867), 16 L. T. 359, and *Phillipson* v. *Hayter* (1870), L. R. 6 C. P. 38 (ordinary or necessary clothing for the children); *Jenkinson* v. *Bullock* (1891), 8 T. L. R. 61 (millinery). As to the costs of legal proceedings, see p. 428, *post*.

(*o*) *Montague* v. *Benedict* (1825), 3 B. & C. 631, 2 Smith, L. C., 11th ed., 476

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department of the household usually entrusted to the wife (*p*), but, if she has the management of his household, it extends to household provisions and all other things incidental to the ordinary course of such management (*q*).

The presumption does not extend to articles of luxury (*r*), nor will any authority be presumed when the orders given are extravagant in their nature (*s*) or are for excessive quantities of goods (*s*), regard being had to the husband's style of living.

No presumption of authority to borrow money.

854. There is no presumption, where a husband and wife live together, of an authority to borrow money in his name for the purpose of purchasing necessaries; nor is he liable to repay money so borrowed, even though it may have been expended on necessaries for which he would have been liable to pay if they had been bought on his credit (*t*).

What are necessaries.

855. The question whether things ordered by a wife are suitable necessaries does not depend on the actual means of the husband, but on the style of living assumed by him, or permitted by him to be assumed by the wife (*a*). A husband has the right to determine in what style he will live and to fix his standard of expenditure (*a*). On the one hand, he may choose to assume, or permit his wife to assume, an appearance far beyond his means (*b*), and on the other hand, although a wealthy man, he may prefer to live on a very small sum (*c*).

The question whether things supplied are suitable necessaries is one of fact for the jury (*d*), but they have merely to determine whether they are suitable according to the husband's actual style of living, and not to decide in what style he ought to live or has the means of living (*e*).

Burden of proof.

The burden of proving that articles supplied are suitable

(jewellery to the amount of £83 in the course of two months for the wife of a special pleader residing at a house at a rental of £200 a year, held unsuitable); *Atkins* v. *Curwood* (1837), 7 C. & P. 756; *Hunt* v. *De Blaquiere* (1829), 5 Bing. 550; *Morgan* v. *Chetwynd* (1865), 4 F. & F. 451; *Debenham* v. *Mellon* (1880), 6 App. Cas. 24; *Canham* v. *Howard* (1887), 3 T. L. R. 458 (shampooing and rubbing held not a necessary).

(*p*) *Phillipson* v. *Hayter* (1870), L. R. 6 C. P. 38.

(*q*) *Ruddock* v. *Marsh* (1857), 1 H. & N. 601; *Emmett* v. *Norton* (1838), 8 C. & P. 506; *Debenham* v. *Mellon, supra; Phillipson* v. *Hayter, supra.*

(*r*) *Phillipson* v. *Hayter, supra.*

(*s*) *Debenham* v. *Mellon, supra; Lane* v. *Ironmonger* (1844), 13 M. & W. 368; *Freestone* v. *Butcher* (1840), 9 C. & P. 643; *Walter* v. *Aldridge* (1884), 1 T. L. R. 138.

(*t*) *Knox* v. *Bushell* (1857), 3 C. B. (N. S.) 334; but see *Re Cook, Ex parte Vernall* (1892), 10 Morr. 8.

(*a*) *Harrison* v. *Grady* (1865), 13 L. T. 369; *Phillipson* v. *Hayter, supra; Morgan* v. *Chetwynd, supra.*

(*b*) *Waithman* v. *Wakefield* (1807), 1 Camp. 120.

(*c*) He must, however, in such a case limit his expenditure in clear and definite terms. Mere grumbling or protesting against his wife's extravagance is not sufficient (*Shoolbred* v. *Baker* (1867), 16 L. T. 359; *Morgan* v. *Chetwynd, supra*).

(*d*) *Dennys* v. *Sargeant* (1834), 6 C. & P. 419; *Phillipson* v. *Hayter, supra.*

(*e*) See cases cited in note (*a*), *supra.*

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necessaries lies, as a general rule, on the person seeking to charge the husband (*f*), but such things as articles of dress delivered at the joint residence will be presumed to be necessaries unless and until it is shown that they are either unsuitable or extravagant (*g*). When the burden of proof is on the plaintiff, it is for the court to decide whether there is any evidence to go to the jury that the things are necessaries for which the husband is liable (*h*).

Presumption of authority: how rebutted.

856. The presumption of authority from the mere fact of cohabitation is only one of fact (*i*), and may be rebutted by proof that the husband had prohibited his wife from pledging his credit (*k*), or expressly revoked her authority to do so (*k*); and, except where his conduct has been such as to create an estoppel between him and the person supplying the necessaries (*l*), it is not necessary for him, in order to escape liability, to show that he gave any notice of the prohibition or revocation (*k*). If, however, he did give actual notice to the plaintiff not to trust his wife, the plaintiff will be precluded from relying on any presumption of authority, though the wife may not herself have been forbidden to pledge her husband's credit (*m*).

But where a husband intends to prohibit his wife from pledging his credit, he must, in order that the prohibition may be effectual, forbid her to do so in plain and definite terms (*n*). Merely protesting against her rate of expenditure is not sufficient to deprive her of her presumed authority (*n*).

Adequate or agreed allowance for necessaries.

857. The presumption of authority may also be rebutted by proof that the wife was sufficiently provided with necessaries (*o*), or with an adequate allowance for the purpose of purchasing them (*p*), and if, by arrangement with her husband, the wife is allowed a definite sum for household expenses, the presumption of authority is rebutted, whether the allowance is adequate or not, because in such case they must be taken to have agreed that she should not pledge his credit beyond the amount of the allowance, though he did not in definite terms prohibit her from

(*f*) *Phillipson* v. *Hayter* (1870), L. R. 6 C. P. 38.

(*g*) *Jewsbury* v. *Newbold* (1857), 26 L. J. (EX.) 247; *Clifford* v. *Laton* (1827), 3 C. & P. 15.

(*h*) *Phillipson* v. *Hayter, supra.*

(*i*) *Lane* v. *Ironmonger* (1844), 13 M. & W. 368; *Freestone* v. *Butcher* (1840), 9 C. & P. 643; *Reid* v. *Teakle* (1853), 13 C. B. 627.

(*k*) *Jolly* v. *Rees* (1864), 15 C. B. (N. S.) 628; *Debenham* v. *Mellon* (1880), 6 App. Cas. 24. As to the revocation of an agent's authority generally, see title AGENCY, Vol. I., pp. 228 *et seq.*

(*l*) See p. 430, *post.*

(*m*) *Etherington* v. *Parrot* (1703), 1 Salk. 118.

(*n*) *Shoolbred* v. *Baker* (1867), 16 L. T. 359; *Morgan* v. *Chetwynd* (1865), 4 F. & F. 451.

(*o*) *Seaton* v. *Benedict* (1828), 5 Bing. 28; *Debenham* v. *Mellon, supra; Re Cook, Ex parte Vernall* (1892), 10 Morr. 8.

(*p*) *Reneaux* v. *Teakle* (1853), 8 Exch. 680; *Holt* v. *Brien* (1821), 4 B. & Ald. 252; *Morgan* v. *Chetwynd, supra; Slater* v. *Parker* (1908), 24 T. L. R. 621. It will not be rebutted by proof of an allowance found to be inadequate, unless fixed by arrangement between the husband and wife.

doing so (*q*). The mere fact that the wife has adequate separate means is not sufficient to rebut the presumption that she has authority to pledge her husband's credit for necessaries (*r*).

Authority revoked by adultery.

858. An act of adultery by a wife revokes any authority she may have to pledge her husband's credit, except where the offence is committed with his connivance (*s*); and the husband's liability in respect of orders given by her subsequently to the adultery is not affected by the circumstance that the tradesman does not know of the adultery (*t*); but if the husband condones the offence, the presumption of authority revives (*a*), and he may, even without condonation, incur liability by continuing to hold out his wife as his agent (*b*).

SUB-SECT. 3.—*For Necessaries while Living Apart.*

Presumed to have no authority.

859. A wife living apart from her husband is presumed, in the absence of evidence to the contrary, to have no authority to pledge his credit, and in an action against the husband on a contract entered into by her, the burden lies in all cases on the plaintiff of proving either that the circumstances of the separation are such as justify her in pledging the credit of her husband, or that she was expressly authorised to do so or was held out as having authority so as to create an estoppel against the husband (*c*). In the absence of any such holding out, it is immaterial whether the plaintiff knew that the wife was separated from her husband or not (*d*).

Judicial separation.

860. In the case of a judicial separation, the wife, from the date of the decree and while the separation continues, has no power, unless expressly authorised, to pledge her husband's credit, and he

(*q*) *Remmington* v. *Broadwood* (1902), 18 T. L. R. 270, C. A. (definite allowance for personal expenditure and clothing); *Morel Brothers & Co., Ltd.* v. *Westmorland (Earl)*, [1904] A. C. 11 (agreed allowance for household expenses). But this does not apply unless the amount of the allowance is fixed and definite. Where a portion of the husband's income and the whole of the wife's were paid to a separate account kept for mutual convenience, on which the wife drew for household expenses, and the amounts paid in by the husband varied, it was held that the arrangement did not amount to a prohibition from pledging his credit, and that he was liable on the wife's orders for necessaries (*Goodyear* v. *Part* (1897), 13 T. L. R. 395).

(*r*) *Davidson* v. *Wood* (1863), 32 L. J. (CH.) 400. But it is a fact to be taken into consideration in determining whether credit was given to the husband or the wife (*Freestone* v. *Butcher* (1840), 9 C. & P. 643).

(*s*) *Wilson* v. *Glossop* (1888), 20 Q. B. D. 354, C. A.; *Swan and Edgar, Ltd.* v. *Mathieson* (1910), 27 T. L. R. 153 (goods ordered after desertion).

(*t*) *Emmett* v. *Norton* (1838), 8 C. & P. 506; *Atkyns* v. *Pearce* (1857), 2 C. B. (N. S.) 763.

(*a*) *Wilson* v. *Glossop, supra; Norton* v. *Fazan* (1798), 1 Bos. & P. 226; *Manwairing* v. *Sands* (1726), 2 Stra. 706; *Harris* v. *Morris* (1801), 4 Esp. 41.

(*b*) *Norton* v. *Fazan, supra;* and see p. 430, *post.*

(*c*) *Johnston* v. *Sumner* (1858), 3 H. & N. 261; *Wilson* v. *Glossop, supra; Edwards* v. *Towels* (1843), 5 Man. & G. 624; *Bird* v. *Jones* (1828), 3 Man. & Ry. (K. B.) 121; *Mainwaring* v. *Leslie* (1826), 2 C. & P. 507; *Reed* v. *Moore* (1832), 5 C. & P. 200; *Clifford* v. *Laton* (1827), 3 C. & P. 15. As to holding out, see p. 430, *post.*

(*d*) *Wallis* v. *Biddick* (1873), 22 W. R. 76; *Willson* v. *Smyth* (1831), 1 B. & Ad. 801.

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is under no liability in respect of any of her contracts or engagements, provided that where alimony has been decreed or ordered to be paid to her, he is liable for necessaries supplied for her use if the alimony is not duly paid (*e*).

The liability of the husband on any contract entered into by the wife before the date of the decree is not, however, affected thereby, even though the contract may be a continuing one in respect of which liabilities are incurred subsequently to the date of the decree (*f*).

Protection order.

861. A protection order, as from the commencement of the desertion, and so long as the order continues in force (*g*), or a separation order granted by a court of summary jurisdiction, while it continues in force (*h*), has the same effect with regard to the husband's liability on his wife's contracts as a decree of judicial separation.

Separation by agreement.

862. Where a husband and wife separate by mutual consent, and she voluntarily (*i*) agrees to maintain herself, or to accept a specified allowance, she has no implied authority to pledge her husband's credit, except in certain cases for costs (*k*), so long as he carries out the terms of the agreement, whether the allowance is adequate or she is otherwise sufficiently provided for, or not (*l*); and in such case the subsequent misconduct of the husband, if it is not of such a nature as to preclude him from setting up the agreement between them (*m*), does not give her any authority, nor affect his liability on her contracts (*n*).

Where contract for separation void.

If a husband and wife are living apart in pursuance of a deed or contract of separation which is void, they are not considered, by reason of such deed or contract, as having separated by mutual consent (*o*), and the liability of the husband on his wife's contracts in such a case depends on the same rules as if he had turned her

(*e*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 26.

(*f*) *Re Wingfield and Blew* (*Solicitors*), [1904] 2 Ch. 665, C. A. (retainers by wife of solicitor to defend divorce proceedings brought by the husband, and to conduct an action of detinue against him. Held not determined by a decree of judicial separation, and the husband held liable to the solicitor for costs incurred in pursuance of the retainers after as well as before the date of the decree). A decree of judicial separation does not affect the power of the court in divorce proceedings to order the husband to give security for the wife's costs of suit or defence (*Sheppard* v. *Sheppard*, [1905] P. 185; and see p. 428, *post*).

(*g*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21; *Tempany* v. *Hakewill* (1858), 1 F. & F. 438; and see p. 429, *post*.

(*h*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (a).

(*i*) The agreement must be voluntary. If the wife's consent is extorted by undue influence or pressure, she may pledge her husband's credit as if turned away by him (see p. 426, *post*; *Biffin* v. *Bignell* (1862), 7 H. & N. 877).

(*k*) See p. 428, *post*.

(*l*) *Eastland* v. *Burchell* (1878), 3 Q. B. D. 432; *Negus* v. *Forster* (1882), 46 L. T. 675, C. A.; *Biffin* v. *Bignell*, *supra*; *Mallalieu* v. *Lyon* (1859) 1 F. & F. 431.

(*m*) As to what degree of misconduct precludes a husband from setting up a contract for separation, see p. 426, *post*.

(*n*) *Negus* v. *Forster*, *supra*.

(*o*) *Cock* v. *Cock* (1864), 33 L. J. (P. M. & A.) 157.

away (*p*), or she had left him without his consent (*q*), as the case may be.

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Where husband fails to carry out terms of agreement.

Where a husband and wife are separated by mutual consent, and he does not pay the allowance agreed upon, or otherwise fails to carry out the terms of the agreement between them, she is an agent of necessity, and has by implication of law an irrevocable authority to pledge his credit for necessaries suitable to her position in life (*r*).

Separation by mutual consent without agreement as to maintenance.

863. Where a wife who lives apart with the consent of her husband has not agreed to maintain herself or to accept a specified allowance for her maintenance, the question whether she has authority to pledge his credit depends on whether she is adequately provided for, regard being had to the means and position of her husband (*s*). If she has sufficient separate means (*t*), or is capable of supporting herself (*a*), or is adequately maintained by some third person (*b*), or if her husband makes her an adequate allowance for her maintenance (*c*), she has no implied authority to pledge her husband's credit, and he is not bound by her contracts, whether the person dealing with her knows of the allowance, or of the fact of her otherwise being sufficiently provided for, or not (*d*).

Whether an allowance or provision from separate means or otherwise is adequate or not is a question of fact to be determined in each particular case by reference to the actual means and position of the husband (*e*).

If the allowance or provision is found to be inadequate, the wife is an agent of necessity, with an absolute authority by implication of law to pledge her husband's credit for necessaries suitable to her position (*f*), and the mere fact that she has acquiesced in the amount of an allowance paid to her does not affect the liability of the husband on her contracts for such necessaries (*g*).

(*p*) *Ewers* v. *Hutton* (1800), 3 Esp. 255 (an allowance paid under a void deed held no answer to an action for the price of necessaries, the wife having asked to return).

(*q*) *Hindley* v. *Westmeath* (*Marquis*) (1827), 6 B. & C. 200 (husband held not liable for the price of necessaries, the wife living apart contrary to his wishes, and he having offered to provide for her if she would return).

(*r*) *Beale* v. *Arabin* (1877), 36 L. T. 249; *Nurse* v. *Craig* (1806), 2 Bos. & P. (N. R.) 148, 155.

(*s*) *Bird* v. *Jones* (1828), 3 Man. & Ry. (K. B.) 121.

(*t*) *Liddlow* v. *Wilmot* (1817), 2 Stark. 86.

(*a*) *War* v. *Huntly* (1703), 1 Salk. 118 (wife of ordinary working man, able to maintain herself by separate earnings); *Bird* v. *Jones*, *supra* (separated for some years, the wife supporting herself; then sought to charge her husband).

(*b*) *Clifford* v. *Laton* (1827), 3 C. & P. 15; *Dixon* v. *Hurrell* (1838), 8 C. & P. 717.

(*c*) *Mizen* v. *Pick* (1838), 3 M. & W. 481; *Hodgkinson* v. *Fletcher* (1814), 4 Camp. 70; *Emmett* v. *Norton* (1838), 8 C. & P. 506; *Holder* v. *Cope* (1846), 2 Car. & Kir. 437.

(*d*) *Mizen* v. *Pick*, *supra*; *Reeve* v. *Conyngham* (*Marquis*) (1847), 2 Car. & Kir. 444; *Bird* v. *Jones*, *supra*.

(*e*) *Hodgkinson* v. *Fletcher*, *supra*.

(*f*) *Johnston* v. *Sumner* (1858), 3 H. & N. 261; *Harvey* v. *Norton* (1840), 4 Jur. 42; *Keegan* v. *Smith* (1826), 8 Dow. & Ry. (K. B.) 118.

(*g*) *Hodgkinson* v. *Fletcher*, *supra*.

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864. A wife who elopes from her husband, or lives apart from him without his consent, has no implied authority to pledge his credit (*h*), unless she was justified in leaving him in consequence of his cruelty or other misconduct (*i*).

When living apart without husband's consent.

Desertion etc. by husband.

865. Where a husband deserts his wife or turns her out of his house (*j*), without adequate cause (*k*), and without the means of supplying herself with necessaries suitable to her position in life, she has an irrevocable authority, as an agent of necessity, to pledge his credit for the purpose of providing herself with such necessaries (*l*).

Money borrowed by a wife so deserted or turned away is recoverable from the husband, if it is shown to have been actually expended by her in providing suitable necessaries (*m*).

A wife's authority of necessity when turned away by her husband is not affected by the circumstance that he makes her an allowance, unless the allowance is found to be adequate, regard being had to his means and position (*n*).

Conduct justifying wife in leaving husband.

866. If a husband is guilty of personal violence, or by his cruelty or ill-treatment gives his wife reasonable ground for apprehending personal violence, and so renders it unsafe for her to continue to live with him, and she leaves him in consequence, that is equivalent, for the purpose of investing her with authority to pledge his credit for necessaries, to turning her out of doors (*o*), and so is such misconduct as bringing a loose woman into the house and cohabiting with her there, or threatening to have the wife confined in a lunatic asylum (*p*). If a husband merely asks his wife to come back, this does not affect her authority, if the consequence of her return may be to subject her to a repetition of the cruelty or misconduct for which she left him (*q*).

(*h*) *Swan and Edgar, Ltd.* v. *Mathieson* (1910), 103 L. T. 832; *Manby* v. *Scott* (1660), 1 Lev. 4; 2 Smith, L.C., 11th ed., 446.

(*i*) *Hindley* v. *Westmeath* (*Marquis*) (1827), 6 B. & C. 200; *Johnston* v. *Sumner* (1858), 3 H. & N. 261; *Bailey* v. *Calcott* (1840), 4 Jur. 699. As to misconduct of the husband, see *infra*.

(*j*) Selling up all the furniture and leaving the wife to obtain lodgings for herself is equivalent to turning her out of doors (*Forristall* v. *Lawson*, *Connelly* v. *Lawson* (1876), 34 L. T. 903).

(*k*) *E.g.*, adultery; see p. 427, *post*.

(*l*) *Wilson* v. *Ford* (1868), L. R. 3 Exch. 63; *Johnston* v. *Sumner*, *supra*; *Harrison* v. *Grady* (1865), 13 L. T. 369; *Wilson* v. *Glossop* (1888), 20 Q. B. D. 354, C. A.; *Forristall* v. *Lawson*, *Connelly* v. *Lawson*, *supra*; *Thompson* v. *Hervey* (1768), 4 Burr. 2177. The authority ceases in the event of the wife's obtaining a judicial separation, or a protection or separation order, except where alimony is ordered, and the husband fails to pay it (*Willson* v. *Smyth* (1831), 1 B. & Ad. 801; and see p. 423, *ante*).

(*m*) *Harris* v. *Lee* (1718) 1 P. Wms. 482; *Deare* v. *Soutten* (1869), L. R. 9 Eq. 151; *Jenner* v. *Morris* (1861), 3 De G. F. & J. 45. *May* v. *Skey* (1849), 16 Sim. 588, *contra*, is not law.

(*n*) *Baker* v. *Sampson* (1863), 14 C. B. (N. S.) 383.

(*o*) *Brown* v. *Ackroyd* (1856), 5 E. & B. 819; *Emery* v. *Emery* (1827), 1 Y. & J. 501; *Baker* v. *Sampson*, *supra*; *Hodges* v. *Hodges* (1796), 1 Esp. 441; *Bolton* v. *Prentice* (1744), 2 Stra. 1214.

(*p*) *Houliston* v. *Smyth* (1825), 3 Bing. 127; *Tempany* v. *Hakewill* (1858), 1 F. & F. 438. *Horwood* v. *Heffer* (1811), 3 Taunt. 421, *contra*, must be considered overruled.

(*q*) *Emery* v. *Emery*, *supra*; *Bolton* v. *Prentice*, *supra*.

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Wife of lunatic.

867. The wife of a lunatic is an agent of necessity, with implied authority to pledge her husband's credit for necessaries (*r*), unless she is adequately provided for according to her station in life (*s*), and this authority extends to borrowing money for expenditure on suitable necessaries (*t*).

What are necessaries.

868. The term "necessaries" (*a*), in respect of which a wife is entitled to pledge her husband's credit as an agent of necessity when living apart from him, includes all such things as she reasonably requires, regard being had to her station and the actual means and position of the husband (*b*).

If the separation is in consequence of the husband's misconduct, and the wife has the custody of the children of the marriage, her implied authority to pledge his credit for necessaries extends to necessaries for the children, including their education, though they may be living with her without his consent and against his wishes (*c*). Necessaries for the children are also deemed to be necessaries for her where, on a separation by mutual consent, it is agreed that she shall have the custody (*d*).

Effect of notice not to trust wife.

869. A husband is liable on a contract made by his wife in pursuance of her authority as an agent of necessity, though he may have given express notice to the other contracting party not to give credit to her (*e*).

Authority revoked: (i.) By adultery;

870. A wife has no implied authority to pledge her husband's credit, even for absolute necessaries (*f*), after having committed an act of adultery (*g*), even if she was turned out of doors by the husband without cause and without any means of support after he had himself been guilty of cruelty or adultery (*h*), unless he either

(*r*) *Read* v. *Legard* (1851), 6 Exch. 636; *Davidson* v. *Wood* (1863), 32 L. J. (CH.) 400; *Drew* v. *Nunn* (1879), 4 Q. B. D. 661, C. A.

(*s*) *Richardson* v. *Du Bois* (1869), L. R. 5 Q. B. 51.

(*t*) *Davidson* v. *Wood*, *supra* (claim of lender admitted against estate of deceased lunatic).

(*a*) As to costs, see p. 428, *post*.

(*b*) *Hunt* v. *De Blaquiere* (1829), 5 Bing. 550 (furniture held a necessary in the case of a daughter of a marquis to whom the court decreed alimony at the rate of £380 a year; not fit that she should live in furnished lodgings); *Richardson* v. *Du Bois*, *supra* (repairs to house in which wife resided; husband a lunatic); *Davidson* v. *Wood*, *supra* (expenses of moving from the country to London in order to be near her husband, who was a lunatic); *Baker* v. *Sampson* (1863), 14 C. B. (N. S.) 383; *Bazeley* v. *Forder* (1868), L. R. 3 Q. B. 559; *Johnston* v. *Sumner* (1858), 3 H. & N. 261; *Thompson* v. *Hervey* (1768), 4 Burr. 2177; *Hodgkinson* v. *Fletcher* (1814), 4 Camp. 70; *Aldis* v. *Chapman* (1810), 1 Selwyn's Nisi Prius, 13th ed., 232; *Collier* v. *Brown* (1862), 3 F. & F. 67.

(*c*) *Bazeley* v. *Forder*, *supra*; *Collins* v. *Cory* (1901), 17 T. L. R. 242.

(*d*) *Rawlyns* v. *Vandyke* (1800), 3 Esp. 250.

(*e*) *Harris* v. *Morris* (1801), 4 Esp. 41; *Wilson* v. *Glossop* (1888), 20 Q. B. D. 354, C. A.; *Bolton* v. *Prentice* (1744), 2 Stra. 1214.

(*f*) *Hardie* v. *Grant* (1838), 8 C. & P. 512; *Cooper* v. *Lloyd* (1859), 6 C. B. (N. S.) 519.

(*g*) *Manby* v. *Scott* (1660), 1 Lev. 4; 2 Smith, L.C., 11th ed., 446; *Cragg* v. *Bowman* (1704), 6 Mod. Rep. 147; see also *Swan and Edgar, Ltd.* v. *Mathieson* (1910), 27 T. L. R. 153 (goods ordered after desertion).

(*h*) *Govier* v. *Hancock* (1796), 6 Term Rep. 603 (where the husband brought

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connived at or has condoned the offence (*i*). It is immaterial whether the person supplying her with necessaries has any knowledge of the fact of her having committed adultery or not (*k*).

A condonation by a husband of the adultery of his wife restores her to the same position as regards her authority to bind him by her contracts as if the offence had not been committed (*l*).

(ii.) By death.

871. The authority of a wife to pledge her husband's credit is revoked by his death, and a contract made by her in the purported exercise of her authority after his death does not bind his estate (*m*), though his executors or administrators may ratify the contract if they choose to do so (*n*).

SUB-SECT. 4.—*Implied Authority to pledge Husband's Credit for Costs.*

Costs incurred in consequence of husband's misconduct.

872. A wife who is deserted by her husband, or is turned away by him without adequate cause, or is compelled to leave him in consequence of his misconduct (*o*), has, by implication of law, authority to pledge his credit for the costs of taking legal advice, and for costs as between solicitor and client of and in connection with such legal proceedings as may be necessary for her security and protection, or as may reasonably be incurred in taking proceedings against him (*p*). She may, for instance, pledge his credit for the costs of exhibiting articles of the peace against him, where such proceedings are necessary by reason of his violence (*q*), or for the costs of and in connection with a suit for the restitution of conjugal rights (*r*). But she has no implied authority to pledge his credit for the costs of prosecuting him by indictment for assault, because such prosecution is not necessary for her security or protection (*s*),

a woman to reside in the house in which he lived with his wife, and committed adultery with her, and, after having ill-treated the wife, turned her out of the house, it was held that she had no authority to pledge his credit after she had herself been guilty of adultery).

(*i*) As to the effect of connivance, see p. 423, *ante*.

(*k*) *Emmett* v. *Norton* (1838), 8 C. & P. 506; *Atkyns* v. *Pearce* (1857), 2 C. B. (N. S.) 763.

(*l*) *Harris* v. *Morris* (1801), 4 Esp. 41 (husband condoned the adultery, and subsequently turned his wife away); *Robison* v. *Gosnold* (1704), 6 Mod. Rep. 171; *Norton* v. *Fazan* (1798), 1 Bos. & P. 226.

(*m*) *Blades* v. *Free* (1829), 9 B. & C. 167. But see note (*s*), p. 431, *post*, as to this case, where the husband had held his wife out as having authority.

(*n*) *Foster* v. *Bates* (1843), 12 M. & W. 226.

(*o*) As to the kind of misconduct which justifies a wife in leaving her husband, see p. 426, *ante*.

(*p*) *Williams* v. *Fowler* (1825), M'Cle. & Yo. 269. In *Wilson* v. *Ford* (1868), L. R. 3 Exch. 63, the husband had deserted his wife, and it was held that she had authority to pledge his credit for the costs of a suit for the restitution of conjugal rights, and of taking counsel's opinion as to whether a verbal ante-nuptial agreement by her husband could be enforced in equity, and also the costs of taking advice as to what she should do in reference to tradesmen who had supplied her with necessaries and were pressing for payment, and with regard to the landlord of the house in which she had lived with her husband, who threatened to distrain for rent on furniture which had belonged to her before marriage.

(*q*) *Shepherd* v. *Mackoul* (1813), 3 Camp. 326; *Turner* v. *Rooks* (1839), 2 Per. & Dav. 294; *Williams* v. *Fowler*, *supra*.

(*r*) *Wilson* v. *Ford*, *supra*.

(*s*) *Grindell* v. *Godmond* (1836), 5 Ad. & El. 755. And see *Mecredy* v. *Taylor*

nor does her implied authority extend to the costs of or incidental to an application to a court of summary jurisdiction for a separation or maintenance order, because the court to which any such application is made has been given exclusive jurisdiction over such costs (*t*).

Costs of proceedings for divorce or judicial separation.

873. A wife also has authority, by implication of law, to pledge the credit of her husband for costs reasonably incurred by her in respect of the prosecution or defence of proceedings for a dissolution of the marriage instituted by her or by her husband (*a*), or in respect of proceedings for a judicial separation (*b*), the solicitor acting for her being entitled, in the event of success, to sue the husband for all the extra costs reasonably incurred beyond those allowed on taxation between party and party (*c*).

It is not necessary, in order to charge the husband, that the wife should be successful in the proceedings (*b*), but the costs must be incurred reasonably, and, in the case of proceedings instituted by the wife, it is the duty of the solicitor acting for her to make proper investigation and inquiry for the purpose of ascertaining that there are reasonable grounds for them, and he is not entitled to charge the husband in the absence of success unless he can show that there were reasonable grounds (*d*).

Authority not affected by separate means or allowance.

874. The implied authority of a wife to pledge her husband's credit for costs incurred in consequence of his misconduct is not affected by the circumstance that she has adequate separate means, or is in receipt of an adequate or agreed allowance (*e*).

Effect of protection or separation order.

But if she obtains a protection order, or is living apart under a decree of judicial separation or a separation order, her implied authority to pledge his credit ceases (*f*), though he continues liable

(1873), 7 I. R. C. L. 256, Ex. Ch., where it was held that a wife living apart from her husband on account of his cruelty had no authority to pledge his credit for the costs of resisting a *habeas corpus* for the recovery of a child of the marriage.

(*t*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (d); *Cale* v. *James*, [1897] 1 Q. B. 418.

(*a*) *Ottaway* v. *Hamilton* (1878), 3 C. P. D. 393, C. A.; *Stocken* v. *Pattrick* (1873), 29 L. T. 507; *Re Wingfield and Blew* (*Solicitors*), [1904] 2 Ch. 665, C. A.

(*b*) *Rice* v. *Shepherd* (1862), 12 C. B. (N. S.) 332; *Brown* v. *Ackroyd* (1856), 5 E. & B. 819. Where a wife makes charges as petitioner the case must be more carefully gone into than where she merely makes allegations by way of defence (*Huntly-Gordon* v. *Huntly-Gordon* (1908), 24 T. L. R. 806).

(*c*) See the cases cited in notes (*a*), (*b*), *supra*; as to costs in such proceedings generally, see pp. 547 *et seq.*, *post*; and as to what is a sufficient bill within the meaning of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), see *Cobbett* v. *Wood*, [1908] 2 K. B. 420, C. A.). As to the remuneration of solicitors generally, see title SOLICITORS.

(*d*) *Taylor* v. *Hailstone* (1882), 52 L. J. (Q. B.) 101; *Re Hooper*, *Baylis* v. *Watkins* (1864), 2 De G. J. & Sm. 91, C. A.; *Walker* v. *Walker and Lawson* (1897), 76 L. T. 234; *Beer* v. *Beer* (1906), 22 T. L. R. 367. As to the wife's liability in the event of the husband becoming bankrupt, see *Pead* v. *Price* (1903), 19 T. L. R. 563.

(*e*) *Ottaway* v. *Hamilton*, *supra*; *Shepherd* v. *Mackoul* (1813), 3 Camp. 326; *Turner* v. *Rooks* (1839), 2 Per. & Dav. 294.

(*f*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 21, 26; Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (a); *Re Wingfield and Blew* (*Solicitors*), *supra*. But such a decree or order does not affect the power of the Probate, Divorce and Admiralty Division to order the husband

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for costs incurred under a retainer given by her before the date of the order or decree, whether the costs are incurred before or after that date (*g*).

Separation deed not a "necessary."

875. A deed of separation is not a "necessary," for the costs of preparing a counterpart of which a wife has implied authority to pledge her husband's credit (*h*).

SUB-SECT. 5.—*Holding out.*

Agency by estoppel.

876. Where a husband by his conduct holds out his wife as having authority to pledge his credit, he will not be permitted to deny that she has such authority with respect to any person contracting with her on the faith of the holding out (*i*).

If a husband pays for goods ordered by his wife on his credit, he is deemed to hold her out to the persons supplying the goods as having authority to give subsequent orders for things of a similar kind (*k*). The principle is not confined to necessaries, but a husband does not, by paying for necessaries bought on his credit, hold his wife out as having authority to order things which are not suitable to his style of living (*l*); and dealing with a tradesman for ready money is not a holding out that the wife has any authority to deal on credit (*m*).

Wife managing household.

877. Where a wife manages her husband's household, she is deemed to be held out by him as having the usual authority of a housekeeper (*n*), and therefore as having authority to order on his

to give security for the costs of the wife's defence in divorce proceedings (*Sheppard* v. *Sheppard*, [1905] P. 185); see p. 523, *post*.

(*g*) *Re Wingfield and Blew (Solicitors)*, [1904] 2 Ch. 665, C. A.

(*h*) *Ladd* v. *Lynn* (1837), 2 M. & W. 265; and as to necessaries, see pp. 421, 427, *ante*.

(*i*) *Filmer* v. *Lynn* (1835), 4 Nev. & M. (K. B.) 559 (a wife ordered goods to be delivered at her mother's house, and, an account for the price being sent to the husband, he paid it, and at the same time gave an order to the tradesman on his own account; the wife subsequently ordered goods to be delivered at the house of her mother. Held, that there was evidence for the jury of a holding out by the husband such as to preclude him from denying that the goods were ordered on his credit and with his authority); *Jetley* v. *Hill* (1884), Cab. & El. 239 (orders were given by a wife for furniture, and for work to be done at the house where she and her husband resided; the husband called several times while the orders were being carried out, sometimes alone, sometimes with his wife, assisted her in selecting the things, and gave instructions as to sending them home, on one occasion directing an alteration. Held, that the wife had been held out as having authority to give the orders on the husband's credit, and that he was liable, although he had forbidden her to pledge his credit, and it had been agreed between them that she should pay, the tradesman having no knowledge of the prohibition or agreement). For further illustrations of the principle, which is based on the doctrine of estoppel, see titles AGENCY, Vol. I., p. 158; ESTOPPEL, Vol. XIII., pp. 388 *et seq.*

(*k*) *Wallis* v. *Biddick* (1873), 22 W. R. 76; *Hinton* v. *Hudson* (1678), Freem. (K. B.) 248; *Filmer* v. *Lynn*, *supra*; but see *Durrant* v. *Holdsworth* (1886), 2 T. L. R. 763.

(*l*) *Atkins* v. *Curwood* (1837), 7 C. & P. 756.

(*m*) *Wallis* v. *Biddick*, *supra*.

(*n*) So, if a wife manages her husband's business, she is deemed to be held out as having the ordinary authority of such a manager (*Meredith* v. *Footner* (1843), 11 M. & W. 202; *Anderson* v. *Sanderson* (1817), 2 Stark. 204; *Smallpiece*

credit such provisions as are generally bought on credit, and he will be liable on any such orders, with regard to tradesmen who had no notice of the allowance, though he may have made her a sufficient allowance for housekeeping expenses (*o*).

Revocation of authority.

878. If a wife is held out as having authority to contract on her husband's behalf, the person to whom she is so held out is entitled to assume that her authority continues until he has notice to the contrary (*p*). A husband is therefore liable for the price of goods supplied to his wife after a separation, if he held her out to the tradesman supplying the goods as having authority to pledge his credit while they were living together, and the tradesman has had no notice of the separation (*q*).

A general notice by advertisement in the *London Gazette* or other newspapers of the revocation of a wife's authority to pledge her husband's credit does not affect his liability to persons to whom he has held her out as having authority, unless he can show that the advertisement came to their actual knowledge (*r*).

Notice of revocation is not, however, necessary where the wife's authority is revoked by her husband's death (*s*) or bankruptcy (*t*).

Condonation of adultery.

879. If a husband, with the knowledge of his wife's adultery, permits her to continue to reside in his house with the children, or otherwise holds her out as still having the ordinary authority of a wife, he will be liable for necessaries supplied to her by persons ignorant of the adultery, to the same extent as if the offence had not been committed (*a*).

SUB-SECT. 6.—*Ratification.*

Ratification by husband of wife's contract.

880. Where a contract is made by a wife on behalf of her husband but without his authority, he may, by ratifying the

v. *Dawes* (1835), 7 C. & P. 40); and see *Petty* v. *Anderson* (1825), 3 Bing. 170, where a wife had carried on her husband's business while he was in prison, and he was held liable for goods supplied with his knowledge after his return, although the invoices were made out in her name.

(*o*) *Ruddock* v. *Marsh* (1857), 1 H. & N. 601; *Debenham* v. *Mellon* (1880), 6 App. Cas. 24; *contra, Slater* v. *Parker* (1908), 24 T. L. R. 621. This is limited to such things as are usually bought on credit; see *Morel Brothers & Co., Ltd.* v. *Westmorland* (*Earl*), [1904] A. C. 11. As to notice of the allowance, see *Holt* v. *Brien* (1821), 4 B. & Ald. 252.

(*p*) *Drew* v. *Nunn* (1879), 4 Q. B. D. 661, C. A.

(*q*) *Wallis* v. *Biddick* (1873), 22 W. R. 76; *Hinton* v. *Hudson* (1678), Freem. (K. B.) 248; *Filmer* v. *Lynn* (1835), 4 Nev. & M. (K. B.) 559. The principle applies where a man and woman live together as husband and wife, though they are not married (*Ryan* v. *Sams* (1848), 12 Q. B. 460); but merely cohabiting with a mistress, and allowing her to pass as a wife, is not sufficient to render the person living with her liable on her contracts after a separation, if he did not, by paying for goods ordered on his credit while they were living together, or otherwise, hold her out as having authority to pledge his credit (*Munro* v. *De Chemant* (1815), 4 Camp. 215).

(*r*) *Hunt* v. *De Blaquiere* (1829), 5 Bing. 550, 560; and compare *Swan and Edgar, Ltd.* v. *Mathieson* (1910), 27 T. L. R. 153.

(*s*) *Blades* v. *Free* (1829), 9 B. & C. 167; *contra, Drew* v. *Nunn, supra, per* BRETT, L.J., at pp. 665 *et seq.*

(*t*) See title AGENCY, Vol. I., pp. 234 *et seq.*

(*a*) *Norton* v. *Fazan* (1798), 1 Bos. & P. 226.

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contract, render it as binding, both with respect to himself and the other contracting party (*b*), as if it had been entered into with his previous express authority (*c*).

This rule applies to a contract of any kind (*d*), provided it is in fact made on the husband's behalf and credit is given to him; but a husband cannot ratify a contract entered into by the wife in respect of her separate property (*e*), or professedly on behalf of some third person (*f*).

What constitutes ratification.

881. An express promise to pay a debt incurred by the wife without authority is a sufficient ratification to render the husband liable (*g*); and the fact that he sees his wife wearing things which are not suitable to his style of living, but were ordered on his credit, and does not express disapproval, is some evidence of a ratification (*h*). It is only necessary that the husband's conduct should be such as to show an intention to recognise the transaction as binding on him (*i*); but a ratification may be conditional, and will then only bind the husband if the condition is fulfilled (*k*).

Ratification discharges wife from liability.

882. A ratification by a husband of a contract made on his behalf discharges the wife from liability for breach of warranty of authority (*l*).

SECT. 3.—*With Husband.*

Contracts between husband and wife.

883. A wife may contract with her husband as with a third person, and they may sue one another on any contract made during the marriage (*m*) in the same manner and with the same effect as

(*b*) *Millard* v. *Harvey* (1864), 34 Beav. 237 (a wife bought a field without her husband's knowledge. Held, that a ratification by the husband rendered the contract binding on the seller).

(*c*) *Montague* v. *Benedict* (1825), 3 B. & C. 631; *Lane* v. *Ironmonger* (1844), 13 M. & W. 368; *Waithman* v. *Wakefield* (1807), 1 Camp. 120. See, generally, title AGENCY, Vol. I., pp. 173 *et seq.*

(*d*) *Stevenson* v. *Hardie* (1773), 2 Wm. Bl. 872 (loan to the wife); *Lindus* v. *Bradwell* (1848), 5 C. B. 583; and see the cases cited in notes (*b*) and (*c*), *supra*.

(*e*) *Saunderson* v. *Griffiths* (1826), 5 B. & C. 909; *Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. 240; *Bentley* v. *Griffin* (1814), 5 Taunt. 356.

(*f*) *Heath* v. *Chilton* (1844), 12 M. & W. 632; *Wilson* v. *Barker* (1833), 4 B. & Ad. 614.

(*g*) *Harrison* v. *Hall* (1832), 1 Mood. & R. 185; *Lindus* v. *Bradwell*, *supra*; *Hornbuckle* v. *Hornbury* (1817), 2 Stark. 177.

(*h*) *Montague* v. *Benedict*, *supra*; compare *Atkins* v. *Curwood* (1837), 7 C. & P. 756.

(*i*) *Jenner* v. *Hill* (1858), 1 F. & F. 269; *West* v. *Wheeler* (1849), 2 Car. & Kir. 714. In *Waithman* v. *Wakefield*, *supra*, the husband was living apart from his wife, but visited her occasionally, and during one of these visits the servant of a tradesman, who had supplied wearing apparel to the wife, called and demanded that the goods should either be paid for or returned; the husband suggested that they should be returned, but on the wife objecting he did not insist. Held, that the husband, having had control of the goods and not having returned them, must be deemed to have ratified the contract to purchase them.

(*k*) *Holt* v. *Brien* (1821), 4 B. & Ald. 252, where the husband promised to pay, provided he was not arrested for the debt.

(*l*) *Spittle* v. *Lavender* (1821), 5 Moore (C. P.), 270; *Risbourg* v. *Bruckner* (1858), 3 C. B. (N. S.) 812.

(*m*) At common law, if a contract was made between persons who afterwards

if the contract had been entered into by the wife as a principal with a third person (*n*).

Thus, a wife may sue her husband for the repayment of money lent (*o*); and a loan to a husband of money belonging to the wife, though not her separate property nor held for her separate use, is valuable consideration for a settlement on the wife of the money so lent (*p*). So, a husband may sue his wife for money lent or money paid by him at her request after marriage (*q*), and may become a

became husband and wife, it was in some cases discharged by the marriage, and in all cases the remedy thereon was suspended during the marriage. If the contract created a debt *in præsenti* or one falling due during the coverture, it was discharged (Co. Litt. 264 b); but if the contract was of such a nature that a right of action could not accrue during the coverture, as in the case of a bond with a condition that it should be void if the husband did not leave the wife a certain amount by will, it could be enforced after his death (*Cage* v. *Acton* (1700), 1 Ld. Raym. 515; and see *Milbourn* v. *Ewart* (1793), 5 Term Rep. 381; *Cotton* v. *Cotton and Ashton* (1692), Prec. Ch. 41). In *Fitzgerald* v. *Fitzgerald* (1868), L. R. 2 P. C. 83, where the husband had before marriage covenanted to pay the wife an annuity for life for her separate use, it was held that the annuity was only suspended during the marriage, and that after the death of the husband the widow could enforce payment against his estate. The rules of the common law were founded on the doctrine of the unity of the person, and the inability of husband and wife to sue one another, and although the Married Women's Property Acts contain no express provision on the subject, it is doubtful whether these rules have any application now that this disability has been removed. There seems on principle to be no reason why a husband or wife should not sue the other on a contract made before marriage, unless, regard being had to the nature or terms of the contract, and the other circumstances of the particular case, a contrary intention appears.

(*n*) *Boston* v. *Boston*, [1904] 1 K. B. 124, C. A. (a wife verbally agreed with her husband that if he would buy a certain house in which she desired to live, she would pay for it and make him a present of it; the husband bought the house, and, the wife refusing to pay the purchase-money, paid for it, and they resided there together for some years. Held, that the contract was not a contract relating to land within the Statute of Frauds (29 Car. 2, c. 3), and that he was entitled to sue her for the purchase-money). Where a husband and wife kept a joint banking account, to which both paid in moneys, and on which they both drew, and the deeds of a house belonging to the wife were deposited as security for the overdraft, which at the death of the wife amounted to some £400, it was held that the true inference was that they had agreed to provide jointly for household expenses, and that the wife's estate and the husband ought each to bear half the liability in respect of the overdraft (*Re Shaw, Shaw* v. *Jones* (1906), 94 L. T. 93; and see *Hunt* v. *Hunt* (1908), 25 T. L. R. 132). As to the nature and extent of a married woman's liability on her contracts, see p. 411, *ante;* and as to contracts entered into under the undue influence of the husband, see *Willis* v. *Barron*, [1902] A. C. 271; *Sanguinetti* v. *Messiter* (1885), 1 T. L. R. 459; and p. 396, *ante*. As to contracts for separation, see pp. 439 *et seq.*, *post*.

(*o*) Independently of the Married Women's Property Acts (*Woodward* v. *Woodward* (1863), 3 De G. J. & Sm. 672; *Horrell* v. *Horrell* (1882), 46 J. P. 295). Where power was given to trustees to apply a certain proportion of a fund, settled to the separate use of a wife for life, with remainder to her children, for her advantage or benefit, it was held, in special circumstances, that the power authorised an advance to the husband on his personal security, for the purpose of setting him up in trade (*Re Kershaw's Trusts* (1868), L. R. 6 Eq. 322).

(*p*) *Re Home, Ex parte Home* (1885), 54 L. T. 301. The waiver of her equity to a settlement is sufficient valuable consideration.

(*q*) *Butler* v. *Butler* (1885), 16 Q. B. D. 374, C. A. The husband could sue his wife in equity, independently of the Married Women's Property Acts, on a contract with him by which she intended to bind property held to her separate use (*ibid.*).

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purchaser for value of her separate property or property belonging to her for her separate use (*r*).

But the contract of a wife, even with her husband, is not effectual to bind non-separate property which can only be lawfully disposed of by deed acknowledged, unless the contract is by deed duly acknowledged (*s*).

Limitation of time.

884. The period of limitation runs both in favour of and against a wife in respect of any contract made with her husband (*a*), except that it does not run against her so long as interest is deemed to be paid by the husband, and the debt thereby to be kept alive, by reason of a gift or presumed gift to him of her income as it becomes due (*b*).

Loan for purpose of business.

885. Any money or other estate (*c*) of a wife lent or entrusted to her husband for the purpose of a trade or business carried on by him (*d*) forms part of his assets in case of his bankruptcy, under reservation of her claim to a dividend as a creditor after, but not before, all claims of the other creditors for valuable consideration in money or money's worth have been satisfied (*e*).

This provision also applies where the husband dies insolvent and his widow seeks to prove against his estate in respect of a loan for the purpose of his trade or business (*f*), but it does not affect the right of the widow, if she is the administratrix of her husband, to retain a debt due to her in respect of such a loan in priority to the other creditors (*g*).

(*r*) *Hewison* v. *Negus* (1853), 16 Beav. 594.

(*s*) *Williams* v. *Walker* (1882), 9 Q. B. D. 576. As to deeds acknowledged, see p. 381, *ante*.

(*a*) *Re Hastings* (*Lady*), *Hallett* v. *Hastings* (1887), 35 Ch. D. 94, C. A. (loan by husband to wife on a verbal promise by her to repay the amount out of her separate estate; debt held barred after six years); and see *Lowe* v. *Fox* (1885), 15 Q. B. D. 667, C. A.; and title LIMITATION OF ACTIONS.

(*b*) *Re Dixon*, *Heynes* v. *Dixon*, [1900] 2 Ch. 561, C. A. (loan by wife to husband at interest; the Statute of Limitations does not run so long as they live together in amity, because a gift of the interest is presumed); and see p. 397, *ante*.

(*c*) *Re Donaldson*, [1902] 2 I. R. 310 (loan of furniture for purpose of husband's business held within the provision).

(*d*) The burden does not lie on the wife of proving that the loan was not for the purpose of her husband's trade or business (*Re Cronmire*, *Ex parte Cronmire*, [1901] 1 K. B. 480, C. A.; *contra*, *Re Genese*, *Ex parte District Bank of London* (1885), 16 Q. B. D. 700, which must be considered overruled).

(*e*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3. The section is not retrospective (*Re Home*, *Ex parte Home* (1885), 54 L. T. 301), and it has no application to the equity of exoneration (see p. 405, *ante*) of a wife (*Re Cronmire*, *Ex parte Cronmire*, *supra*; *Alexander* v. *Barnhill* (1888), 21 L. R. Ir. 511). The statute does not contain any similar provision with regard to a loan by a husband to his wife for the purpose of a separate trade or business carried on by her, and it is doubtful whether, in such a case, he would be postponed to her other creditors. See, also, on the subject generally, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 159, 222.

(*f*) *Re Leng*, *Tarn* v. *Emmerson*, [1895] 1 Ch. 652, C. A. It must be considered a bankruptcy rule imported into administration of deceased insolvents' estates by the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10. The contrary has been held in Ireland (*Moore* v. *Smith*, [1895] 1 I. R. 512, C. A.).

(*g*) *Re May*, *Crawford* v. *May* (1890), 45 Ch. D. 499; *Re Ambler*, *Woodhead* v. *Ambler*, [1905] 1 Ch. 697; *Re Simpson*, [1895] 1 I. R. 530. As to the right

SECT. 3. With Husband.

Other loans by wife.

886. Where a loan by a wife is for purposes unconnected with the trade or business of her husband, she may prove in his bankruptcy in competition with his other creditors, and is entitled to receive a dividend *pari passu* with them (*h*); and where the loan is to a partnership firm of which the husband is a member, the wife may prove against the joint estate of the partners, and is entitled to receive a dividend *pari passu* with the other creditors of the firm (*i*).

Proof in husband's bankruptcy.

887. A wife may prove as a creditor in the bankruptcy of her husband, and is entitled to be paid *pari passu* with the other creditors, in respect of any contract with him which is outside the scope of the provision above referred to (*k*).

Part VIII.—Wrongs of Wife during Coverture.

SECT. 1.—*Crimes and Offences.*

Liability of husband.

888. A husband is not criminally liable for the act of his wife except where the crime is committed by her at his instigation or command (*l*), or where she is in the position of his agent, and the offence is committed in the course of the agency (*m*). In the case of certain statutory offences, where *mens rea* is not essential, the husband may be criminally liable for the act of his wife as his agent, though the offence is committed without his authority or connivance (*m*).

of retainer, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 256 *et seq.*

(*h*) *Re Clark, Ex parte Schulze*, [1898] 2 Q. B. 330, C. A.; *Re Tidswell, Ex parte Tidswell* (1887), 56 L. J. (Q. B.) 548; *Mackintosh* v. *Poyose*, [1895] 1 Ch. 505.

(*i*) *Re Tuff, Ex parte Nottingham* (1887), 19 Q. B. D. 88. If a wife is a partner with her husband, she will be postponed to other creditors (*Re Childs* (1874), 9 Ch. App. 508).

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40 (4). This is so even in the case of a voluntary bond or covenant (*Re Stewart, Ex parte Pottinger* (1878), 8 Ch. D. 621, C. A.).

(*l*) On this subject generally, and as to where husband and wife are competent or compellable to give evidence against one another in criminal proceedings, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 401, 402, 405 *et seq.* As to offences against the laws relating to the customs and excise, see the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 240; and the Excise Management Act, 1841 (4 & 5 Vict. c. 20), s. 7. The rule that husband and wife cannot conspire together is based on the doctrine of the unity of the person.

(*m*) If, for instance, the wife of a dairyman, while in charge of the shop, watered the milk and sold it, her husband would be liable to be convicted under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, for selling adulterated milk, whether the adulteration was connived at or authorised by him or not (*Brown* v. *Foot* (1892), 66 L. T. 649). And see *A.-G.* v. *Siddon* (1830), 1 Cr. & J. 220; and *A.-G.* v. *Riddle* (1832), 2 Cr. & J. 493, as to offences against the revenue laws; and *R.* v. *Stephens* (1866), L. R. 1 Q. B. 702; *Barnes* v. *Akroyd* (1872), L. R. 7 Q. B. 474, as to indictments for public nuisances. See generally, title AGENCY, Vol. I., pp. 217 *et seq.*

SECT. 1. Crimes and Offences.

A husband cannot conspire with his wife, but may be an accessory after the fact to a felony committed by her (*n*).

Liability of wife.

889. A wife cannot conspire with her husband, nor be an accessory after the fact to a felony committed by him, nor can she be convicted of treason for receiving or assisting him knowing him to be a traitor (*n*).

In certain classes of crimes it is a defence for the wife to show that she acted under the coercion of her husband, and his coercion will be presumed if the crime was committed in his presence (*o*).

Subject to these exceptions, and to an exemption from criminal liability for any act done in respect of her husband's property, except in certain circumstances (*p*), a married woman is subject to the ordinary criminal law (*q*).

SECT. 2 —*Torts.*

Wife may be sued alone.

890. A married woman may be sued alone for damage or injury caused to any third person (*r*) by any tort committed by her during coverture, and any damages or costs recovered against her in any such action are payable out of her separate property, and not otherwise (*s*).

Husband jointly liable with wife.

891. Except in one case (*t*), a husband is liable to be sued jointly with his wife for any tort (*u*) committed by her during the

(*n*) See note (*l*), p. 435, *ante*.

(*o*) The doctrine of coercion applies to larceny and most misdemeanours, but not to treason, murder, or robbery. See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 244

(*p*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 338, 634, 680, 772.

(*q*) See note (*l*), p. 435, *ante*.

(*r*) As to the right of husband and wife to sue one another for torts, see p. 460, *post*. As to torts generally, see title TORT.

(*s*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2). As to property subject to a restraint on anticipation, see p. 366, *ante*, and as to the form of judgment, see *Re Beauchamp, Ex parte Beauchamp*, [1904] 1 K. B. 572, C. A., and p. 456, *post*. Before the 1st January, 1883, it was necessary to join the husband as defendant, but the liability for a tort survived against the wife personally in the event of her husband's death, whether or not an action had been brought or judgment obtained in his lifetime (*Wright* v. *Leonard* (1861), 11 C. B. (N. S.) 258). The separate estate of a wife was not, generally speaking, liable for her torts (*Wainford* v. *Heyl* (1875), L. R. 20 Eq. 321), but the court would not discharge her, if taken in execution on the judgment, unless she satisfied it that she had no separate estate (*Ferguson* v. *Clayworth* (1844), 6 Q. B. 269), and in one case, where a joint judgment had been obtained in respect of an assault by the wife, and the husband had obtained the protection of the Insolvent Debtors Act, the court refused to order the wife's discharge, although she had no separate estate (*Larkin* v. *Marshall* (1850), 4 Exch. 804). As to the liability in equity of the separate estate of a wife where she was guilty of fraud in dealing with or contracting in respect of it, see *Vaughan* v. *Vanderstegen* (1854), 2 Drew. 363; *Re Lush's Trusts* (1869), 4 Ch. App. 591; *Hobday* v. *Peters* (No. 2) (1860), 28 Beav. 354.

(*t*) *Earle* v. *Kingscote*, [1900] 2 Ch. 585, C. A.; see note (*k*), p. 438, *post*.

(*u*) *Keyworth* v. *Hill* (1820), 3 B. & Ald. 685 (trespass); *Catterall* v. *Kenyon* (1842), 3 Q. B. 310 (conversion: refusal of wife to deliver on demand held sufficient evidence of a conversion for which both were liable); *Larkin* v. *Marshall*, *supra* (assault); *Ferguson* v. *Clayworth*, *supra* (slander); *Head* v. *Briscoe* (1833), 5 C. & P. 484 (libel); *Vine* v. *Saunders* (1837), 4 Bing.

coverture (*v*), and he has no right of indemnity against her or her separate property in respect of any damages or costs which may be recovered against him in any such action (*x*).

Where living apart.

892. The liability of the husband is not affected by the circumstance that the tort is committed by the wife while permanently separated from him (*a*), unless she is living apart under a decree of judicial separation (*b*), or a separation order (*c*), but during a separation under any such decree or order the wife alone is liable for any wrongful act or omission, and for any costs incurred by her (*d*).

Effect of wife's death, divorce, or judicial separation.

893. The husband's liability is, however, joint only. He cannot be sued alone, and is not liable at all after the death of the wife (*e*), or a dissolution of the marriage (*f*), or the granting of a decree of judicial separation (*g*), unless judgment has been obtained during the coverture, and before the granting of the decree in case of a judicial separation; even though an action against them jointly may

(N. C.) 96 (assault and false imprisonment; joint act of husband and wife); *Utley* v. *Mitre Publishing Co.* (1901), 17 T. L. R. 720 (libel); *Wright* v. *Leonard* (1861), 11 C. B. (N. S.) 258 (deceit unconnected with contract); *Earle* v. *Kingscote*, [1900] 2 Ch. 585, C. A. (fraudulent misrepresentation not the inducement to a contract); *Seroka* v. *Kattenburg* (1886), 17 Q. B. D. 177 (libel); *Beaumont* v. *Kaye*, [1904] 1 K. B. 292, C. A. (libel).

(*v*) The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), has not affected the common law liability of the husband to be sued jointly with his wife for a tort. So held in *Seroka* v. *Kattenburg*, *supra*, followed by the Court of Appeal in *Beaumont* v. *Kaye*, *supra*, and *Earle* v. *Kingscote*, *supra*. The point, however, cannot be considered as finally and conclusively settled until a decision of the House of Lords is obtained. The foundation of the husband's common law liability was the inability of the wife to be sued; he was merely joined for conformity (see *Capell* v. *Powell* (1864), 17 C. B. (N. S.) 743); and although the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), contains no express provision relieving the husband, it does enable the wife to be sued alone, and so destroys the foundation on which his liability rested; see *Cuenod* v. *Leslie*, [1909] 1 K. B. 880, C. A., *per* FLETCHER MOULTON, L.J., at p. 886.

(*x*) There is no provision in the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), making the separate property of a wife primarily liable in respect of her torts, as there is in respect of her ante-nuptial obligations (see *ibid.*, s. 13), such as might have been expected on the assumption that the legislature really intended that the husband should continue to be liable.

(*a*) *Utley* v. *Mitre Publishing Co.*, *supra* (wife living apart under a separation deed with a large allowance: husband held jointly liable with her for a libel written and published by her without his knowledge); *Ferguson* v. *Clayworth* (1844), 6 Q. B. 269 (slander); *Head* v. *Briscoe* (1833), 5 C. & P. 484 (libel).

(*b*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 26. Possibly the same rule applies where the wife has obtained a protection order, but this is by no means clear (*ibid.*, s. 21; *Ramsden* v. *Brearley* (1875), L. R. 10 Q. B. 147).

(*c*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (a).

(*d*) See notes (*b*) and (*c*), *supra*.

(*e*) *Wright* v. *Leonard*, *supra*; *Capell* v. *Powell*, *supra*.

(*f*) *Capell* v. *Powell*, *supra*. A dissolution of marriage, on the decree being made absolute, takes effect from the date of the decree *nisi*; see *Prole* v. *Soady* (1868), 3 Ch. App. 220.

(*g*) *Cuenod* v. *Leslie*, *supra*.

SECT. 2. Torts.

be pending at the time when the coverture ceases or the decree is granted (*h*).

Inconsistent defences.

894. Where a common law action is brought against husband and wife jointly for the wife's tort, they cannot set up inconsistent defences (*i*).

Tort connected with contract.

895. The joint liability of the husband extends to fraudulent misrepresentation for which an action of deceit will lie, except where the fraud is directly connected with a contract of the wife, and is the means of effecting, in the sense of obtaining, the contract, and is parcel of the same transaction (*k*). In such case the husband cannot be joined and is under no liability (*k*), although the wife can now be sued for the fraud (*l*).

Tort authorised by husband.

896. Where a tort is committed by a wife by the express authority of her husband, or where she is in the position of his agent, and the tort is committed in the ordinary course of the agency, the husband and wife are liable jointly and severally therefor, and both or either of them may be sued, as in any other case of principal and agent (*m*).

(*h*) *Capell* v. *Powell* (1864), 17 C. B. (N. S.) 743; *Cuenod* v. *Leslie*, [1909] 1 K. B. 880, C. A. The action abates on the death of the wife, the dissolution of the marriage, or the grant of a decree of judicial separation.

(*i*) *Beaumont* v. *Kaye*, [1904] 1 K. B. 292, C. A. (libel; husband paid money into court, and wife denied liability. Held, that wife's defence must be struck out).

(*k*) *Liverpool Adelphi Loan Association* v. *Fairhurst* (1854), 9 Exch. 422 (fraudulent representation by wife that she was sole and unmarried at the time of signing a promissory note as surety, whereby the plaintiff was induced to make an advance. Held, husband not liable); *Wright* v. *Leonard* (1861), 11 C. B. (N. S.) 258 (fraudulent misrepresentation that a bill of exchange had been accepted by the husband, whereby the plaintiff was induced to discount the bill. Held, husband not liable); *Cooper* v. *Witham* (1668), 1 Lev. 247 (wife, by representing herself unmarried, procured the plaintiff to go through a form of marriage with her. Held, husband not liable). Compare *Earle* v. *Kingscote*, [1900] 2 Ch. 585, C. A. (plaintiff having lent money to the wife on her I. O. U., was subsequently asked by the wife to join her in purchasing some shares, and for that purpose to raise a sum of £2,000; plaintiff consented to raise the money when the shares had been purchased, and shortly afterwards, relying on a representation by the wife that she had bought the shares, signed and discounted two promissory notes for £1,000 each and handed the proceeds to the wife; the wife had not in fact purchased any shares. Held, that as the fraudulent misrepresentation was not the means of effecting or inducing the contract, but was subsequent to and independent thereof, the husband was liable jointly with the wife for the fraud). As to misrepresentation generally, see title MISREPRESENTATION AND FRAUD.

(*l*) Neither husband nor wife could be sued in such case before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), by reason of the wife's incapacity to contract.

(*m*) *Taylor* v. *Green* (1837), 8 C. & P. 316 (fraudulent misrepresentations to an intending purchaser as to the takings of a business managed by the wife on behalf of her husband; purchaser bought business on faith of the misrepresentations. Held, that the husband was liable, and could be sued alone for the fraud); *Miell* v. *English* (1866), 15 L. T. 249 (the wife assisted her husband in his trade, and generally gave orders to the men. Held, that the husband was liable for injuries to a servant sustained in consequence of riding in a defective cart by the wife's directions). As to the liability generally of a principal for the wrongs of his agent, see title AGENCY, Vol. I., pp. 211 *et seq.*

897. If a wife is sued alone, and judgment is obtained against her in respect of any tort during coverture, the judgment, though unsatisfied, is a bar to any subsequent proceedings against the husband; and, in a case where they are jointly and severally liable, a judgment obtained against either is a bar to any subsequent proceedings against the other (*n*). Judgment against one a bar to action against the other.

SECT. 3.—*Breaches of Trust.*

898. A married woman is liable in respect of, and to the extent of, her separate property (*o*), for any breach of trust or *devastavit* committed by her, being a trustee or executrix or administratrix, either before or after her marriage, as if the breach of trust or *devastavit* had been a breach of contract, and her husband is not subject to any liability in respect of any such breach of trust or *devastavit* unless he has acted or intermeddled in the trust or administration (*p*). Liability for breaches of trust.

Part IX.—Contracts for Separation.

SECT. 1.—*Form and Validity.*

899. An agreement between husband and wife to live apart, whether with or without cause, is not (*q*) considered contrary to public policy, but is valid and enforceable, provided it is made in contemplation of, and is followed by, an immediate separation (*r*). Immediate separation.

900. But any agreement or settlement providing for the event of a future separation is void as being contrary to public policy (*s*), Agreement for future separation.

(*n*) *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547, Ex. Ch.; *Buckland* v. *Johnson* (1854), 15 C. B. 145, 161. This does not apply where both are sued, and a merely interlocutory judgment is entered against one in default of appearance or defence; see *Pim* v. *Coyle*, [1903] 2 I. R. 457.

(*o*) That is to say, separate property which is not subject to a restraint on anticipation; see pp. 369, 391, *ante*.

(*p*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1 (2), 24. Before this enactment, which is not retrospective, the separate estate of a married women was not, as a general rule, bound by her breach of trust or *devastavit* (see *Wainford* v. *Heyl* (1875), L. R. 20 Eq. 321; *Davies* v. *Stanford* (1889), 61 L. T. 234), but her husband was liable whether he interfered in the trust or administration or not. See on this subject generally, title TRUSTS AND TRUSTEES.

(*q*) This was not so formerly, voluntary separations being regarded as encroaching on the jurisdiction of the ecclesiastical courts in matrimonial causes, and it was only gradually that the courts of equity, in particular, ceased to regard such agreements as invalid; see *Besant* v. *Wood* (1879), 12 Ch. D. 605, *per* JESSEL, M.R., at p. 620; *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538; *Wilson* v. *Wilson* (1854), 5 H. L. Cas. 40; *Hunt* v. *Hunt* (1862), 4 De G. F. & J. 221. See also title EQUITY, Vol. XIII., p. 73.

(*r*) *Hunt* v. *Hunt, supra*; *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538; *Vansittart* v. *Vansittart* (1858), 4 K. & J. 62, C. A. The execution by the husband of a separation deed at the request of a third person is a legal consideration for a promise by the third person to pay a sum of money towards the husband's debts (*Jones* v. *Waite* (1842), 9 Cl. & Fin. 101, H. L.). For forms of agreements, see Encyclopædia of Forms and Precedents, Vol. II., pp. 424, 427.

(*s*) *Durant* v. *Titley* (1819), 7 Price, 577, Ex. Ch.; *Hindley* v. *Westmeath*

SECT. 1. Form and Validity.

and a contract, the terms of which apparently contemplate an immediate separation, is void unless a separation in fact at once takes place (*t*). It is necessary that the parties should actually cease to reside together. Ceasing cohabitation as man and wife is not sufficient (*a*).

A covenant in a settlement before marriage to make a provision for the wife (*b*), or a condition for the cesser of her interest (*c*), in the event of a separation, is void as contemplating a future separation, and it is immaterial whether the settlement is made by the husband himself or by a third person (*d*).

A clause in a separation deed providing that the payment of an annuity to the wife shall be suspended in the event of a reconciliation, during recohabitation, and resumed if the parties again separate, is void on the same ground (*e*); but a provision for the continuance of the trusts of the deed notwithstanding any agreement by the parties to live together again is valid (*f*).

An agreement made on a reconciliation, the object of which is to put an end to an existing separation, is not, however, void merely because it contemplates and provides for the possibility that the parties will again become separated (*g*).

(*Marquis*) (1827), 6 B. & C. 200; *Westmeath* (*Marquis*) v. *Salisbury* (*Marquis*) (1831), 5 Bli. (N. S.) 339, H. L.; *Byrne* v. *Carew* (*Lord*) (1849), 13 I. Eq. R. 1; *H.* v. *W.* (1857), 3 K. & J. 382; *Procter* v. *Robinson* (1866), 14 W. R. 381; *Westmeath* (*Marquis*) v. *Westmeath* (*Marchioness*) (1830), 1 Dow & Cl. 519, H. L.; *Re Moore*, *Trafford* v. *Maconochie* (1888), 39 Ch. D. 116, C. A.; *Re Morgan*, *Dowson* v. *Davey* (1910), 26 T. L. R. 398. *Rodney* (*Lord*) v. *Chambers* (1802), 2 East, 283, is no longer law.

(*t*) *Bindley* v. *Mulloney* (1869), L. R. 7 Eq. 343; *Hindley* v. *Westmeath* (*Marquis*) (1827), 6 B. & C. 200.

(*a*) *Westmeath* (*Marquis*) v. *Salisbury* (*Marquis*), *supra*; *Westmeath* (*Marquis*) v. *Westmeath* (*Marchioness*), *supra*; *Hindley* v. *Westmeath* (*Marquis*), *supra*.

(*b*) *Cocksedge* v. *Cocksedge* (1844), 14 Sim. 244, (1845), 5 Hare, 397; but see *contra*, *Hoare* v. *Hoare* (1790), 2 Ridg. Parl. Rep. 268.

(*c*) *Merryweather* v. *Jones* (1864), 4 Giff. 509.

(*d*) *Cartwright* v. *Cartwright* (1853), 3 De G. M. & G. 982, C. A. (settlement by husband's father in trust for the separate use of wife, but in the event of a separation taking place, the rents and profits from the time of the separation to be paid to husband, held void). Compare *Re Hope Johnstone*, *Hope Johnstone* v. *Hope Johnstone*, [1904] 1 Ch. 470, where a trust for the benefit of wife so long as she should continue to cohabit with her husband, and a gift over to husband in the event of cohabitation ceasing, was held valid as being a conditional limitation, and not a gift defeasible on a void condition.

(*e*) *Westmeath* (*Earl*) v. *Westmeath* (*Countess*) (1821), Jac. 126, at p. 140; *Byrne* v. *Carew* (*Lord*), *supra*; compare *Re Charlton*, *Bracey* v. *Shirwin*, [1911] W. N. 54.

(*f*) *Wilson* v. *Mushett* (1832), 3 B. & Ad. 743; *Webster* v. *Webster* (1853), 4 De G. M. & G. 437, C. A.; *Byrne* v. *Carew* (*Lord*), *supra*.

(*g*) *Vandergucht* v. *De Blaquiere* (1839), 5 My. & Cr. 229, 244; *Harrison* v. *Harrison*, [1910] 1 K. B. 35 (agreement between husband and wife, living apart under a separation order, to resume cohabitation, the husband covenanting to pay the wife £150 in the event of a fresh separation order being made at her instance. Held, that the agreement was valid, and, a separation order having been made, that the wife was entitled to recover the £150); and see *Jodrell* v. *Jodrell* (1845), 9 Beav. 45, where, on a suit for divorce, it was arranged that the husband should assign a house to trustees for the accommodation of the wife and children, and allow her £4,000 a year for her separate use to keep up the establishment, the husband to be at liberty to reside in the house and partake of the benefit of the establishment so long as he desired to

SECT. 1. Form and Validity.

901. Where an agreement for separation is made in the contemplation of a renewal or continuance of illicit intercourse by both parties (*h*), or by one of the parties to the knowledge of the other (*h*), it is void; and where it is made in the contemplation of a renewal or continuance of such intercourse by one of the parties only, it is voidable, and will be set aside at the instance of the other party (*i*). Agreement in contemplation of adultery.

An agreement made with the object of facilitating proceedings for divorce is absolutely void (*k*). Facilitating divorce.

902. A contract for separation is not invalid because it is entered into by way of compromise of criminal proceedings between husband and wife for assault or other misdemeanour (*l*). Compromise of criminal proceedings.

An agreement for separation will always be presumed to be legal until the contrary is proved, the burden of proving illegality lying on the person alleging it (*m*). Presumption of legality.

903. No particular formality is necessary for the validity of a contract for separation (*n*). It is usually made by deed, with or without the intervention of trustees for the wife, trustees not being necessary, but a mere oral agreement between husband and wife is binding (*n*). Form.

An executory contract for separation, generally called separation articles, may be specifically enforced (*o*). There is, however, an important difference as regards illegal provisions between separation articles and a separation deed. If any portion of an executory contract is contrary to public policy or otherwise illegal, specific performance will not be granted of any part of it (*p*), whereas, if some of the clauses in a separation deed are legal and others illegal, those which are legal will be enforced by the courts (*q*). Specific performance.

do so. Held, that the arrangement was not invalid as providing for a future separation.

(*h*) *Fearon* v. *Aylesford* (*Earl*) (1885), 14 Q. B. D. 792, C. A.

(*i*) *Evans* v. *Carrington* (1860), 2 De G. F. & J. 481.

(*k*) *Hope* v. *Hope* (1857), 8 De G. M. & G. 731, C. A. Such an agreement, though made abroad, in a country in which it is valid, will not be enforced here in respect of any portion thereof, the consideration being contrary to public policy (*ibid.*). See also title CONFLICT OF LAWS, Vol. VI., p. 244.

(*l*) *McGregor* v. *McGregor* (1888), 21 Q. B. D. 424, C. A.; *Elworthy* v. *Bird* (1825), 2 Sim. & St. 372. It is otherwise, in the case of a felony; see title CONTRACT, Vol. VII., p. 399.

(*m*) *Jones* v. *Waite* (1842), 9 Cl. & Fin. 101, H. L.; *Clough* v. *Lambert* (1839), 10 Sim. 174. A separation deed may be partly valid and partly invalid (*B.* v. *B.* (1892), 8 T. L. R. 636).

(*n*) *McGregor* v. *McGregor*, *supra*; *Aldridge* v. *Aldridge* (1888), 13 P. D. 210; *Sweet* v. *Sweet*, [1895] 1 Q. B. 12. The intervention of a trustee was formerly necessary owing to the inability of a wife to contract with her husband (see *Walrond* v. *Walrond* (1858), John. 18), and also in some cases because they could not convey property directly to one another. The former disability was removed by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and the latter by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 50; see pp. 391, 432, *ante*.

(*o*) *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538; *Vansittart* v. *Vansittart* (1858), 4 K. & J. 62, C. A.

(*p*) *Vansittart* v. *Vansittart*, *supra*; *Walrond* v. *Walrond*, *supra*; and see, generally, title SPECIFIC PERFORMANCE.

(*q*) *Hamilton* v. *Hector* (1872), L. R. 13 Eq. 511.

SECT. 1. Form and Validity.

Limit to wife's power to bind property.

904. A wife cannot by a separation deed or contract bind property which she is restrained from anticipating (*r*); nor can she make any disposition of, nor release, any of her property without complying with the formalities which would be required in ordinary circumstances (*s*). It may be necessary, therefore, where her non-separate property is dealt with, that she should be separately examined and the deed acknowledged (*s*).

Fraud.

905. If one of the parties to a contract for separation is induced to enter into it by fraudulent misrepresentations in reference to material facts, such as the previous misconduct of the other party, or in ignorance of such facts, fraudulently concealed, the contract is voidable at the instance of the party deceived (*t*). This rule applies even where it is agreed that all past causes of complaint shall be condoned, if the contract is made in reliance on a positive assertion of innocence (*a*). But it must appear that the contract was induced by the fraud (*b*). A fraudulent misrepresentation which is not believed is no ground for setting it aside (*c*).

Duress.

906. A wife is not bound by a separation agreement to which she is induced to consent by threats of violence (*d*) or other undue pressure (*e*) on the part of the husband. Threats of proceedings for a dissolution or nullity of the marriage, or for a judicial separation, are not, however, such duress as will entitle either party to resist performance of an agreement for separation, even in the case of a threat by the wife of a nullity suit on the ground of the husband's impotence (*f*).

(*r*) *Walrond* v. *Walrond* (1858), John. 18; see pp. 363 *et seq.*, *ante*.

(*s*) *Cahill* v. *Cahill* (1883), 8 App. Cas. 420; *Harle* v. *Jarman*, [1895] 2 Ch. 419 (the deed, executed in 1875, provided for the payment of an annuity to the wife, who covenanted that she would, when discovert, release a reversionary life interest in real and personal property to which she was entitled. Held, that she was not bound to release the interest after the husband's death, though she had been duly paid the annuity, the deed not having been acknowledged). As to when a deed acknowledged is necessary, see pp. 323 *et seq.*, *ante*, and title REAL PROPERTY AND CHATTELS REAL.

(*t*) *Evans* v. *Carrington* (1860), 2 De G. F. & J. 481 (deed executed by husband in ignorance of wife's previous adultery, fraudulently concealed); *Evans* v. *Edmonds* (1853), 13 C. B. 777 (wife's trustee represented that she was virtuous and moral, whereas he had committed adultery with her. Held, voidable, though it was not shown that the wife was privy to the misrepresentation). Compare *Field* v. *Serres* (1804), 1 Bos. & P. (N. R.) 121; and see *Crabb* v. *Crabb* (1868), L. R. 1 P. & D. 601, where it was held that the wife was not bound by a separation agreement because the husband never had any intention of fulfilling it; and see, generally, title MISREPRESENTATION AND FRAUD.

(*a*) *Brown* v. *Brown* (1868), L. R. 7 Eq. 185 (covenant by husband to condone all past causes of complaint and take no proceedings in reference to them, wife positively asserting her innocence).

(*b*) *Kendall* v. *Webster* (1862), 1 H. & C. 440.

(*c*) *Wasteneys* v. *Wasteneys*, [1900] A. C. 446, P. C.

(*d*) *Lambert* v. *Lambert* (1767), 2 Bro. Parl. Cas. 18.

(*e*) *Adamson* v. *Adamson* (1907), 23 T. L. R. 434 (the husband and his solicitor told the wife that the only way to get any money was to sign the agreement, otherwise the husband would leave her, and she would get nothing; she had no independent advice. Held, that she was not bound by the agreement). And see *Crabb* v. *Crabb*, *supra*.

(*f*) *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538, 572.

SECT. 1. Form and Validity.

Provisions as to custody of children.

907. Before 1873, any provision in a separation deed by which the husband agreed to give up the custody or control of any of his infant children to the wife was void (*g*). Such a provision is not now necessarily invalid, but it will not be enforced if the court is of opinion that it is not for the benefit of the children to give effect to it (*h*).

Valuable consideration.

908. A separation deed or agreement was formerly regarded as voluntary unless there was some valuable consideration on both sides (*i*) beyond the mere covenants or promises to live apart and not molest one another, such as, on the wife's part, a covenant by her trustees to indemnify the husband against her debts (*k*), or a release of her dower (*l*), or a compromise or abandonment of legal proceedings against the husband (*m*), and, on the husband's part, a covenant to pay the wife an annuity, or a release by him of his marital rights with respect to her property (*n*); and although a

(*g*) As to custody of children, see title INFANTS AND CHILDREN.

(*h*) Custody of Infants Act, 1873 (36 Vict. c. 12), s. 2; and see p. 449, *post*.

(*i*) In *Gibbs* v. *Harding* (1870), 5 Ch. App. 336, it was held that a provision that each of the parties should pay half the costs incidental to the agreement for separation was sufficient consideration to support a suit for specific performance.

(*k*) *Stephens* v. *Olive* (1786), 2 Bro. C. C. 90; *Worrall* v. *Jacob* (1817), 3 Mer. 256 (such a covenant held valuable consideration as regards creditors); *Wellesley* v. *Wellesley* (1839), 10 Sim. 256 (although the covenant by the trustee was conditional on the husband securing payment of an annuity to the wife); *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538 (or a covenant by a third person to pay the husband's debts). A covenant by the wife herself to indemnify the husband against her own and her daughter's debts was held insufficient consideration to entitle her to specific performance, where she had no separate property, except such as she was restrained from anticipating (*Walrond* v. *Walrond* (1858), John. 18); but compare *McGregor* v. *McGregor* (1888), 21 Q. B. D. 424, C. A. A trustee's covenant to indemnify the husband against his wife's debts was of little practical value, because a wife separated from her husband by mutual agreement has, generally speaking, no authority to pledge his credit (see pp. 424, 426, *ante*).

(*l*) *Jee* v. *Thurlow* (1824), 2 B. & C. 547, 553 (release of jointure or dower).

(*m*) *Hobbs* v. *Hull* (1788), 1 Cox, Eq. Cas. 445 (husband guilty of adultery; waiver by wife of her right to alimony held sufficient consideration as against creditors to support a settlement of realty on her to the amount of £300 a year); *Wilson* v. *Wilson*, *supra* (compromise of nullity suit held sufficient consideration for a settlement of property); *Crouch* v. *Waller* (1859), 4 De G. & J. 302 (action by wife's mother against husband for necessaries furnished to wife; reference to arbitration; execution of separation deed in pursuance of award. Held, sufficient valuable consideration to support trusts in the wife's favour); *Vansittart* v. *Vansittart* (1858), 4 K. & J. 62, C. A., and *Jodrell* v. *Jodrell* (1845), 9 Beav. 45 (abandonment of suit for divorce held sufficient consideration to support a suit for specific performance); *McGregor* v. *McGregor*, *supra* (compromise of cross-summonses for assault); *Hart* v. *Hart* (1881), 18 Ch. D. 670 (compromise of divorce suit held sufficient consideration for specific performance); *Aldridge* v. *Aldridge* (1888), 13 P. D. 210 (mutual agreement not to sue for nullity of marriage held a bar to such a suit, though the contract was not by deed, the promise by each not to sue being sufficient valuable consideration for the promise by the other); *Hulse* v. *Hulse* (1910), 103 L. T. 804 (wife refrained from taking proceedings for assault when legally entitled to do so. Held, sufficient consideration). And see *Re Pope, Ex parte Dicksee*, [1908] 2 K. B. 169, C. A.

(*n*) *Logan* v. *Birkett* (1833), 1 My. & K. 220 (release by husband of his marital rights in respect of the wife's subsequently acquired property held sufficient

SECT. 1. Form and Validity.

voluntary deed, when executed, was binding as between the husband and wife (*o*), it operated only as a voluntary settlement as regards creditors (*p*) and subsequent purchasers (*q*); and, further, specific performance would not be decreed of an executory agreement for separation, unless there was valuable consideration (*r*).

Agreement to live apart is valuable consideration.

This principle seems to have been founded partly on the incapacity of husband and wife to contract with one another (*s*), and partly on the view formerly held that separations by agreement were contrary to public policy (*t*), but it may now be considered obsolete, the mere agreement to live apart being sufficient valuable consideration, whether for the purpose of enforcing specific performance of separation articles, no part of which is contrary to public policy (*u*), or for supporting a separation deed or agreement against creditors and subsequent purchasers (*a*).

Even when some other valuable consideration was regarded as necessary, an agreement to execute a separation deed with the usual clauses would be specifically enforced, because a covenant by the wife's trustee to indemnify the husband against her debts was a usual clause (*b*).

SECT. 2.—*Construction and Operation.*

Usual clauses.

909. The term "usual" in an agreement entered into for the execution of a separation deed, with the usual covenants and clauses, is construed with reference to the surrounding circumstances, and to the practice and custom of conveyancers in such cases (*c*).

The usual clauses include mutual covenants not to sue for a restitution of conjugal rights, a covenant by the husband to permit the wife to live separate and apart without molestation or interference by him, and a covenant by the wife or her trustee to indemnify the husband against debts contracted by her during the separation (*d*).

consideration for her covenant to pay him an annuity out of property limited to her separate use); *Marshall* v. *Marshall* (1879), 5 P. D. 19 (renunciation by husband of marital rights held sufficient valuable consideration to support the wife's engagements with him).

(*o*) *Frampton* v. *Frampton* (1841), 4 Beav. 287; *Fitzer* v. *Fitzer* (1743), 2 Atk 511.

(*p*) *Fitzer* v. *Fitzer*, *supra*; *Clough* v. *Lambert* (1839), 10 Sim. 174.

(*q*) *Cowx* v. *Foster* (1860), 1 John. & H. 30.

(*r*) *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538, 574; *Walrond* v. *Walrond* (1858), John. 18.

(*s*) *Walrond* v. *Walrond*, *supra*.

(*t*) *Logan* v. *Birkett* (1833), 1 My. & K. 220.

(*u*) See p. 439, *ante*.

(*a*) See *Re Weston*, *Davies* v. *Tagart*, [1900] 2 Ch. 164 (wife's living apart in pursuance of her covenant held valuable consideration, and sufficient to support an assignment of property to trustees for her benefit against the husband's trustee in bankruptcy); *Aldridge* v. *Aldridge* (1888), 13 P. D. 210 (mutual agreements to live apart and not sue one another for nullity of the marriage. Held, that the agreement of each was sufficient valuable consideration to support the agreement by the other not to sue). And see *McGregor* v. *McGregor* (1888), 21 Q. B. D. 424, C. A.

(*b*) *Gibbs* v. *Harding* (1870), 5 Ch. App. 336.

(*c*) *Hart* v. *Hart* (1881), 18 Ch. D. 670, 687.

(*d*) *Wilson* v. *Wilson* (1854), 5 H. L. Cas. 40; *Hart* v. *Hart*, *supra*, at p. 684; *Gibbs* v. *Harding*, *supra*. The wife's own covenant of indemnity against her debts is probably now all that can be required.

A *dum casta* clause is not a "usual clause," whether in a separation agreed to as part of a compromise of a divorce suit (*e*) or otherwise (*f*).

Dum casta clause not usual.

910. Where a wife has acted on a deed of separation and accepted benefits under it, she will be estopped from denying that she has contracted, although the covenants are expressed to be made by her trustee alone, and a recital in a deed to which she is a party of an agreement to live separate is sufficient evidence of a contract by her to that effect (*g*).

Estoppel where deed acted on.

911. A covenant by the husband to allow the wife to live apart without molestation (*h*), or by the wife not to molest or interfere with the husband (*i*), is broken by the institution of proceedings by the covenantor for a restitution of conjugal rights. But to sue for a judicial separation is not a breach of such covenant (*k*).

Covenant not to molest.

To amount to molestation something must be done with the intention of annoying, and it must be an annoyance in fact (*l*). Adultery by the wife, even if followed by the birth of an illegitimate child, is not of itself a breach of a covenant not to molest the husband, but it is molestation to put such child forward as legitimate, especially if it is done with the intention of claiming a title or property (*m*). Whether the institution of divorce proceedings by a husband is a molestation of the wife by him depends upon whether the proceedings are taken with the intention of annoying her (*n*).

912. A covenant in general terms to indemnify the husband against the wife's debts extends to costs incurred by the husband in defending actions on her contracts for necessaries (*o*); and a covenant of indemnity against debts which the wife had then contracted, or should thereafter during the separation contract, includes debts for necessaries contracted by the wife as agent for the husband while they were living together (*p*). But the indemnity is confined to debts contracted during the separation unless the contrary is expressed (*p*).

Covenant to indemnify against debts.

913. The extent to which the provisions of a separation deed are to be regarded as permanent, and how far they are to be

How far provisions construed as permanent.

(*e*) *Hart* v. *Hart* (1881), 18 Ch. D. 670.

(*f*) *Fearon* v. *Aylesford* (*Earl*) (1885), 14 Q. B. D. 792, C. A.; *Gandy* v. *Gandy* (1882), 7 P. D. 168, C. A.

(*g*) *Clark* v. *Clark* (1885), 10 P. D. 188, C. A.; *Re Weston, Davies* v. *Tagart*, [1900] 2 Ch. 164. *Williams* v. *Bailey* (1866), L. R. 2 Eq. 731, *contra*, is no longer law. As to the appointment of a new trustee of a separation deed, see *Re Matthews* (1859), 26 Beav. 463. As to estoppel by deed, see title ESTOPPEL, Vol. XIII., pp. 365 *et seq.*, *post*.

(*h*) *Wilson* v. *Wilson* (1854), 5 H. L. Cas. 40, *per* Lord ST. LEONARDS, at p. 62.

(*i*) *Besant* v. *Wood* (1879), 12 Ch. D. 605.

(*k*) *Thomas* v. *Everard* (1861), 6 H. & N. 448 (covenant by wife not to molest or disturb the husband).

(*l*) *Fearon* v. *Aylesford* (*Earl*), *supra*; *Hunt* v. *Hunt*, [1897] 2 Q. B. 547, C. A.; and see *Besant* v. *Wood*, *supra*.

(*m*) *Fearon* v. *Aylesford* (*Earl*), *supra*.

(*n*) *Hunt* v. *Hunt*, *supra* (divorce proceedings by husband abroad. Held not a molestation in the absence of an intention to annoy).

(*o*) *Duffield* v. *Scott* (1789), 3 Term Rep. 374.

(*p*) *Summers* v. *Ball* (1841), 8 M. & W. 596.

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construed as limited to the period during which the separation continues, depends on the intention of the parties, to be ascertained from the terms of the deed as a whole and the circumstances of the particular case (*q*).

Settlement of property.

Provisions relating to the settlement of property will be construed as permanent unless a contrary intention plainly appears (*r*).

Covenant for payment of annuity.

A covenant by the husband for payment of an annuity to the wife will be construed as permanent, or as limited to the time during which they remain separated, according to the expressed or presumed intention of the parties (*s*). The fact that he covenants to pay the annuity during the life of the wife is some indication of an intention that it should be permanent, but is not conclusive (*s*).

Where a covenant for the payment of an annuity to the wife is regarded as a permanent provision, it is enforceable against the executors or administrators of the husband after his death (*t*).

(*q*) *Randle* v. *Gould* (1857), 8 E. & B. 457; *Rowell* v. *Rowell*, [1900] 1 Q. B. 9; *Wilson* v. *Mushett* (1832), 3 B. & Ad. 743; and see p. 452, *post*.

(*r*) *Ruffles* v. *Alston* (1875), L. R. 19 Eq. 539 (wife entitled to money secured by her brother's promissory note; on a separation the brother covenanted to hold the money in trust for the wife and husband successively for their lives, and then for the children. Held, a permanent settlement); *Negus* v. *Forster* (1882), 46 L. T. 675, C. A.; *Re Spark's Trusts, Spark* v. *Massey*, [1904] 1 Ch. 451; compromised, [1904] 2 Ch. 121, C. A. (funds vested in trustee in trust for wife and children held a permanent settlement). But see *O'Malley* v. *Blease* (1869), 20 L. T. 899.

(*s*) *Goslin* v. *Clark* (1862), 12 C. B. (N. S.) 681 (covenant to pay annuity during life of wife held permanent); *Clough* v. *Lambert* (1839), 10 Sim. 174; *Randle* v. *Gould*, *supra* (covenant to pay the wife 10*s*. a week for life, with a provision that if the parties should agree in writing to cohabit, and should cohabit for a month, the deed should be void. Held, that the express provision excluded any implied provision that the payments should cease on a reconciliation, and that the husband continued liable on the covenant though the parties had been reconciled and had cohabited without any agreement in writing for six months); *Rowell* v. *Rowell*, *supra*; *Nicol* v. *Nicol* (1886), 31 Ch. D. 524, C. A. (agreement that in the event of a decree for judicial separation the wife should enjoy certain furniture during her life; separation decreed. Held, that the agreement was limited to the period of the separation, and was at an end on the resumption of cohabitation); *Negus* v. *Forster*, *supra* (covenant for payment of annuity held permanent); *Chapman* v. *Guest* (1887), 3 T. L. R. 438. In *Crouch* v. *Waller* (1859), 4 De G. & J. 302, there were two deeds, one providing that the parties should not molest one another, for the indemnity of the husband against the wife's debts and for the support of the children in her custody, to be void on the resumption of cohabitation, and the other for payment of an annuity to the wife for her separate use. Held, that the annuity deed was permanent, and the husband's liability thereunder was not affected by a resumption of cohabitation); *Re Gilling*, *Procter* v. *Watkins* (1905), 74 L. J. (CH.) 335 (covenant for payment of annuity for the sole and separate use of the wife during her life, "if she should so long continue to live separate and apart," for her maintenance and support. Held, that the liability under the covenant ceased on the death of the husband); and see note (*t*), *infra*.

(*t*) *Clough* v. *Lambert*, *supra*; *Atkinson* v. *Littlewood* (1874), L. R. 18 Eq. 595; compare *Re Gilling*, *Procter* v. *Watkins*, *supra*. Where there was a provision for payment of an annuity to the wife without power of anticipation, the husband to have power at the end of twelve months to give notice of his intention to reduce the amount, and, in the event of no agreement being come to within one month after the notice, the arrangement to be at an end, and the wife waived notice of the intention to reduce, and received smaller sums from time to time, but no definite arrangement was come to, it was held that

An annuity for the maintenance and support of the wife payable under a separation deed accrues *de die in diem*, and is apportionable in the event of the death of the wife between the dates fixed for the payment of instalments (*a*), but such an annuity is not assignable by her (*b*). The husband is entitled to deduct income tax from payments in respect of such an annuity (*c*).

Trust for benefit of children.

914. A trust in a separation deed for the benefit of the children of the marriage is construed, *primâ facie*, as including only children born or conceived prior to the separation, and not those who may be born after a reconciliation and resumption of cohabitation (*d*).

Subsequent misconduct.

915. A covenant or agreement by either party not to take proceedings for a divorce or judicial separation on the ground of any offence previously committed is not a bar to proceedings in the event of subsequent misconduct (*e*).

Subsequent adultery by wife.

There is no implied condition in a contract for separation that the wife will remain chaste (*f*), and in the absence of a *dum casta* clause the subsequent adultery of the wife is no defence, either at law or in equity, to an action against the husband on his covenant to pay her an annuity (*g*).

Misconduct by husband.

916. A covenant by the wife not to claim alimony in excess of the amount of an annuity agreed upon is not affected by subsequent misconduct of the husband of a nature similar to that which brought about the separation; but misconduct on his part of a kind entirely different from any in contemplation of the parties at the time of the separation will preclude him from setting up the deed (*h*).

Covenant not to sue for increased alimony.

A covenant by the wife not to sue for increased alimony in the

the notice was a mere formality which could be waived by the wife, and that she was not entitled to claim arrears of the annuity as originally agreed upon, the waiver not being an anticipation (*Macnaghten* v. *Paterson*, [1907] A. C. 483, P. C.).

(*a*) Apportionment Act, 1870 (33 & 34 Vict. c. 35), ss. 2, 3; *Howell* v. *Hanforth* (1775), 2 Wm. Bl. 1016. As to apportionment of annuities generally, see title RENTCHARGES AND ANNUITIES.

(*b*) *Hyde* v. *Price* (1797), 3 Ves. 437.

(*c*) *Re Barry's Trusts, Barry* v. *Smart*, [1906] 1 Ch. 768; affirmed, [1906] 2 Ch. 358, C. A. As to deduction of income tax generally, see title INCOME TAX, pp. 662, 677, *post*.

(*d*) *Hulme* v. *Chitty* (1846), 9 Beav. 437; and see *Re Spark's Trusts, Spark* v. *Massey*, [1904] 1 Ch. 451; compromised, [1904] 2 Ch. 121, C. A.

(*e*) *Gandy* v. *Gandy* (1882), 7 P. D. 168, C. A.; *Kunski* v. *Kunski* (1907), 23 T. L. R. 615; see also *Dowling* v. *Dowling*, [1898] P. 228; and pp. 451, 486, *post*. Where the wife covenanted not to sue for restitution of conjugal rights before 1913, and the husband to pay her maintenance, and in 1909 he informed her that he did not intend to pay any longer or to resume cohabitation in 1913 or at all, it was held that the wife could sue for restitution of conjugal rights (*Waller* v. *Waller* (1910), 26 T. L. R. 223).

(*f*) *Fearon* v. *Aylesford* (*Earl*) (1885), 14 Q. B. D. 792, C. A.; *Scholey* v. *Goodman* (1823), 8 Moore (C. P.), 350; and see p. 445, *ante*.

(*g*) *Wasteneys* v. *Wasteneys*, [1900] A. C. 446, P. C.; *Sweet* v. *Sweet*, [1895] 1 Q. B. 12; *Hart* v. *Hart* (1881), 18 Ch. D. 670; *Fearon* v. *Aylesford* (*Earl*), *supra*; *Jee* v. *Thurlow* (1824), 2 B. & C. 547; *Baynon* v. *Batley* (1832), 8 Bing. 256.

(*h*) *Morrall* v. *Morrall* (1881), 6 P. D. 98 (no previous misconduct; subsequent incestuous adultery); *Gandy* v. *Gandy*, *supra*, *per* COTTON, L.J., at p. 175.

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event of subsequent misconduct of the husband will not be implied (*i*).

Effect of breach.

917. A breach of the provisions of a contract for separation does not preclude the party committing the breach from setting up and enforcing the contract, unless the breach is of such a deliberate and substantial nature as to amount to a repudiation of the contract (*k*).

Covenants by the husband for the payment of an annuity to the wife, and by the wife not to molest the husband, will be construed as independent covenants in the absence of an express provision making one dependent on the other (*l*). The same rule applies to covenants by the husband for payment of an annuity and by the wife to maintain the children committed to her custody (*m*).

Satisfaction of dower.

918. A separation deed does not deprive the wife of her right to dower (*n*), unless there is an express declaration of an intention to that effect (*o*); and a covenant by the wife to receive an annuity secured by the deed in satisfaction of her dower and thirds does not deprive her of her share of the husband's personal estate (*p*) in the event of his death intestate (*o*). On the other hand, a provision that the wife surviving shall be entitled to dower and thirds in respect of all realty and personalty of which the husband may die possessed will not be construed as a covenant by the husband to leave her any portion of his real or personal estate, but merely as a declaration that she shall be in the same position in respect of her claims to his property as if there had been no separation, her claim, therefore, being subject to his will (*q*).

Satisfaction of annuity by legacy.

919. Whether a bequest by the will of the husband operates as a satisfaction of an annuity which he has contracted to pay to the wife by a separation deed depends upon the ordinary rules as to the satisfaction of debts by legacies (*r*).

(*i*) *Bishop* v. *Bishop*, *Judkins* v. *Judkins*, [1897] P. 138, C. A.

(*k*) *Durand* v. *Durand* (1789), 2 Cox, Eq. Cas. 207; *Besant* v. *Wood* (1879), 12 Ch. D. 605, 627; *Kunski* v. *Kunski* (1898), 68 L. J. (P.) 18 (default by husband in payment of weekly allowance not sufficient to prevent him setting up the contract); *Kennedy* v. *Kennedy*, [1907] P. 49 (husband ceased to pay allowance, and expressed his intention to make no further payments. Held, a repudiation, and a decree for restitution of conjugal rights granted to the wife); *Balcombe* v. *Balcombe*, [1908] P. 176.

(*l*) *Fearon* v. *Aylesford* (*Earl*) (1885), 14 Q. B. D. 792, C. A., where molestation by the wife was held no defence to an action for recovery of the annuity. The only remedy in such a case is a counterclaim for the breach of covenant. In *Jee* v. *Thurlow* (1824), 2 B. & C. 547, it was held that proceedings for the restitution of conjugal rights by the wife constituted no answer to an action by her trustees for arrears of an annuity agreed to be paid by the husband; but it would probably now be held that suing for the restitution of conjugal rights is such a breach as to amount to a repudiation of the entire contract for separation.

(*m*) *Crouch* v. *Waller* (1859), 4 De G. & J. 302, where the wife was held unfit to have the custody of the children.

(*n*) See title REAL PROPERTY AND CHATTELS REAL. As to jointure, see *Mornington* (*Countess*) v. *Mornington* (*Earl*) (1849), 18 L. J. (CH.) 442.

(*o*) *Slatter* v. *Slatter* (1834), 1 Y. & C. (EX.) 28.

(*p*) See title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*

(*q*) *Cochran* v. *Graham* (1811), 19 Ves. 63.

(*r*) *Atkinson* v. *Littlewood* (1874), L. R. 18 Eq. 595 (bequest of annuity of same amount as under separation deed. Held, that the widow was put to her

Provisions as to custody of children.

920. The court will not refuse to decree the specific performance of articles of separation because it is provided that the wife shall have the custody or control of children of the marriage (*s*). But the court may refuse to enforce any provision in a separation deed or contract with regard to the custody or control of the children which it may consider not to be for their benefit (*t*).

A husband does not commit a breach of a covenant to allow a child to reside with his wife, if he joins in an application to the court to remove the child from her custody on the ground of her unfitness (*a*).

A provision that the wife shall have free access to the children remaining in the custody of the husband does not preclude him from taking them with him to any place to which he is ordered in the course of military duties, though the effect may be to deprive the wife of her right of access (*b*).

A covenant by the husband to maintain children, of whom it is agreed that he shall have the custody, is binding although he may be deprived by the court of their custody (*c*).

Where the wife undertakes to support children in her custody, and the husband covenants to pay her an annuity, his liability on the covenant is not affected by the fact that the children are removed from her custody on the ground of her unfitness (*d*).

election); *Horlock* v. *Wiggins*, *Wiggins* v. *Horlock* (1888), 39 Ch. D. 142, C. A. (separation deed and will contemporaneous. Legacy held not a satisfaction); *Coates* v. *Coates*, [1898] 1 I. R. 258 (covenant to pay 15*s*. a week for life; bequest of 12*s*. a week for life and the use of a house and furniture. Held, not a satisfaction); and see generally, titles EQUITY, Vol. XIII., pp. 128 *et seq.*; WILLS.

(*s*) *Hart* v. *Hart* (1881), 18 Ch. D. 670.

(*t*) See p. 443, *ante*; *Besant* v. *Wood* (1879), 12 Ch. D. 605, 629. Where it was agreed that the wife should have the custody of a child eight years old for eleven months in each year, and the wife held and promulgated atheistic opinions and refused to allow any religious instruction to be given to the child, and had published an obscene book, it was held that there were sufficient grounds for removing the custody from her, notwithstanding the agreement (*Re Besant* (1879), 11 Ch. D. 508, C. A.). In *Hamilton* v. *Hector* (1872), L. R. 13 Eq. 511; *Hamilton* v. *Hector* (1871), 6 Ch. App. 701, a provision that the children should remain at schools to be selected by the husband, and should spend their holidays sometimes with the husband and sometimes with the wife as should be directed by trustees, was held reasonable, and enforced. A reference to arbitration of the question of the right of access to the children does not empower the arbitrator to decide who shall have the custody (*Evershed* v. *Evershed* (1882), 46 L. T. 690). As to custody of infants generally, see title INFANTS AND CHILDREN.

(*a*) *Besant* v. *Wood*, *supra*.

(*b*) *Hunt* v. *Hunt* (1884), 28 Ch. D. 606, C. A. (army medical officer, ordered to Egypt).

(*c*) *Gandy* v. *Gandy* (1882), 7 P. D. 168, C. A. Where the husband covenanted to pay the whole expense of the education and maintenance of three children who should remain in his custody and be under his complete control, with a proviso that the wife or her trustees should pay the expense of the education and maintenance of such of them as should be permitted to reside with her during such residence, it was held that, subject to the particular proviso, the husband's covenant to maintain the children was a general one, and that he was responsible for the expenses of their maintenance, though they were of age and were not under his custody or control (*De Crespigny* v. *De Crespigny* (1853), 9 Exch. 192).

(*d*) *Crouch* v. *Waller* (1859), 4 De G. & J. 302; and see *Rowell* v. *Rowell* (1903), 89 L. T. 288, C. A., where the husband covenanted to pay an additional

SECT. 2. Construction and Operation.

The children are not, in relation to a covenant for their maintenance in a separation deed, in the position of beneficiaries, and have no right of action on such covenant (*e*).

Effect of divorce.

921. A dissolution of the marriage does not of itself affect such of the provisions of a separation deed as constitute a permanent settlement of property, nor the liability of the husband on a covenant to pay an annuity to the wife by way of a permanent provision (*f*); but such provisions may be varied by the court in pursuance of its jurisdiction with regard to the variation of settlements (*g*).

Judicial separation.

922. The provisions of a separation deed are not affected by a decree for judicial separation, nor has the court power in the case of such decree to vary them, except by granting the wife an increased allowance by way of alimony where she is not under a binding covenant (*h*) not to sue for alimony in excess of the amount agreed upon (*i*).

SECT. 3.—*Remedies for Breach.*

Specific performance.

923. The remedy for a refusal by either party to carry out the terms of an executory agreement for separation is an action for specific performance (*k*), and it is not necessary, in order to maintain

weekly sum to the wife for the maintenance and education of a son as long as he was under twenty-one, and remained under her care and tutelage; it was held that the husband was not relieved of his liability to pay the additional sum because the son was admitted to Christ's Hospital, and by consent spent half his holidays with each party, and was therefore maintained and educated at a very trifling expense to the wife.

(*e*) *Gandy* v. *Gandy* (1885), 30 Ch. D. 57, C. A.; and see *Crouch* v. *Waller* (1859), 4 De G. & J. 302.

(*f*) *Charlesworth* v. *Holt* (1873), L. R. 9 Exch. 38 (covenant to pay an annuity during the spouses' joint lives so long as they should live separate and apart. Held, that the obligation was not limited to the coverture, and that a dissolution of the marriage on the ground of the wife's adultery did not affect the husband's liability on the covenant); *Rowley* v. *Rowley* (1866), L. R. 1 Sc. & Div. 63; *Grant* v. *Budd* (1874), 30 L. T. 319 (action for arrears against a surety for the payment by the husband of a weekly sum to a trustee for the wife during their joint lives; plea, that the defendant was a party to the deed in order to prevent any public exposure, and that the wife had subsequently sued for a divorce, and the marriage had been dissolved. Held bad); *Goslin* v. *Clark* (1862), 12 C. B. (N. S.) 681; compare *Re Gilling*, *Procter* v. *Watkins* (1905), 74 L. J. (CH.) 335; and see note (*s*), p. 446, *ante*.

(*g*) *Worsley* v. *Worsley* (1869), L. R. 1 P. & D. 648 (covenant by husband to pay annuity for joint lives); *Benyon* v. *Benyon* (1876), 1 P. D. 447 (husband, having received an allowance from the wife under a separation deed, held entitled, in a suit for dissolution of the marriage on the ground of her subsequent adultery, to apply to the court for an increased provision out of her income). As to the variation of settlements generally, see p. 571, *post*.

(*h*) See p. 447, *ante*.

(*i*) *Gandy* v. *Gandy* (1882), 7 P. D. 168, C. A., *per* JESSEL, M.R., at p. 172, and *per* LINDLEY, L.J., at p. 175; *Jee* v. *Thurlow* (1824), 2 B. & C. 547.

(*k*) *Besant* v. *Wood* (1879), 12 Ch. D. 605; *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538 (agreement for separation in consideration of abandonment by wife of proceedings for nullity of marriage); *Hart* v. *Hart* (1881), 18 Ch. D. 670 (agreement for separation by way of compromise of proceedings for divorce); *Seeling* v. *Crawley* (1700), 2 Vern. 386; *Guth* v. *Guth* (1792), 3 Bro. C. C. 614 (offer by husband to resume cohabitation no answer to action for specific

SECT. 3. Remedies for Breach.

such an action, that there should be any valuable consideration other than the mutual promises to separate and live apart (*l*).

The court will not, in an action for specific performance of separation articles, inquire into the cause of the separation (*m*).

Injunction.

924. An injunction may be granted restraining either party to a contract for separation from instituting proceedings for the restitution of conjugal rights (*n*), or from molesting the other party (*o*), or from otherwise committing a breach of the contract (*p*).

But proceedings which have actually been commenced in breach of the contract cannot be restrained by injunction (*q*), the remedy in such case being to plead the contract in bar of the proceedings (*r*) or, *semble*, to apply for a stay of proceedings.

Wife may sue on covenant with trustee.

925. The wife may sue the husband on his covenants with her trustee, if the trustee refuses so to do (*s*).

Proof for annuity in husband's bankruptcy.

926. The estimated value of an annuity covenanted to be paid by the husband may be proved for in his bankruptcy, although it may be payable only so long as the wife may continue chaste, and may be determinable on the happening of other specified events (*t*).

Where the wife or her trustee proves for the ascertained value of such an annuity, and receives a dividend, there is no obligation to refund any portion of the dividend because, by reason of the wife's death, the amount thereof may happen to exceed the sum which would have been payable by the husband if he had remained solvent (*a*).

performance); *Fletcher* v. *Fletcher* (1788), 2 Cox, Eq. Cas. 99; and see *R.* v. *Mead* (1758), 1 Burr. 542; *Vane's* (*Lord*) *Case* (1744), 13 East, 171, n., 173, n.; *R.* v. *Winton* (1792), 5 Term Rep. 89, as to the right of the wife to be discharged on a writ of *habeas corpus* where she is detained by the husband notwithstanding an agreement for separation.

(*l*) See p. 444, *ante*.

(*m*) *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538.

(*n*) *Kitchin* v. *Kitchin* (1869), 19 L. T. 674 (injunction against wife); *Hunt* v. *Hunt* (1861), 4 De G. F. & J. 221 (injunction against husband); *Besant* v. *Wood* (1879), 12 Ch. D. 605.

(*o*) *Sanders* v. *Rodway* (1852), 16 Beav. 207, 211 (injunction against husband, who had called and requested to see his wife etc.).

(*p*) *Besant* v. *Wood*, *supra*.

(*q*) *Marshall* v. *Marshall* (1879), 5 P. D. 19; *Clark* v. *Clark* (1885), 10 P. D. 188, C. A.; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5).

(*r*) *Marshall* v. *Marshall*, *supra*; *Clark* v. *Clark*, *supra* (suit for restitution of conjugal rights); *Gandy* v. *Gandy* (1882), 7 P. D. 168, C. A. (application for alimony); *Aldridge* v. *Aldridge* (1888), 13 P. D. 210 (nullity suit); compare *Bishop* v. *Bishop*, *Judkins* v. *Judkins*, [1897] P. 138, C. A.; and see pp. 486, 571, *post*. A contract for separation is a bar to proceedings for a separation under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39) (*Medway* v. *Medway*, [1900] P. 141; *Piper* v. *Piper*, [1902] P. 198); see p. 597, *post*.

(*s*) *Gandy* v. *Gandy* (1885), 30 Ch. D. 57, C. A.; and see *Archard* v. *Coulsting* (1843), 6 Man. & G. 75, where the trustee, after accepting the trust, died before executing the deed, and it was held that the wife might sue in the names of his executors on giving them security for costs.

(*t*) *Re Batey*, *Ex parte Neal* (1880), 14 Ch. D. 579, C. A.; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 203.

(*a*) *Re Punnell*, *Ex parte Bates* (1879), 11 Ch. D. 914, C. A.

SECT. 4.
Effect of Reconciliation.

SECT. 4.—*Effect of Reconciliation.*

Effect of reconciliation on separation deed.

927. A separation deed sometimes contains an express provision that, in the event of a reconciliation and the resumption of cohabitation, the provisions of the deed shall cease; and, on the other hand, it may be expressly provided that the trusts of the deed shall continue notwithstanding an agreement by the parties to live together again (*b*).

In the absence of express provision, the question to what extent a contract for separation is affected by a reconciliation depends upon the intention of the parties to be ascertained from the terms of the contract as a whole and the circumstances of the particular case (*c*).

Agreement that annuity shall continue.

928. Where a covenant by the husband for payment of an annuity to the wife is to be construed as limited to the period of separation (*d*), a subsequent agreement that if she will return to cohabitation he will continue the payment is valid, and will have the effect of making the annuity permanent (*e*).

Arrears of annuity.

929. The fact that the parties are reconciled and resume cohabitation does not of itself operate as an accord and satisfaction of arrears, accrued due to the wife during the separation, of an allowance agreed to be paid by the husband, even if the allowance was payable only during the continuance of the separation (*f*).

Resumption of cohabitation necessary.

930. The mere circumstance that the parties cease to be separated, in the sense that they reside together in a state of hostility, is not sufficient to put an end to the provisions of a contract for separation (*g*); nor, on the other hand, is a reconciliation, as evidenced by friendly correspondence, without a resumption of cohabitation (*h*); and mere casual acts of sexual intercourse are not conclusive evidence that the parties have ceased to live separate within the meaning of a separation deed (*i*).

(*b*) *Wilson* v. *Mushett* (1832), 3 B. & Ad. 743.

(*c*) See p. 446, *ante*, and the cases there cited; *Westmeath* (*Marquis*) v. *Westmeath* (*Marchioness*) (1830), 1 Dow & Cl. 519, H. L.; *Westmeath* (*Marquis*) v. *Salisbury* (*Marquis*) (1831), 5 Bli. (N. S.) 339, H. L.; *Bateman* v. *Ross* (*Countess*) (1813), 1 Dow, 235, H. L.; *Angier* v. *Angier* (1718), Gilb. (CH.) 152; *O'Malley* v. *Blease* (1869), 20 L. T. 899. In the case of a separation deed between unmarried parties who had cohabited, it was held that an annuity granted by the deed did not cease on a resumption of cohabitation (*Re Abdy, Rabbeth* v. *Donaldson*, [1895] 1 Ch. 455, C. A.).

(*d*) See note (*s*), p. 446, *ante*.

(*e*) *Webster* v. *Webster* (1853), 4 De G. M. & G. 437, C. A.

(*f*) *Macan* v. *Macan* (1900), 70 L. J. (K. B.) 90.

(*g*) *Bateman* v. *Ross* (*Countess*), *supra*.

(*h*) *Frampton* v. *Frampton* (1841), 4 Beav. 287.

(*i*) *Rowell* v. *Rowell*, [1900] 1 Q. B. 9, C. A.

Part X.—Legal Proceedings.

SECT. 1.—*Civil Proceedings* (*j*).

SECT. 1. Civil Proceedings.

SUB-SECT. 1.—*By and Against Married Women.*

May sue or be sued as a *feme sole*.

931. A married woman may sue or be sued in contract or in tort (*k*), or otherwise (*l*), in all respects (*m*) as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, nor be made a party to any action or other legal proceeding (*l*) brought by or taken against her (*n*); and she has in her own name the same remedies for the protection and security of her separate property as if it belonged to her as a *feme sole* (*o*).

(*j*) As to procedure in civil proceedings generally, see title PRACTICE AND PROCEDURE, and, so far as is relative to each subject, titles COUNTY COURTS, Vol. VIII., p. 405; DISCOVERY, INSPECTION AND INTERROGATORIES, Vol. XI., p. 35; EXECUTION, Vol. XIV., p. 1; INJUNCTION; INTERPLEADER; JUDGMENTS AND ORDERS; PLEADING; SET-OFF AND COUNTERCLAIM; SPECIFIC PERFORMANCE.

(*k*) The husband is still liable to be joined, at the option of the plaintiff, in an action for tort against his wife; see p. 436, *ante*, and as to liability for tort generally, see title TORT.

(*l*) *Threlfall* v. *Wilson* (1883), 8 P. D. 18 (probate action by married woman executrix); *Re Thompson, Stevens* v. *Thompson* (1888), 38 Ch. D. 317, C. A. (originating summons for administration of a testator's estate); *Re Prynne* (1885), 53 L. T. 465 (application for an injunction restraining the Bank of England from permitting transfer of stock); *Re Outwin's Trusts* (1883), 48 L. T. 410 (petition for appointment of new trustees of a fund in which the petitioner was interested); *Whittaker* v. *Kershaw* (1890), 45 Ch. D. 320, C. A. (action against a married woman residuary legatee to compel her to refund for payment of debts held maintainable, though she had no separate property free from a restraint on anticipation at the time of the action). The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12, is, however, limited to proceedings in which the married woman is herself interested; it does not enable a married woman to act as a next friend or guardian *ad litem* (*Re Somerset* (*Duke*), *Thynne* v. *St. Maur* (1887), 34 Ch. D. 465). As to actions in respect of ante-nuptial obligations, see p. 407, *ante*.

(*m*) The third party procedure applies; and if a married woman enters an appearance in pursuance of a third party notice, judgment may be given against her in respect of her separate property under R. S. C., Ord. 16, r. 52, in default of her satisfying the court that there is a question proper to be tried as to her liability (*Gloucestershire Banking Co.* v. *Phillipps* (1884), 12 Q. B. D. 533). As to suing *in formâ pauperis*, see *Re Atkin's Trusts, Smith* v. *Atkin*, [1909] 1 Ch. 471.

(*n*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2). A married woman could formerly sue or be sued as a *feme sole* only if she was living apart under a decree of judicial separation or had obtained a protection order (see Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 21, 26; *Ramsden* v. *Brearley* (1875), L. R. 10 Q. B. 147), and in certain cases for the protection or security of her separate property under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93) (see note (*o*), *infra*).

(*o*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12, superseding the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 11; *Summers* v. *City Bank* (1874), L. R. 9 C. P. 580 (damages for wrongfully dishonouring a cheque drawn in the course of a separate trade, or for not duly presenting, or not giving due notice of dishonour of, a bill of exchange acquired in such trade. Held, a remedy for the security or protection of wife's separate property); *Moore* v. *Robinson* (1878), 48 L. J. (Q. B.) 156 (damages for expulsion from a beerhouse carried on as a separate trade, and for loss of profits and of fixtures and stock purchased with separate moneys); *Weldon* v. *De Bathe* (1884),

SECT. 1. Civil Proceedings.

No abatement by reason of marriage.

No action or other legal proceeding abates by reason of the marriage of any party, if the cause of action continues (*p*); but, if it is deemed necessary for the complete settlement of the questions involved, the court may order that the husband of any party so marrying shall be made a party and the proceedings be carried on accordingly (*q*).

Limitation.

The periods of limitation run both in favour of and against a married woman as if she were unmarried (*r*).

Damages etc. recovered are separate property.

932. Any damages or costs recovered by a married woman in any such action or proceeding are her separate property (*s*), and therefore may be attached for the purpose of satisfying a judgment against her (*t*), but they are not liable to attachment to answer a judgment against her husband, even if he joined as a co-plaintiff in the action in which the damages or costs were recovered by her (*a*).

Joinder of claims.

933. Claims by or against husband and wife may be joined with claims by or against either of them separately (*b*), subject to the power of the court to order separate trials, or to confine the action to some causes and exclude others, where they cannot conveniently be disposed of together (*c*).

Where husband and wife are joined as co-defendants, they must both be served with the writ of summons, unless the court otherwise orders (*d*).

Where husband and wife join as co-plaintiffs, they are bound to make discovery as in the case of other co-plaintiffs. Their affidavit of documents must disclose not only documents in their joint possession or power, but also those in the possession or power of either of them (*e*).

Security for costs.

934. A married woman plaintiff cannot be ordered to give security for costs in any case where such security could not be

14 Q. B. D. 339, C. A. (action of trespass against a person entering a house bought out of a wife's earnings and in her sole occupation, though defendant did no injury and entered with the husband's authority, the entry being for purposes unconnected with the husband's desire to live with his wife). As to proceedings in matrimonial causes, see pp. 462 *et seq.*, *post.*

(*p*) R. S. C., Ord. 17, r. 1.

(*q*) *Ibid.*, rr. 2, 3.

(*r*) *Lowe* v. *Fox* (1885), 15 Q. B. D. 667, C. A.; *Re Hastings* (*Lady*), *Hallett* v. *Hastings* (1886), 35 Ch. D. 94, C. A.; and see title LIMITATION OF ACTIONS.

(*s*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2).

(*t*) *Holtby* v. *Hodgson* (1889), 24 Q. B. D. 103, C. A.

(*a*) *Beasley* v. *Roney*, [1891] 1 Q. B. 509 (action by husband and wife for damages for personal injuries to wife; jury gave damages to wife and a sum to husband for expenses incurred by him. Held, that a judgment creditor of husband was not entitled to attach wife's damages).

(*b*) R. S. C., Ord. 18, r. 4; County Court Rules, Ord. 4, r. 4.

(*c*) R. S. C., Ord. 18, rr. 1, 7—9; County Court Rules, Ord. 4, r. 7.

(*d*) R. S. C., Ord. 9, r. 3; County Court Rules, Ord. 7, r. 17; formerly service on the husband alone was sufficient.

(*e*) *Fendall* v. *O'Connell* (1885), 29 Ch. D. 899, C. A. (action by husband and wife for breach of trust). In *Smith* v. *Berg* (1877), 36 L. T. 471, it was held that, where defendants were sued as husband and wife, they were not bound to answer an interrogatory as to whether they were in fact married. See also title DISCOVERY, INSPECTION AND INTERROGATORIES, Vol. XI., pp. 61 *et seq.*

ordered if she were unmarried (*f*), even though she may have no separate property, and there is nothing on which the defendant can levy execution (*g*); but if a married woman sues by her next friend, security for costs may be ordered (*h*).

Undertaking as to damages.

935. If a married woman obtains an injunction subject to the usual undertaking as to damages, her sole undertaking must be accepted, even if she has no separate property of any value (*i*). A married woman who has given such an undertaking will be treated on the same footing as her next friend would have been, if she had sued by next friend and he had given the undertaking (*k*).

Payment into court.

936. Where, on an application for summary judgment against a married woman, leave is given to her to defend conditionally on her bringing money into court, and she pays money into court accordingly, the plaintiff, on obtaining judgment for an amount equal to or in excess of that paid in, is entitled to have the money forthwith paid out to him, without an inquiry whether the defendant has separate property, even though the judgment is limited to her separate property and is not against her personally (*l*).

Form of judgment against married woman.

937. A judgment against a married woman, widow, or divorced wife in an action on a contract made during coverture is a proprietary judgment only and not a personal one (*m*).

If the contract was entered into on or since the 5th December, 1893, the judgment extends to all separate property to which she is entitled at the time of the judgment or may subsequently acquire, and also to property which she may subsequently acquire while discovert, excluding any property which at the time of her entering into the contract or thereafter was or is subject to a valid restraint on anticipation (*n*).

(*f*) *Threlfall* v. *Wilson* (1883), 8 P. D. 18 (probate action by married woman executrix); *Severance* v. *Civil Service Supply Association* (1883), 48 L. T. 485 (though the cause of action arose before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75)).

(*g*) *Re Isaac, Jacob* v. *Isaac* (1885), 30 Ch. D. 418, C. A.; *Re Thompson, Stevens* v. *Thompson* (1888), 38 Ch. D. 317, C. A. (originating summons for administration of a testator's estate).

(*h*) *Re Thompson, Stevens* v. *Thompson, supra.*

(*i*) *Re Prynne* (1885), 53 L. T. 465; *Pike* v. *Cave* (1893), 62 L. J. (CH.) 937.

(*k*) *Hunt* v. *Hunt* (1884), 54 L. J. (CH.) 289.

(*l*) *Bird* v. *Barstow*, [1892] 1 Q. B. 94, C. A. (action against a widow on a contract made during coverture).

(*m*) *Scott* v. *Morley* (1887), 20 Q. B. D. 120, C. A.; *Findlater's Brewery Co.* v. *Lynch* (1889), 24 L. R. Ir. 249; *Turnbull* v. *Forman* (1885), 15 Q. B. D. 234, C. A. And see *Collett* v. *Dickenson* (1879), 11 Ch. D. 687. Such a judgment cannot be the foundation of a bankruptcy notice (*Re Lynes, Ex parte Lester & Co.*, [1893] 2 Q. B. 113, C. A.), nor of an application for committal under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5; see p. 457, *post*. As to judgments generally, see title JUDGMENTS AND ORDERS.

(*n*) The judgment is in the ordinary form, and then, in the case of a married woman, proceeds as follows: "such sum and costs to be payable out of separate property of the said defendant which she is now or may hereafter be possessed of or entitled to, and any property which she may hereafter, while discovert, be possessed of or entitled to, and not otherwise: provided that nothing herein contained shall render available to satisfy this judgment any separate property which at the time of entering into the contract sued on in this action, or thereafter, she was or may be restrained from anticipating, unless, by reason of s. 19

SECT. 1. Civil Proceedings.

If the contract was entered into on or since the 1st January, 1883, and before the 5th December, 1893, the judgment is limited to separate property acquired during the coverture and not subject to a valid restraint on anticipation at any time during the coverture (*o*).

Ante-nuptial obligations and torts during coverture.

938. A judgment against a married woman, widow, or divorced wife in respect of an ante-nuptial obligation, or of a tort committed during coverture, is a personal one (*p*), but is limited in a similar manner as regards the property available to satisfy it as a judgment in respect of a contract made on or after the 5th December, 1893 (*q*).

Judgment for costs.

939. Where an action brought by a married woman is dismissed with costs, the judgment is a proprietary, and not a personal one (*r*); but liberty is given to the defendant to apply for payment of the costs out of property which is subject to a restraint on anticipation (*s*).

of the Married Women's Property Act, 1882, such property shall be available to satisfy this judgment notwithstanding such restriction"; or, in the case of a widow or divorced woman, "such sum and costs to be payable out of such property of the said defendant as during her coverture was her separate property, and any property which she is now or may hereafter, while discovert, be possessed of or entitled to, and not otherwise: provided that nothing herein contained shall render available to satisfy this judgment any separate property which she was during her coverture, is now or may hereafter be restrained from anticipating, etc."; see the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1; R. S. C., Appendix F; County Court Rules, Form 151A (3). As to property subject to a restraint on anticipation, see p. 368, *ante*. Income accruing due from property subject, at the date of the contract, to a restraint on anticipation cannot be attached on a judgment against her obtained after her divorce (*Barnett* v. *Howard*, [1900] 2 Q. B. 784, C. A.); nor by the appointment of a receiver after her husband's death (*Brown* v. *Dimbleby*, [1904] 1 K. B. 28, C. A.).

(*o*) In the case of a married woman, the judgment proceeds as follows: "such sum of money and costs to be payable out of her separate property and not otherwise: provided that nothing herein contained shall render available to satisfy this judgment any property which she is restrained from anticipating, unless, by reason etc." (as in note (*n*), p. 455, *ante*); and, in the case of a widow or divorced wife, "such sum of money and costs to be payable out of such property as during her coverture was her separate property and not otherwise: provided that nothing herein contained shall render available to satisfy this judgment any property which she was during her coverture restrained from anticipating, unless etc." (R. S. C., Appendix F; County Court Rules, Form 151A (2)). A judgment against a firm containing a married woman as a partner is limited in form, and has only the same effect as if it were against her by name, and is, therefore, enforceable only against her separate estate (*Re Handford (Frances) & Co., Ex parte Handford (Frances)*, [1899] 1 Q. B. 566, C. A.).

(*p*) *Scott* v. *Morley* (1887), 20 Q. B. D. 120, C. A.; *Robinson, King & Co.* v. *Lynes*, [1894] 2 Q. B. 577 (a bankruptcy notice may be founded on such a judgment in the case of a married woman carrying on a separate trade or business); *Greatorex* v. *Wynne, Butler* v. *Wynne* (1892), 36 Sol. Jo. 527. And see *Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35, C. A.; *Re Beauchamp, Ex parte Beauchamp*, [1904] 1 K. B. 572, C. A.

(*q*) The judgment is similar in form to that referred to in note (*n*), p. 455, *ante*, and the words "and not otherwise" recently omitted (see R. S. C., Appendix F; County Court Rules, Form 151A (1)) are now inserted.

(*r*) *Paget* v. *Paget*, [1898] 1 Ch. 470, 477, C. A.; *Pawley* v. *Pawley*, [1905] 1 Ch. 593; *Re Walter* (1891), 7 T. L. R. 445 (a married woman committed for not complying with an order for the payment of costs was released on *habeas corpus*); *Galmoye* v. *Cowan* (1889), 58 L. J. (CH.) 769; *Goatley* v. *Jones* (No. 1), *Goatley* v. *Jones* (No. 2), [1909] 1 Ch. 557.

(*s*) *Pawley* v. *Pawley, supra*; R. S. C., Appendix F.; County Court Rules, Ord. 23, r. 3. As to the payment of costs out of property subject to a

Order against married woman executrix or trustee.

940. A personal order may be made against a married woman executrix or trustee for the payment into court of a sum of money in her hands belonging to the estate or trust, and she may be attached for disobedience to such an order; but if money has been lost by her *devastavit*, the judgment against her in respect thereof must be a proprietary, and not a personal, one (*t*).

Execution.

941. A proprietary judgment against a married woman may, subject to the limitations in the judgment, be enforced against her separate property, other than property which she is restrained from anticipating (*a*), by the ordinary modes of execution against property (*b*), and debts due to her may be attached to satisfy such a judgment (*c*), or a receiver by way of equitable execution may be appointed (*d*).

A married woman, widow, or divorced wife may, on proof of means, be committed to prison (*e*) for default in payment of a sum due under a personal judgment or order (*f*), but no order for payment or committal can be made where the judgment is merely a proprietary one (*g*).

restraint on anticipation in the case of proceedings instituted by a married woman generally, see p. 374, *ante*. The *onus* is on a married woman plaintiff, whose action is dismissed with costs, to show why an order for payment out of property subject to a restraint on anticipation should not be made (*Pawley* v. *Pawley*, [1905] 1 Ch. 593).

(*t*) *Re Turnbull, Turnbull* v. *Nicholas*, [1900] 1 Ch. 180; and see titles CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 300; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 340.

(*a*) As to execution against the arrears of income from property subject to a restraint on anticipation, see p. 369, *ante*.

(*b*) *E.g.*, by writ of *fi. fa.* or *elegit* etc.; see title EXECUTION, Vol. XIV., pp. 37 *et seq.*

(*c*) *Holtby* v. *Hodgson* (1889), 24 Q. B. D. 103, C. A. (damages recovered by her in an action for personal injuries); *Beasley* v. *Roney*, [1891] 1 Q. B. 509. Alimony payable under a decree of judicial separation is not separate property which can be attached (*Anderson* v. *Hay* (*Lady*) (1890), 7 T. L. R. 113), nor is income accruing due after the date of the judgment in respect of property subject to a restraint on anticipation and in the hands of a trustee (*Galmoye* v. *Cowan* (1889), 58 L. J. (CH.) 769).

(*d*) *Bryant* v. *Bull, Bull* v. *Bryant* (1878), 10 Ch. D. 153; *Re Peace and Waller* (1883), 24 Ch. D. 405, C. A.; *Bird* v. *Argent* (1887), 4 T. L. R. 12; *Loibl* v. *Fraser* (1893), 9 T. L. R. 534 (reversionary interest in personalty). A receiver may be appointed to protect property out of which costs are payable by order, even though the taxation of the costs has not been completed and the order does not specify any particular fund out of which they are to be paid (*Cummins* v. *Perkins*, [1899] 1 Ch. 16, C. A.). A receiver will not be appointed, in respect of a judgment obtained on a covenant entered into by a married woman after the date of a protection order, so far as regards her life interest devolving upon her prior to the desertion (*Hill* v. *Cooper*, [1893] 2 Q. B. 85, C. A.). As to the appointment of a receiver of the income of property subject to a restraint on anticipation, see p. 369, *ante*; and as to receivers generally, see title RECEIVERS.

(*e*) Under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.

(*f*) *Scott* v. *Morley* (1887), 20 Q. B. D. 120, C. A.; *Robinson, King & Co.* v. *Lynes*, [1894] 2 Q. B. 577; *Greatorex* v. *Wynne, Butler* v. *Wynne* (1892), 36 Sol. Jo. 527. A married woman is liable to imprisonment in default of distress for non-payment of parochial rates (*Re Allen*, [1894] 2 Q. B. 924).

(*g*) *Scott* v. *Morley*, *supra*; *Draycott* v. *Harrison* (1886), 17 Q. B. D. 147; *Meager* v. *Pellew* (1885), 14 Q. B. D. 973, C. A.

SECT. 1. Civil Proceedings.

Sequestration.

942. A writ of sequestration, which may be issued for disobedience to an order directing the payment of money into court, or any other act to be done, within a limited time (*h*), or, by leave and at the discretion of the court, to enforce payment of costs (*i*), is properly issued in the ordinary form against the estate and effects of a married woman, without expressly limiting it to separate property not subject to a restraint on anticipation, although it only operates against property not so subject (*k*). On an application for leave to issue the writ, it is not necessary to indicate any particular property against which it will operate (*l*).

Examination in aid of execution.

943. Where a judgment or order against a married woman is for the recovery or payment of money, the court may order that she be orally examined before a judge or officer of the court, as to whether any and what debts are owing to her, and whether she has any and what other property or means of satisfying the judgment or order, and may make an order for her attendance and examination accordingly, and also for the attendance and examination of any other person, and for the production of any books or documents (*m*).

Payment out of court.

944. On an application for payment out of court of a fund due to a married woman, an affidavit by the husband and wife is, as a general rule, required, showing that there has been no settlement nor agreement for a settlement of the fund (*n*).

Affidavit.

The affidavit may be dispensed with when the amount is very small (*o*), and the court will act on the wife's sole affidavit if the husband is permanently residing abroad (*p*).

Small fund.

Where the fund has been assigned, and the application for payment out is made by the assignee, the affidavit may be made by any person with a knowledge of the circumstances, if the husband and wife refuse to make it (*q*).

(*h*) R. S. C., Ord. 43, r. 6.

(*i*) *Ibid.*, r. 7; *Hulbert* v. *Cathcart*, [1896] A. C. 470.

(*k*) *Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A.; *Worrall* v. *Worrall* (1895), 11 T. L. R. 573.

(*l*) *Hulbert* v. *Cathcart*, *supra*.

(*m*) *Aylesford* (*Countess*) v. *Great Western Rail. Co.*, [1892] 2 Q. B. 626, C. A.; R. S. C., Ord. 42, r. 32; County Court Rules, Ord. 25, r. 71.

(*n*) *Minet* v. *Hyde* (1789), 2 Bro. C. C. 663; *Lawrence* v. *Johnson* (1843), 7 Jur. 1122; *Britten* v. *Britten* (1846), 9 Beav. 143; *Rose* v. *Rolls* (1839), 1 Beav. 270. A similar affidavit by a widow is required on an application for payment out of money due to her (*Elrington* v. *Elrington* (1859), 4 Drew. 545).

(*o*) *Veal* v. *Veal* (1867), L. R. 4 Eq. 115 (amount less than £10); *Guest* v. *Neames*, [1884] W. N. 227 (amount less than £20).

(*p*) *Wilkinson* v. *Schneider* (1870), L. R. 9 Eq. 423. Where the wife was permanently resident abroad, the court accepted the affidavit of a solicitor disclosing facts showing that it was unlikely that any settlement had been made, and stating that he had been told by the husband and wife that there was no settlement (*Woodward* v. *Pratt* (1873), L. R. 16 Eq. 127). Where a wife, having obtained a protection order, brought an administration suit as a *feme sole*, the court, on an application by her for payment of her share, required an affidavit of the continuance of the desertion, and also that there had been no settlement (*Ewart* v. *Chubb* (1875), 45 L. J. (CH.) 108).

(*q*) *Rowland* v. *Oakley* (1850), 14 Jur. 845; *Timothy* v. *Crown* (1900), 82 L. T. 142 (the affidavit in such a case should allege the husband's and wife's refusal).

Separate examination.

945. Where a married woman is entitled to or interested in a fund in court, which is not her separate property nor given to her separate use (*r*), it will not be paid out without an examination of the wife apart from her husband in order to ascertain whether she consents to waive her equity to a settlement (*s*), and desires payment to be made to her husband, or whether she wishes to assert her equity to a settlement (*t*). No person connected with the husband ought to be present at the examination (*a*).

Small fund.

The separate examination may be dispensed with, and the fund paid out on the joint application of husband and wife, where the amount is small (*b*), and it is invariably dispensed with if the amount is less than £200 (*c*).

A fund belonging to a married woman for her separate use or as her separate property will be paid out to her on her separate receipt without any examination (*r*).

SUB-SECT. 2.—*Between Husband and Wife.*

Wife's remedies for security of separate property.

946. A wife has the same civil remedies against her husband for the protection and security of her separate property as if it belonged to her as a *feme sole* (*d*). She may sue him in trover or detinue (*e*), and, if she has a trade or business which is her separate property, he may be restrained by injunction from interfering with it (*f*), but

(*r*) *Re Voss, King* v. *Voss* (1880), 13 Ch. D. 504 (personalty to which the wife was entitled as next of kin under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 7); *Re Clarke's Trusts* (1882), 21 Ch. D. 748 (sum of money in cash bequeathed to married woman for her separate use); *Anon.* (1857), 3 Jur. (N. S.) 839; *Lechmere* v. *Brotheridge* (1863), 32 Beav. 353; *Deignan* v. *Deignan* (1884), 13 L. R. Ir. 278.

(*s*) See p. 340, *ante*. If the wife is a minor, she cannot waive her equity to a settlement (*Shipway* v. *Ball* (1887), 16 Ch. D. 376; *Stubbs* v. *Sargon* (1839), 2 Beav. 496).

(*t*) *Minet* v. *Hyde* (1789), 2 Bro. C. C. 663; *Tasburgh's Case* (1813), 1 Ves. & B. 507. In *Binford* v. *Bawden* (1792), 1 Ves. 512, where money was devised to be laid out in the purchase of land for a married woman in tail, a separate examination was directed to ascertain whether she elected to take the money or desired to have it laid out as directed. And see County Court Rules, Ord. 37, r. 5.

(*a*) *Re Bendyshe* (1857), 3 Jur. (N. S.) 727; *Re Morton's Leasehold Estate* (1874), 31 L. T. 82 (amount under £500).

(*b*) *Frith* v. *Lewis, Frith* v. *Foster*, [1881] W. N. 145 (in this case the amount was £264).

(*c*) *Elworthy* v. *Wickstead* (1819), 1 Jac. & W. 69 (in this case the money, being less than £200, was paid to the husband on a joint petition of husband and wife, though there was a suggestion by the trustees that she did not really concur in the petition); *Roberts* v. *Collett* (1853), 1 Sm. & G. 138; County Court Rules, Ord. 37, r. 5 (less than £200, or £10 in annual payments). But the court will not allow a married woman to elect to take her share of the proceeds of realty as personalty without her separate examination, even if her share does not amount to £200 (*Re Shaw, Topham* v. *Burgoyne* (1879), 49 L. J. (CH.) 213).

(*d*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12. As to actions on contracts, see pp. 432, 453, *ante*.

(*e*) *Larner* v. *Larner*, [1905] 2 K. B. 539; and see title TROVER AND DETINUE.

(*f*) *Wood* v. *Wood* (1871), 19 W. R. 1049 (hotel settled on the wife to be conducted by her for the benefit of herself and children, and to be occupied by her as if she were a *feme sole*); *Gaynor* v. *Gaynor*, [1901] 1 I. R. 217 (public house belonging to the wife as her separate property).

SECT. 1. Civil Proceedings.

he cannot be restrained from entering premises belonging to and in the occupation of his wife in the exercise of his marital right of *consortium* (*g*).

Spouses cannot generally sue one another for torts.

947. Except for the security and protection of her separate property, a wife cannot sue her husband for a tort during coverture, and in no case, even in respect of his property, can a husband sue his wife for a tort during coverture (*h*). But if a wife, on obtaining an injunction against her husband, enters into the usual undertaking as to damages, he is entitled, on the injunction being discharged, to enforce her undertaking (*i*).

Summary proceedings as to property.

948. Where any question arises between husband and wife as to the title to or possession of property, either party or any bank, corporation, company, public body, or society, in whose books any stocks, funds or shares of either party are standing, may apply (*j*), by summons or otherwise in a summary way, to any judge of the High Court (*k*), or, at the option of the applicant irrespectively of the value of the property in dispute, to the judge of the county court of the district in which either party resides, and the judge

(*g*) In *Symonds* v. *Hallett* (1883), 24 Ch. D. 346, C. A., the wife was entitled to a house for her separate use, in which she resided with her husband. Differences arose, and they ceased to cohabit. The husband claimed to use the house, not for the purpose of consorting with his wife, but generally for his own purposes. An *interim* injunction was granted restraining him from entering the house, and, a divorce suit being pending, the Court of Appeal confirmed the *interim* injunction, but declined to express an opinion whether a final injunction ought to be granted at the trial of the action. In *Wood* v. *Wood* (1871), 19 W. R. 1049, the husband was restrained from keeping possession of the hotel or any part thereof, but the decision was based on the special terms of the deed (a post-nuptial settlement), by which he settled the premises on his wife, and cannot be relied on as an authority against the proposition stated in the text. In *Gaynor* v. *Gaynor*, [1901] 1 I. R. 217, the court, while restraining the husband from interfering with the business carried on, refused to restrain him from entering the premises, though he had illtreated his wife and acted as if he were the owner of the business. And see *Weldon* v. *De Bathe* (1884), 14 Q. B. D. 339, C. A., cited note (*o*), p. 453, *ante*.

(*h*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12; *Phillips* v. *Barnet* (1876), 1 Q. B. D. 436 (divorced wife held not entitled to sue husband for an assault during the coverture); *Tinkley* v. *Tinkley* (1909), 25 T. L. R. 264, C. A. (wife not entitled to sue husband for false imprisonment or malicious prosecution); *Young* v. *Young* (1903), 5 F (Ct. of Sess.) 330 (neither entitled to sue the other for slander). The husband's only remedy in case of any wrongful act by his wife with respect to his property is to take summary proceedings under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17; see *infra*.

(*i*) *Hunt* v. *Hunt* (1884), 54 L. J. (CH.) 289.

(*j*) This does not preclude a married woman from proceeding by an action of detinue or otherwise in the ordinary way (*Larner* v. *Larner*, [1905] 2 K. B. 539).

(*k*) Where a wife, who had obtained a decree for judicial separation, claimed certain furniture in her husband's house as her separate property, and the husband disputed the claim, an inquiry before the registrar was directed as to whether the furniture was her separate property or not (*Phillips* v. *Phillips* (1888), 13 P. D. 220). A similar direction may be given in proceedings for dissolution of marriage, but the registrar has no jurisdiction in such a case to make any order in respect of the property claimed; he merely has power to inquire and report as to the title to the property in question (*Wood* v. *Wood and White* (1889), 14 P. D. 157; *Joseph* v. *Joseph*, [1909] P. 217).

may make such order (*l*) with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit, or may direct the application to stand over from time to time, and may direct any inquiry (*m*) touching the matters in question to be made in such manner as he shall think fit (*n*). Any such application, if either party so requires, may be heard in the judge's private room (*n*).

Appeal.

949. Any order of a judge of the High Court on any such application is subject to appeal in the same way as an order made by the same judge in a suit pending, or on an equitable plaint, in such court (*o*), and any order of the county court is subject to appeal in the same way as any other order made by the same court (*p*).

Removal from county court to High Court.

950. Any such proceedings in a county court in which, by reason of the value of the property in dispute (*q*), the court would not have had jurisdiction independently of the foregoing provisions, may, at the option of the defendant or respondent to the proceedings, be removed as of right into the High Court by writ of *certiorari;* but any order made or act done in the course of the proceedings before the removal is valid, unless the contrary is ordered by the High Court (*r*).

Bank etc. to be treated as stakeholder.

951. Any bank, corporation, company, public body, or society must, in the matter of any such application, for the purpose of costs and otherwise, be treated as a stakeholder only (*r*).

(*l*) In *Gaynor* v. *Gaynor*, [1901] 1 I. R. 217, an order was made declaring the wife entitled to a public-house as her separate property, and restraining the husband from interfering with the business carried on there, he having systematically interfered in the business and acted as if he were the owner thereof.

(*m*) See note (*k*), p. 460, *ante.*

(*n*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17, superseding the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 9.

(*o*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17. But the court is reluctant to interfere with the decision of a judge in chambers (*Re Schofield* (1890), 7 T. L. R. 60); see title PRACTICE AND PROCEDURE.

(*p*) *Ibid.;* see title COUNTY COURTS, Vol. VIII., pp. 601 *et seq.*, 671.

(*q*) The county court has jurisdiction in personal actions, including detinue, where the amount claimed does not exceed £100 (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56, as amended by the County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3); in actions for the recovery of land where neither the rent nor the value of the property exceeds £100 a year (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 59, as amended by the County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3); and in actions for the execution of trusts, and certain other specified proceedings of an equitable nature where the value of the property in question does not exceed £500 (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67); and see title COUNTY COURTS, Vol. VIII., pp. 429 *et seq.*, 622 *et seq.* It is not by any means clear which limit of value is referred to with regard to the right of removal by *certiorari*, and there is no authority on the point. Probably it depends on the nature of the question in dispute, *e.g.*, whether it relates to goods or chattels, which would be determined in the ordinary way by an action of detinue or trover, or to land, which might be the subject of an action of ejectment or an equitable claim for a declaration of title.

(*r*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17. As to the procedure in the county court, see title COUNTY COURTS, Vol. VIII., p. 671.

SECT. 1. Civil Proceedings.

For the purpose of any such proceedings, the legal personal representative of a married woman has the same rights and liabilities, and is subject to the same jurisdiction, as she would be if she were living (*s*).

Legal personal representative.

SECT. 2.—*Criminal Proceedings between Husband and Wife.*

Criminal proceedings.

952. The nature of the redress by a husband or wife against each other by way of criminal proceedings is dealt with elsewhere (*t*).

Part XI.—Matrimonial Causes.

SECT. 1.—*The Divorce Division of the High Court.*

SUB-SECT. 1.—*In General.*

Jurisdiction.

953. The power to adjudicate upon matrimonial disputes, and to make declarations as to legitimacy, validity of marriage and nationality in certain cases (*a*), is assigned to the Probate, Divorce and Admiralty Division (Divorce) of the High Court of Justice (for the sake of brevity hereinafter called the "Divorce Division" (*b*)), subject to certain rights of appeal to the Court of Appeal and the House of Lords (*c*). This power is exclusive, except that Metropolitan police magistrates or justices in petty sessions can make and discharge orders for the protection of a wife's property (*d*), and courts of summary jurisdiction can grant, either to a wife or to a husband, relief (*e*) similar to a judicial separation (*f*), subject

Exclusive except as to—
(i.) Protection orders;
(ii.) summary jurisdiction.

(*s*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 23.

(*t*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 338, 634, 635, 680, 772; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12, 16. As to the prosecution of a person eloping with the wife, and assisting her to carry off the husband's property, or subsequently receiving it, see *R.* v. *Berry* (1859), Bell, C. C. 95, C. C. R.; *R.* v. *Avery* (1859), Bell, C. C. 150, C. C. R.; *R.* v. *Payne*, [1906] 1 K. B. 97, C. C. R.; *R.* v. *Kenny* (1877), 2 Q. B. D. 307, C. C. R. A wife cannot take criminal proceedings against her husband, nor a husband against his wife, for a defamatory libel, whether they are living together or not (*R.* v. *London* (*Lord Mayor*) (1886), 16 Q. B. D. 772; and see title LIBEL AND SLANDER). As to when husband and wife are competent or compellable to give evidence against each other in criminal proceedings, and on the subject of crimes by one against the other generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 401, 402, 405, 611, 634 *et seq.*

(*a*) Under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), and the Greek Marriages Act, 1884 (47 & 48 Vict. c. 20).

(*b*) See the *dictum* of HANNEN, P. (1875), *Times*, 10th November; compare Divorce Rule 219, p. 498, *post*; and see *Euston* v. *Smith* (1884), 9 P. D. 57, 58; *O'Shea* v. *Parnell* (1890), 15 P. D. 59, 63. As to rules, see p. 469, *post*. The term "Divorce Rule" is used in this title in preference to "Matrimonial Causes Rules."

(*c*) See p. 557, *post*.

(*d*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21; Matrimonial Causes Act, 1861 (27 & 28 Vict. c. 44), s. 1; see pp. 501, 562, *post*.

(*e*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39); Licensing Act, 1902 (2 Edw. 7, c. 28), s. 5; and see p. 596, *post*.

(*f*) See p. 500, *post*.

to a right of appeal to a Divisional Court (*g*) of the Divorce Division (*h*).

SUB-SECT. 2.—*The Court.*

(i.) *The Judges.*

Permanent judges.

954. The President (*i*) of the Probate, Divorce and Admiralty Division, and one other judge attached thereto, are the permanent judges of the Divorce Division. Both are liable to go on circuit (*k*), though it is not the practice for them to do so, and they or two other judges of the High Court sitting together (*l*) constitute a Divisional Court of the Divorce Division (*m*).

Divisional Court.

(ii.) *The Registrars.*

Registrars.

955. The four registrars of the Principal Probate Registry of the High Court of Justice at Somerset House, who are appointed by the President of the Division (*n*), are also the registrars of the Divorce Division (*o*). They have under their control clerks, record keepers, a sealer and other officers (*p*).

The registry.

Duties and powers of registrars.

956. Their principal duties and powers (*q*) during the sittings (*r*), in addition to hearing most classes of summonses (*s*), are :—Taking care of all pleadings and documents (*t*); examining and certifying copies (*u*) thereof, and affixing the seal of the court (*x*) when required; attending (the three junior registrars perform this duty) the sitting judge, in court and in chambers, and also the lords justices (*y*) in case of an appeal; assigning guardians (*a*); approving applications to proceed *in formâ pauperis* (*b*), and affidavits on a demand for resumption of cohabitation (*c*); settling advertisements for substituted service of citations (*d*) and orders; signing writs (*e*); allotting

(*g*) See p. 602, *post*.
(*h*) As to Jewish "divorces," see *Levi* v. *Levi* (1910), *Times*, 18th February.
(*i*) A barrister of fifteen years' standing, or a judge of the High Court or of the Court of Appeal, is eligible for the office of President (Judicature Act, 1891 (54 & 55 Vict. c. 53), s. 2). See also Judicature Act, 1877 (40 & 41 Vict. c. 9), s. 4; Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 8.
(*k*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 8.
(*l*) Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 40, 44.
(*m*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 17; and see pp. 561, 602, *post*.
(*n*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 84.
(*o*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 14 (repealed by the Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78), s. 29); Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 77; R. S. C., Ord. 60, r. 1: and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 152.
(*p*) Divorce Rules 172, 173.
(*q*) Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 4, and Divorce Rules; compare R. S. C., Ord. 54, r. 12.
(*r*) As to business during vacations, see p. 467, *post*.
(*s*) See p. 466, *post*.
(*t*) Divorce Rule 118.
(*u*) *Ibid.*, 119.
(*x*) *Ibid.*, 120; and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 13.
(*y*) Compare R. S. C., Ord. 60, r. 2.
(*a*) See p. 504, *post*.
(*b*) See p. 505, *post*.
(*c*) See p. 499, *post*.
(*d*) See p. 510, *post*.
(*e*) See pp. 585 *et seq.*, *post*.

SECT. 1. The Divorce Division of the High Court.

alimony (*f*); administering oaths (*g*); issuing subpœnas (*h*); requiring the attendance of a husband or wife and others, when necessary, on questions of alimony (*i*), and of maintenance and variation of settlements etc. (*k*); selecting medical inspectors, and attending the identification of parties to a nullity suit to be medically inspected (*l*); personally opening the reports of medical inspectors (*m*), and the depositions of witnesses taken by examiners or commissioners, and signing minutes (*n*); settling the questions for a jury (*o*); ascertaining the amount to be paid or secured, and making the necessary order, for a wife's costs (*p*); certifying that the papers are in order before a case is set down for trial (*q*); granting a stay, removing petitions from the cause lists when necessary (*r*); inquiring into, and reporting to the judge on, questions of maintenance and variation of settlements (*s*); inquiring into disputes as to property (*t*) between husband and wife, on the direction of the judge, and reporting to him; taxing bills of costs (*u*), and ordering payment thereof when taxed and certified (*x*); making charging and garnishee orders and appointing receivers (*y*); procuring discovery in aid of execution (*a*); making orders for the consolidation of cross suits (*b*), and for payment of alimony (*c*).

SUB-SECT. 3.—*Business of the Court.*

(i.) *In Open Court. In Camerâ. In Chambers.*

In open court.

957. The judges of the Divorce Division sit at the Royal Courts of Justice at the same time as the other judges of the High Court (*d*), and ordinarily in open court, although they have power,

(*f*) See pp. 516, 563, *post.*

(*g*) Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 2; Oaths Acts, 1888 (51 & 52 Vict. c. 46), and 1909 (9 Edw. 7, c. 39); and see Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 12 (repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19)).

(*h*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 49, and Divorce Rules 109, 180; see p. 531, *post.* A person failing to attend before a registrar when ordered is not in contempt unless conduct money has been provided (*Townend* v. *Townend* (1905), 21 T. L. R. 657; *Jennings* v. *Jennings* (1865), L. R. 1 P. & D. 35).

(*i*) See pp. 518, 563, *post.*

(*k*) Divorce Rule 204; and generally, see pp. 564 *et seq.*, *post.*

(*l*) See p. 527, *post.*

(*m*) *Ibid.*

(*n*) See pp. 535 *et seq.*, *post.*

(*o*) See p. 529, *post.*

(*p*) See p. 523, *post.*

(*q*) See p. 528, *post.*

(*r*) See p. 530, *post.*

(*s*) Divorce Rule 101; and see pp. 564, 571, *post.*

(*t*) Under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17; see p. 521, *post.*

(*u*) See p. 580, *post.*

(*x*) See p. 583, *post.*

(*y*) See pp. 588, 589, *post.*

(*a*) See p. 590, *post.*

(*b*) See p. 530, *post.*

(*c*) See pp. 516, 563, *post.*

(*d*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 12; see also Orders

inherited from the Ecclesiastical Courts (*e*), to sit *in camerâ*, a practice which, so far as reported (*f*), appears to have been adopted only in cases of nullity of marriage for incapacity (*g*). But in cases where the ends of justice may be defeated owing to the difficulty of obtaining the necessary evidence from witnesses in open court, the judges sometimes exercise their inherent jurisdiction and exclude the public from the court during the whole or part of the hearing (*h*); and occasionally, when the details of the case are very unpleasant, the judge orders the removal from the court of women and children (*i*).

In camerâ.

Excluding the public.

(ii.) *Motions.*

958. The following matters must be dealt with on motion (*k*):— Applications for substituted service (*l*) of citations and orders; for leave to proceed without naming a co-respondent or to strike out the name of a deceased co-respondent (*m*); for attachment (or committal) and sequestration (*n*); for an injunction (*o*) (if *ex parte*, this may be made in judge's chambers); for confirming or varying a registrar's report, as to maintenance (*p*), and variation of settlements (*q*); for rescinding decrees *nisi* (*r*) where the petitioner does not oppose; and for discharging protection orders (*s*).

Motions.

959. A case on motion (*t*), setting out shortly the proceedings, the facts of the case, and what order is asked for, and also a copy of the notice of motion, must always be filed. The notice must be delivered to opponents (*u*) (if any), with copies of affidavits and documents (*v*). The notice must be in writing, and signed by the party or his solicitor (*w*). All papers must be lodged at the

Case on motion.

Lodging papers.

in Council, 12th December, 1883, and 1st March, 1907; W. N., Pt. 2 (1883), p. 591; (1907), p. 79.

(*e*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22; see also *M.* (*falsely called H.*) v. *H.* (1864), 3 Sw. & Tr. 517, where the evidence was so offensive that Sir J. P. WILDE desired that cases of nullity for incapacity should in future be tried *in camerâ*, and, with the consent of counsel, ordered them to be so tried.

(*f*) *A.* v. *A.* (1875), L. R. 3 P. & D. 230 (restitution; unnatural offences alleged; tried *in camerâ*); see *C.* v. *C.* (1869), L. R. 1 P. & D. 640.

(*g*) See p. 470, *post.*

(*h*) *A.* v. *A.*, *supra*; *Cohen* v. *Cohen* (1897), 13 T. L. R. 255; *D.* v. *D.*, *D.* v. *D. and G.*, [1903] P. 144; *De Lisle* v. *De Lisle* (1904), *Times*, 15th March.

(*i*) *Barnett* v. *Barnett* (1859), 29 L. J. (P. M. & A.) 28.

(*k*) In term time motions are heard in court by a judge, usually on Mondays at 11 o'clock, but for urgent matters special leave may be obtained. As to vacation business, see p. 467, *post.*

(*l*) See p. 509, *post.*

(*m*) See pp. 506, 537, *post.*

(*n*) See pp. 585, 586, *post.*

(*o*) See p. 590, *post.*

(*p*) See p. 564, *post.*

(*q*) See p. 571, *post.*

(*r*) See p. 555, *post.*

(*s*) Divorce Rule 125; and see p. 562, *post.*

(*t*) Divorce Rule 147.

(*u*) *Ibid.* 115; this must be delivered four clear days before the motion.

(*v*) Divorce Rule 150.

(*w*) *Ibid.* 113.

SECT. 1. The Divorce Division of the High Court

registry (*x*), and if some of the necessary papers are already in the registry, the applicant or his solicitor must take care that they are looked up, and sent with the case on motion to the judge (*y*). The registrar will not allow the motion to come on if the papers are defective (*z*).

Affidavits.

960. Original affidavits in opposition to the application are handed in at the hearing to the registrar (*a*), who (*b*) enters the order made, a copy of which may be obtained on application after notice. If an order be made without proper notice having been given, it will not stand (*c*), and, if the hearing be adjourned, a motion will be restored to the list only on notice of the adjourned motion being given at the registry in the same way as if it were an original motion.

(iii.) *Summonses.*

Summonses.

961. Any person, in any matter in the Divorce Division, may take out a summons (in duplicate, stating the date and hour when returnable), if not contrary to the rules or practice (*d*). The name of the matter, and of the person taking out the summons, and the fact of the issue thereof are entered in the minutes at the registry, and a copy of the summons is served on the party summoned (*e*).

Before registrar.

Most summonses (*f*) are heard in the first instance (*g*) by one of the registrars (*h*), including applications for:—extension of time (*i*); leave to file an answer etc. (*j*), or to appear after default (*k*); leave to intervene (*l*); leave to amend pleadings or to file a supplemental petition (*m*); an order by consent to strike out pleadings (*n*), or to dismiss a petition (*o*); a trial by jury (*p*); leave to take evidence out of court (*q*) (except that of a party to the suit, when leave is given only by a judge); leave to dispense with a guardian on attaining twenty-one (*r*); an order by consent for alimony (*s*);

(*x*) By 2 p.m. on the preceding Wednesday.
(*y*) Divorce Rule 149.
(*z*) *Ibid.*, 148.
(*a*) The registrar sends them to the registry to be filed.
(*b*) Briefs are not left with him.
(*c*) Divorce Rule 116.
(*d*) *Ibid.*, 160.
(*e*) *Ibid.*, 161: one clear day before it is returnable, and before 7 p.m., but on Saturdays before 2 p.m.
(*f*) For the exceptions, see p. 468, *post*.
(*g*) At Somerset House on Tuesdays and Fridays at 11.30, and other matters by special appointment. As to interlocutory appeals, see p. 559, *post*.
(*h*) Divorce Rules 168 and (since 1875) 181, 182.
(*i*) *Ibid.*, 122.
(*j*) *Ibid.*, 37.
(*k*) *Ibid.*, 185; see p. 511, *post*.
(*l*) Under the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 3; Divorce Rule 23, which directs a motion, does not apply to this, but to the King's Proctor; see p. 552, *post*; and see *Farrell* v. *Farrell* (1896), 76 L. T. 167.
(*m*) See p. 502, *post*.
(*n*) See p. 512, *post*.
(*o*) See p. 539, *post*.
(*p*) See p. 528, *post*.
(*q*) See p. 535, *post*.
(*r*) See p. 504, *post*.
(*s*) See p. 517, *post*.

discovery (*a*); particulars (*b*); appointment of medical inspectors (*c*); access to children (*d*): but a registrar can refer any case to a judge (*e*). Summonses for custody of children, or for leave to take them out of the jurisdiction, or for an order to bring them within the jurisdiction (*f*), or for leave to take evidence of a party to a suit out of court (*g*), or in any other way to deal with a suit in the judge's list, or to have issues against a respondent and co-respondent tried separately (*h*), or for the apportionment of damages (*i*), or (it would appear) for leave to administer interrogatories (*k*), must be heard by the judge, who also deals in chambers with appeals (*l*) and references (*m*) from the registrars.

Before judge.

962. On production of the original summons (*n*) and after hearing both sides (*o*), or by consent indorsed on the summons (*p*), an order may be made, entered on the minutes (*q*), and, if necessary, formally drawn up in the registry (*r*), on the application of either party (*s*), but if the party summoned does not appear at the appointed place, at the end of half an hour from the time named an order may be made (on an affidavit of service and no attendance) in his absence (*t*).

The order.

If the party taking out the summons has not arrived within half an hour from the time named therein, that is sufficient to prevent his being heard on that occasion (*u*).

If a summons be withdrawn, the fee paid for the order is returned (*x*).

(iv.) *During Vacations.*

963. In the Divorce Division time runs in vacation (*y*), and, although no suits are actually tried, most of the other matters are dealt with, and although registrars do not tax costs nor deal with alimony, maintenance, or variation of settlements during

When time runs.

(*a*) As to interrogatories, see p. 526, *post.*
(*b*) See p. 513, *post.*
(*c*) See p. 527, *post.*
(*d*) See p. 521, *post.*
(*e*) Divorce Rule 183.
(*f*) See p. 522, *post.*
(*g*) See p. 535, *post.*
(*h*) See p. 530, *post.*
(*i*) See p. 579, *post.*
(*k*) *Harvey* v. *Lovekin* (1884), 10 P. D. 122, 129, C. A.
(*l*) Divorce Rules 43, 184, 206.
(*m*) *Ibid.*, 183, 206.
(*n*) *Ibid.*, 162.
(*o*) *Ibid.*, 163.
(*p*) *Ibid.*, 167.
(*q*) *Ibid.*, 163.
(*r*) *Ibid.*, 166.
(*s*) If either side intends to appear by counsel, notice must be given to the opponent, otherwise an adjournment may be allowed. Costs of counsel attending will not be allowed on taxation unless a certificate for counsel be obtained at the hearing, though, when counsel appear on both sides before a judge, this is dispensed with. A solicitor who taxes his bill against his own client should also obtain such a certificate on application *ex parte.*
(*t*) Divorce Rule 164.
(*u*) *Ibid.*, 165; and the registrar may mark the attendance of the party's opponent, with costs.
(*x*) An allowance being made for the spoilt stamp.
(*y*) But see pp. 557 *et seq.*, *post.*

SECT. 1. The Divorce Division of the High Court.

Powers of registrars.

Vacation judge.

vacation, except in special circumstances, they sit to hear such summonses as may be brought before them in term time (*a*), and to hear motions, which must be attended by counsel (*b*), for substituted service, to strike out the name of a deceased co-respondent, and for leave to proceed without naming a co-respondent (*c*). They may also discharge from prison a person who has been committed (*d*). All other summonses and motions are heard on leave (obtained from the judge or registrar) by the vacation judge (*e*), who also pronounces decrees absolute in open court.

SUB-SECT. 4.—*How Practice and Procedure are Governed.*

(i.) *In General, and where no Special Provision.*

Not by Rules of Supreme Court, but by Judicature Acts.

964. The practice and procedure of the Divorce Division are not governed by the Rules of the Supreme Court, save as therein expressly provided (*f*), but by the Judicature Acts, which incorporate the various Matrimonial Causes Acts and the rules made thereunder (*g*); and, through them, by the practice founded on, and growing out of, that of the Ecclesiastical Courts (*h*).

Application of the common law.

In the absence, however, of rule or practice as to any particular point, the Rules of the Supreme Court are sometimes taken as a guide (*i*), or the common law is applied (*k*).

(ii.) *Under the Matrimonial Causes Acts and Rules.*

Apply to England only.

965. The operation of the various Matrimonial Causes Acts (*l*) is confined to England (*m*) and Wales, and does not extend to

(*a*) See p. 463, *ante*.

(*b*) On alternate Wednesdays at 12.30 p.m., during the Long Vacation. Papers for motions, whether before the vacation judge or a registrar, must be lodged at the registry before 2 p.m. on the Friday previous to hearing.

(*c*) Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 4.

(*d*) See p. 586, *post*.

(*e*) Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 27, 28; and R. S. C., Ord. 63, rr. 11, 12.

(*f*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 18; R. S. C., Ord. 68, r. 1 (d). See also *Stanhope* v. *Stanhope* (1886), 11 P. D. 103, 108, C. A. (as to R. S. C., Ord. 17, r. 1); *Redfern* v. *Redfern*, [1891] P. 139, 143, C. A. (as to R. S. C., Ord. 31, r. 12); *Ivimey* v. *Ivimey*, [1908] 2 K. B. 260, 264, C. A. (as to R. S. C., Ord. 42, r. 24); and *Hyde* v. *Hyde* (1888), 13 P. D. 166, 176, C. A.; *Brydges* v. *Brydges and Wood*, [1909] P. 187, 194, C. A. (as to R. S. C., Ord. 42, r. 33).

(*g*) As to these Acts and the rules thereunder, see *infra*.

(*h*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 23; and see titles COURTS, Vol. IX., p. 52; ECCLESIASTICAL LAW, Vol. XI., p. 504.

(*i*) *Giles* v. *Giles*, [1900] P. 17.

(*k*) *Blackett* v. *Blackett*, [1902] P. 170, C. A.

(*l*) These are the Matrimonial Causes Acts, 1857 (20 & 21 Vict. c. 85); 1858 (21 & 22 Vict. c. 108); 1859 (22 & 23 Vict. c. 61); 1860 (23 & 24 Vict. c. 144); 1864 (27 & 28 Vict. c. 44); 1866 (29 & 30 Vict. c. 32); Divorce Amendment Act, 1868 (31 & 32 Vict. c. 77); Matrimonial Causes Acts, 1873 (36 & 37 Vict. c. 31); and 1878 (41 & 42 Vict. c. 19; (see the Short Titles Act, 1896 (59 & 60 Vict. c. 14), Sched. II., which gives the collective title to these Acts, except that of 1864): and also the Matrimonial Causes Acts, 1884 (47 & 48 Vict. c. 68); and 1907 (7 Edw. 7, c. 12).

(*m*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 6; see also the Wales and Berwick Act, 1746 (20 Geo. 2, c. 42), s. 3.

SECT. 1. The Divorce Division of the High Court.

Ireland (*n*), Scotland (*o*), the Channel Islands (*p*), the Isle of Man (*q*), or other parts of the Empire (*r*). The President of the Divorce Division has power to make, and alter or revoke, special "Rules and Regulations, concerning practice and procedure in Matrimonial Causes," as well as rules and regulations under the Legitimacy Declaration and Greek Marriage Acts (*s*) (hereinafter called the "Divorce Rules"), subject to the approval of Parliament (*t*).

Divorce Rules.

SECT. 2.—*What Relief can be obtained and on what Grounds.*

SUB-SECT. 1.—*Relief in General.*

Proof of marriage.

966. If one falsely allege marriage with another, the latter may obtain a decree of perpetual silence in a suit for jactitation of marriage (*u*). This is the only case in which a matrimonial suit can, as of right (*v*), be proceeded with without *primâ facie* proof of a marriage *de facto*.

Marriage is void *ab initio* (*x*) in cases of relationship, bigamy, want of consent, including insanity at time of marriage (*y*), irregularity etc. (*z*), but it is only voidable (*a*) where one of the parties is incapable of consummating it (*b*), or if one is or both are under the age of consent (*c*).

Remedy for desertion.

The remedy for desertion (*d*) is restitution of conjugal rights (*e*), or, alternatively, judicial separation (*f*), which latter may also be a remedy for adultery (*g*), cruelty (*h*), or unnatural offences (*i*).

(*n*) See note (*i*), p. 500, *post*.
(*o*) *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574, 586.
(*p*) *Le Sueur* v. *Le Sueur* (1876), 1 P. D. 139.
(*q*) *Davison* v. *Farmer* (1851), 6 Exch. 242.
(*r*) *Blankard* v. *Galdy* (1693), 4 Mod. Rep. 222; *Lautour* v. *Teesdale* (1816), 8 Taunt. 830.
(*s*) 21 & 22 Vict. c. 93; 47 & 48 Vict. c. 20.
(*t*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 53, 67; and Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 18, which latter continued in the High Court and Court of Appeal the rules and orders then in force. Compare *Charles* v. *Charles* (1866), L. R. 1 P. & D. 260; *Wilson* v. *Wilson* (1871), L. R. 2 P. & D. 341. As to the effect on these rules of a new Act of Parliament, see *Stacey* v. *Stacey* (1860), 29 L. J. (P. M. & A.) 63. As to Divorce Rule 220, see *Re Clark's Petition*, [1905] W. N. 180. Divorce Rule 180a (as to the Debtors Act, 1869 (32 & 33 Vict. c. 62)), being obsolete, has disappeared.
(*u*) See p. 470, *post*.
(*v*) Though in a suit for nullity on the ground of impotence the facts may sometimes be considered first (*G.* v. *G.*, *falsely called K.* (1908), 25 T. L. R. 328, C. A.
(*x*) See p. 278 *et seq.*, *ante*.
(*y*) See p. 281, *ante*.
(*z*) See p. 279, *ante*.
(*a*) See p. 499, *post*.
(*b*) See p. 470, *post*.
(*c*) See p. 281, *ante*.
(*d*) See p. 481, *post*.
(*e*) See p. 471, *post*.
(*f*) See p. 500, *post*; and see *Theobald* v. *Theobald* (1889), 15 P. D. 26.
(*g*) See p. 477, *post*.
(*h*) See p. 473, *post*.
(*i*) See p. 477, *post*.

SECT. 2. What Relief can be obtained and on what Grounds.

Relative positions of husband and wife.

Damages.

967. Although the spouses are on an equal footing in obtaining the foregoing forms of relief, to enable a husband to obtain a dissolution of marriage (*i*), it is not necessary that his wife should have offended in the same way (*k*) as a husband must have offended, before his wife can obtain that relief. In the former case the adultery (*l*) of the wife is sufficient, but in the latter the husband's adultery must be coupled (*m*) with either desertion (*n*), or cruelty (*o*), or he must have been guilty of incestuous adultery (*p*), of bigamy with adultery (*q*), of rape (*r*), of sodomy, or of bestiality (*s*). A husband may also obtain damages from the adulterer (*t*). Declarations as to legitimacy (*u*) and as to the validity of certain marriages (*v*) may also be obtained.

SUB-SECT. 2.—*Where a Declaration against Marriage is sought.*

(i.) *Jactitation of Marriage.*

Declarations against marriage.

968. Jactitation of marriage means a persistent boasting of a marriage falsely alleged to have taken place between the boaster and the petitioner. A petition in such a suit can only be presented by the person so misrepresented (*w*), and in these days it is seldom necessary to seek for such a remedy (*x*).

(ii.) *When Marriage is Invalid ab initio.*

Marriages void *ab initio*.

969. To ascertain whether a marriage is void *ab initio*, the circumstances which constitute a valid marriage (*y*) must be investigated.

A civil suit for the purpose of annulling a marriage, for reasons other than impotence (*z*) may, it seems, be brought by persons having a financial interest in the matter (*a*).

(iii.) *When Marriage is Voidable for Impotence.*

Voidable marriage.

970. Inability to consummate a marriage is now the only cause (except non-age) for which, though not void, it may be avoided. If

(*j*) See p. 500, *post*.
(*k*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 27.
(*l*) See p. 477, *post*.
(*m*) *Bland* v. *Bland* (1866), L. R. 1 P. & D. 237.
(*n*) See p. 481, *post*.
(*o*) See p. 473, *post*.
(*p*) See p. 480, *post*.
(*q*) *Ibid.*
(*r*) *Ibid.*
(*s*) See p. 477, *post*.
(*t*) See p. 500, *post*.
(*u*) Under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93); and see p. 315, *ante*.
(*v*) Under the Greek Marriages Act, 1884 (47 & 48 Vict. c. 20); and see p. 315, *ante*.
(*w*) *Re Campbell* v. *Corley*, *Ex parte Campbell* (1862), 31 L. J. (P. M. & A.) 60.
(*x*) For a recent case, see *Ascroft* v. *Trevor*, *otherwise Foley* (1906), *Times*, 13th—23rd March (cross petition for restitution granted).
(*y*) See p. 278, *ante*.
(*z*) See *infra*.
(*a*) *Faremouth* v. *Watson* (1811), 1 Phillim. 355 (brought by sisters of man

the condition of one of the parties thereto at the time of a marriage (*b*) renders consummation practically impossible, this makes the marriage voidable only, and not void (*c*). Such marriages are deemed valid for all civil purposes, unless a sentence of nullity is actually obtained during the lifetime of the parties (*d*).

Parties.

971. In suits for this purpose, the party who is fit must almost invariably be the petitioner (*e*). Sometimes, though rarely, what, at first sight, appear to be exceptions to this arise, as where the party who is not fit was unaware of the defect (*f*), or where the party who is fit has treated the marriage as if it were void, but has refused to take any steps to make it so (*g*). Either party may resort to the court as soon as he or she discovers that the other, from malformation (*h*) or other defect, is incapable of sexual

who married deceased wife's sister, who were interested in the question of his leaving issue. Such marriages were then only voidable); see p. 283, *ante*.

(*b*) A defect arising subsequently is no ground for relief (*Brown* v. *Brown* (1828), 1 Hag. Ecc. 523).

(*c*) *Turner* v. *Thompson* (1888), 13 P. D. 37.

(*d*) *Elliott* v. *Gurr* (1812), 2 Phillim. 16.

(*e*) *Norton* v. *Seton* (1819), 3 Phillim. 147; the reason being that no one may take advantage of his own wrong.

(*f*) *G.* v. *G.*, *falsely called K.* (1908), 25 T. L. R. 328, C. A. where both husband and wife were apparently fit, but the petitioning wife refused to undergo a slight operation to make her fit for the respondent).

(*g*) *A.* v. *A.*, *sued as B.* (1887), 19 L. R. Ir. 403 (where the wife, who was fit, was alleged to have obtained some sort of relief from a court of her church); compare *De Laubenque* v. *De Laubenque*, [1899] P. 42 (refusal of husband to cohabit, after civil and religious ceremony, became desertion); and see *Halfen* v. *Boddington* (1881), 6 P. D. 13, *per* HANNEN P., at p. 15.

(*h*) Decrees were granted to husbands in:—*D*——*e* v. *A*——*g* (1845), 1 Rob. Eccl. 279 (wife with no *uterus* and a *vagina* forming a *cul de sac*, complete *coitus* impossible); *W*—— v. *H*——, *falsely called W*—— (1861), 2 Sw. & Tr. 240 (congenital malformation of wife, rendering consummation impossible, only removable at considerable risk to her); *G.*—— v. *G.*—— (1871), L. R. 2 P. & D. 287 (a middle-aged wife successfully resisted for nearly three years; no malformation; refusal to submit to remedies, because dangerous); *P.* v. *L.*, *falsely called P.* (1873), 3 P. D. 73, n. (wife (18) hysterical, struck husband when he attempted; threats to drown herself; refused remedies; said no sexual desire); *H.* v. *P.* (1873), L. R. 3 P. & D. 126 (three years' cohabitation; husband's attempts excited hysteria and flight; wife (25) refused examination; compare the remarks of HANNEN, P., in *S.* v. *A.* (1878), 3 P. D. 72, as to incapacity being inferred from persistent refusal); *L.* v. *L.* (1882), 7 P. D. 16 (wife aged 23; *vaginismus;* slept with husband occasionally for three years; refused slightly dangerous operation); *F.* v. *P.*, *falsely called F.* (1896), 75 L. T. 192 (widow, no children, not a virgin, slept with second husband five months; no defect in either; she admitted non-consummation; the allegation "incurable by art or skill" struck out and decree granted on ground of latent incapacity arising from hysteria); *E.* v. *E.*, *otherwise T.* (1900), 50 W. R. 607 (wife resisted full intercourse for six months; called husband a brute; declined to have children; refused inspection); *S.* v. *S.*, *otherwise M.* (1908), 24 T. L. R. 253 (wife refused; no attempt; examination refused). As to the three latter cases it is to be observed that the necessity, in the absence of undoubted incapacity, for a three years' cohabitation as a condition precedent to a decree of nullity no longer exists; see *F.*, *falsely called D.*, v. *D.* (1865) 4 Sw. & Tr. 86 (non-appearance of the husband, so only wife's evidence available, and that believed); also *Aleson* v. *Aleson* (1728), 2 Lee, 576; *Welde, alias Aston*, v. *Welde* (1731), 2 Lee, 580; *Briggs* v. *Morgan* (1820), 3 Phillim. 325; *U-* —*n*, *falsely called F*——*s*, v. *F*——*s* (1853), 2 Rob. Eccl. 614.

Decrees were refused in:—*S.* v. *A.* (1878), 3 P. D. 72 (parties lived

SECT. 2. What Relief can be obtained and on what Grounds.

intercourse; and delay, however long, in bringing a suit for this purpose is not in itself a bar (*i*).

Degrees of proof.

972. If the incapacity be *propter frigiditatem*, the law requires, before a suit can be commenced, a sufficient cohabitation to establish the fact (*k*); and if the court is not satisfied as to the facts, it may suspend its decree in order that further attempts at consummation may be made, or, if the petitioner desire it, may find against him to enable him to appeal (*l*). Proof that a wife is incapable of becoming a mother is not a sufficient ground for a decree of nullity, if she be otherwise *apta viro* (*m*); but if a husband or a wife refuses to submit to inspection, the court may nevertheless grant a decree (*n*).

together nine years; court not satisfied as to husband's attempts); *Brown* v. *Brown* (1828), 1 Hag. Ecc. 523 (man 60, woman 52; court not satisfied impediment in wife had not been removed, but observed he ought to take her *tanquam soror*); *Briggs* v. *Morgan* (1820), 3 Phillim. 325 (second marriage of wife after effective cohabitation with first husband).

Decrees were granted to wives in:—*Pollard* v. *Wybourn* (1828), 1 Hag. Ecc. 725 (husband 41, wife 17; eleven years later she was *virgo intacta;* he, having confessed his impotence, left the country); *N——r, falsely called M——e*, v. *M——e* (1853), 2 Rob. Eccl. 625 (husband 45, wife 30; slept together nearly two years; wife *virgo intacta;* husband impotent *quoad hanc. Per curiam:* If both appear capable, the impotence must be attributed to the husband, unless the woman resists); *G——s, falsely called T——e*, v. *T——e* (1854), 1 Ecc. & Ad. 389 (separation at end of three months; no perfect signs of virginity or of connection; husband, although no visible defect, believed to be incurably impotent); *Lewis* (*falsely called Hayward*) v. *Hayward* (1866) 35 L. J. (P. & M.) 105, H. L. (on appeal: *virgo intacta* after 14 years: *onus* on husband); *B.* v. *B.*, [1901] P. 39 (separate beds, eight months after marriage, against wife's wish; afterwards same bed and attempts; deed of separation unwillingly executed by wife; husband refused examination); *R., otherwise K.*, v. *R.* (1907), 24 T. L. R. 65 (wife seduced by another before marriage; husband admitted impotence).

Decrees were refused in:—*U.* v. *J.* (1867), L. R. 1 P. & D 460 (where doctor's evidence uncertain and husband denied; wife's assertion not accepted) but compare *P.* v. *P., otherwise G.* (1909), 25 T. L. R. 638 (where the incapacity of the wife was pronounced on her own statement); *S——, falsely called E——*, v. *E——* (1863), 3 Sw. & Tr. 240 (court refused to assume permanent incapacity where, during a cohabitation of under three months, two attempts were made, unsuccessful owing to the husband's habit of self-abuse (possibly curable), and the wife's health was affected; but where the husband refused to give up the habit and left wife, a decree was granted (*J., otherwise K.*, v. *J.* (1908), 24 T. L. R. 622).

(*i*) *L., otherwise B.*, v. *B.*, [1895] P. 274 (seven years' delay by wife); *Mansfield, falsely called Cuno*, v. *Cuno* (1873), 42 L. J. (P. & M.) 65 (provided case already proved); *B——n* v. *B——n* (1854), 1 Ecc. & Ad. 248, P. C. (distinguishing such a suit from one on account of adultery); but see *dictum* of Sir W. SCOTT, in *Guest* v. *Shipley, falsely called Guest* (1820), 2 Hag. Con. 321, 323; and compare *S.* v. *B., falsely called S.* (1905), 21 T. L. R. 219 (where seventeen years elapsed between marriage and decree).

(*k*) *B——n* v. *B——n, supra*, at p. 260; and see p. 441, *ante*.

(*l*) *T.* v. *M., falsely called T.* (1865), L. R. 1 P. & D. 31; *M——, falsely called H——*, v. *H——* (1864), 3 Sw. & Tr. 517, 592 (decree *nisi* made after an adjournment and further attempts).

(*m*) *B——n* v. *B——n, supra*; compare *D——e* v. *A——g, falsely calling herself D——e* (1845), 1 Rob. Eccl. 279 (where there were further defects).

(*n*) *Sparrow, falsely called Harrison*, v. *Harrison* (1841), 3 Curt. 16; *E.* v. *E.* (*otherwise T.*) (1900), 50 W. R. 607; *B.* v. *B.*, [1901] P. 39; *W.* v. *S.*, [1905] P. 231; *S.* v. *B., falsely called S., supra.*

SUB-SECT. 3.—*Where Marriage is sought to be Upheld.*

(i.) *Refusal to render Conjugal Rights etc.*

SECT. 2. **What Relief can be obtained and on what Grounds.**

Conjugal rights.

Refusal to cohabit.

Cohabitation.

973. Unless there has been a separation, either judicial (*o*), or by a valid arrangement (*p*), the parties are not entitled to refuse to cohabit in the absence of any matrimonial or *quasi*-matrimonial offence, or even where such an offence has been committed and afterwards condoned (*q*). Cohabitation in this sense does not necessarily refer to actual sexual intercourse (*r*) nor even to actual residence under the same roof (*s*), but may be defined (*t*) as being the antithesis of that wilful separation without cause or reasonable excuse which constitutes desertion and a discretionary bar to a decree of dissolution (*u*) of marriage. Circumstances, however, which would not entitle a party to relief in other matrimonial suits are sometimes held sufficient to justify a refusal to cohabit (*a*); but family difficulties (*b*), not resulting in cruelty, are not of this class, nor, it appears, is premarital misconduct (*c*).

(ii.) *Legitimacy Declarations.*

Legitimacy declarations.

974. Declarations of legitimacy also fall under this head (*d*).

SUB-SECT. 4.—*Where Partial or Complete Divorce is sought.*

(i.) *For Offences under Ecclesiastical Law.*

(a) *Cruelty.*

Definition of cruelty.

975. Cruelty (*e*) may be defined as conduct of such a character as to have caused danger to life, limb, or health (bodily or mental),

(*o*) See p. 486, *post*.

(*p*) *Ibid.*; and see *Hunt* v. *Hunt* (1861), 31 Beav. 89, reversed (1862), 4 De G. F. & J. 221; *Marshall* v. *Marshall* (1879), 5 P. D. 19; *Besant* v. *Wood* (1879), 12 Ch. D. 605; *Clark* v. *Clark* (1885), 10 P. D. 188, C. A.; *Oldroyd* v. *Oldroyd*, [1896] P. 175.

(*q*) See *Westmeath* (*Earl*) v. *Westmeath* (*Countess*) (1829), 2 Hag. Ecc. Supplement, 1; *Bramwell* v. *Bramwell* (1831), 3 Hag. Ecc. 618; *Moore* v. *Moore* (1840), 3 Moo. P. C. C. 84, 86; and p. 489, *post*.

(*r*) *Orme* v. *Orme* (1824), 2 Add. 382; see *Rowe* v. *Rowe* (1865), 34 L. J. (P. M. & A.) 111.

(*s*) *Bradshaw* v. *Bradshaw*, [1897] P. 24.

(*t*) *Russell* v. *Russell*, [1895] P. 315, 333 *et seq.*, C. A.; affirmed, [1897] A. C. 395; and compare *Scott* v. *Scott* (1865), 4 Sw. & Tr. 113 (no precise definition offered).

(*u*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31; *Haswell* v. *Haswell and Sanderson* (1859), 1 Sw. & Tr. 502, 505; and see p. 544, *post*.

(*a*) *Russell* v. *Russell*, *supra* (where wife made a maliciously false charge of sodomy: the appeal to the House of Lords, [1897] A. C. 395, was on another point); and see *Green* v. *Green* (1869), 21 L. T. 401. See also cases on desertion without cause or reasonable excuse arising under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85); and pp. 481 *et seq.*, *post*; and compare *Perrin* v. *Perrin* (1822), 1 Add. 1, 4.

(*b*) *Oldroyd* v. *Oldroyd*, *supra*.

(*c*) *Mason* v. *Mason* (1889), 61 L. T. 304, *sed quære*.

(*d*) See pp. 315, 316, *ante*.

(*e*) *I.e.*, legal cruelty; *Russell* v. *Russell*, [1897] A. C. 395, *per* Lord DAVEY, at p. 467. See also *Evans* v. *Evans* (1790), 1 Hag. Con. 35, where, at p. 38, Sir W. SCOTT is reported to have said: "What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced"; "admitted" refers to the admission of articles for proof in the Ecclesiastical Court; see *Russell* v. *Russell*, *supra*, *per* Lord SHAND, at p. 463; *Otway* v. *Otway* (1812), 2

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or as to give rise to a reasonable apprehension of such danger. It is important to observe, in considering the many and varied cases on this subject, that the word "cruelty" appears to have been used not only in this, but, not infrequently, also in a wider and more popular sense.

Who may be guilty.

976. Either of the parties may be guilty of this offence (*f*), and in determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status (*g*). In some cases one act may be so grievous as by itself to constitute cruelty (*h*), although this is seldom the case (*i*); but a blow, followed by minor acts (*k*), may be enough, and continued acts of ill-usage, none of them, in themselves, sufficient to support such a charge, may accumulate until a case of cruelty arises (*l*). Such acts, however, if only continued for a short

Phillim. 95, *per* Sir John NICHOLL, at p. 97, "it is the acknowledged doctrine that danger to the person and health is sufficient"; *Cooke* v. *Cooke* (1863), 32 L. J. (P. M. & A.) 81, 154 (a wife, who had remained away for several years after cruelty, succeeded in her suit for judicial separation, brought principally because of differences about the children, on the ground that it was unsafe for her to return); *Milford* v. *Milford* (1866), L. R. 1 P. & D. 295, *per* Lord PENZANCE, at p. 299: "the court, as Lord Stowell once said," in *Evans* v. *Evans* (1790), 1 Hag. Con. 35, at p. 39, "has never been driven off this ground"; *Birch* v. *Birch* (1873), 42 L. J. (P. & M.) 23 (where HANNEN, P., decided that cruelty to a child, to wound its mother's feelings, was not sufficient unless it injured her health); and a similar case, *Suggate* v. *Suggate* (1859), 1 Sw. & Tr. 489, *per* Sir CRESSWELL CRESSWELL, at p. 490, "cruelty in ordinary language is an ambiguous term").

(*f*) *Kirkman* v. *Kirkman* (1807), 1 Hag. Con. 409; *Furlonger* v. *Furlonger* (1847), 5 Notes of Cases, 422, 425. It was formerly a frequent practice for the conduct of a wife, who behaved badly to her husband, to be pleaded as a defence to, and explanation of, her charges of cruelty against him; see *Wallscourt* (*Lady*) v. *Wallscourt* (*Lord*) (1847), 5 Notes of Cases, 121; *Dysart* (*Earl*) v. *Dysart* (*Countess*) (1844), 1 Rob. Eccl. 106; *Forth* v. *Forth* (1867), 16 L. T. 574; *Waring* v. *Waring* (1813), 2 Phillim. 132; but at the present day it is scarcely expedient to plead anything of this nature against a woman (by way of confession and avoidance) which does not amount to actual cruelty on her part; although it is well recognised that, occasionally, a husband may stand in real need of a separation to protect him from his wife's conduct; see *Prichard* v. *Prichard* (1864), 3 Sw. & Tr. 523 (wife's foul language and blows passively resisted by husband for many years, till she drove him away from his chapel with abuse and blows and he fell in a fit); *White* v. *White* (1859), 1 Sw. & Tr. 591. Such cases are seldom now tried-out in public, but usually, by the good offices of the judge, result in a deed of separation. As to deeds of separation, see pp. 439 *et seq.*, *ante*.

(*g*) In *Tomkins* v. *Tomkins* (1858), 1 Sw. & Tr. 168, Sir CRESSWELL CRESSWELL pointed out to the jury that what they had to decide was a mixed question of fact and law. Blows between parties in the lower and higher stations of life bear different aspects (*Westmeath* (*Earl*) v. *Westmeath* (*Countess*) (1829), 2 Hag. Ecc. Supplement, 1).

(*h*) *Reeves* v. *Reeves* (1862), 3 Sw. & Tr. 139; and see *Grossi* v. *Grossi* (1873), L. R. 3 P. & D. 118.

(*i*) *Smallwood* v. *Smallwood* (1861), 2 Sw. & Tr. 397.

(*k*) *Waddell* v. *Waddell* (1862), 2 Sw. & Tr. 584.

(*l*) *Power* v. *Power* (1865), 34 L. J. (P. M. & A.) 137 (husband's constant drinking; slight blows; some bruises; pretending to cut wife's throat); *Green* v. *Green* (1864), 33 L. J. (P. M. & A.) 64 (wife's drinking; obstruction of meals and unkindness when ill); *Cochrane* v. *Cochrane* (1910), 27 T. L. R. 107 (cumulative effect of acts of cruelty).

time, may be due to circumstances of the moment, and cause no real danger to the life, health, or even future happiness of the wife or husband (*m*).

It is cruelty wilfully and recklessly (*n*) to communicate a venereal disease (*o*), but not so a mere skin disease (*p*), unless in conjunction with other acts; and a course of conduct calculated to break the spirit of the sufferer (more usually the wife), continued till health breaks down, or is likely to break down, under the strain (*q*) (sometimes termed constructive cruelty (*r*)), is also a ground for relief; but not mere neglect and want of affection (*s*), even if such is the result of a husband's secret intrigue in his own house (*t*), or of a recital of his infidelities and preference for other women (*a*).

Instances of cruelty.

Constructive cruelty.

Threats (*b*) of actual personal violence sometimes constitute cruelty, and the court does not wait to act until such threats are carried into effect (*c*). Proof that a wife has made complaints about her husband is admissible in evidence (*d*). For this purpose a certificate of a husband's summary conviction for cruelty to his

Threats.

(*m*) *Plowden* v. *Plowden* (1870), 23 L. T. 266; *Oliver* v. *Oliver* (1801), 1 Hag. Con. 361, *per* Sir WILLIAM SCOTT, at p. 371 (affection may exist, though accidents may happen in petty quarrels).

(*n*) *Popkin* v. *Popkin* (1794), 1 Hag. Ecc. 765, n., 767, n.; *Boardman* v. *Boardman* (1866), L. R. 1 P. & D. 233. The *onus* is on a person found to have been infected to show ignorance of that state (*Brown* v. *Brown* (1865), L. R. 1 P. & D. 46); see also *Ciocci* v. *Ciocci* (1853), 1 Ecc. & Ad. 121; *Collett* v. *Collett* (1838), 1 Curt. 678. Scientific evidence (such as microscopical examination of discharge) is desirable; see *Morphett* v. *Morphett* (1869), L. R. 1 P. & D. 702.

(*o*) Namely syphilis, or gonorrhœa. It must be definitely alleged; "cruelty" in general is not enough (*Squires* v. *Squires* (1864), 3 Sw. & Tr. 541), and proof of such disease, if contracted during the marriage from some other person, is sufficient evidence of adultery (*Gleen* v. *Gleen* (1900), 17 T. L. R. 62; *Wallace* v. *Cook* (1803), 5 Esp. 117).

(*p*) *Chesnutt* v. *Chesnutt* (1854), 1 Ecc. & Ad. 196.

(*q*) *Kelly* v. *Kelly* (1869), L. R. 2 P. & D. 31 (a clergyman, thinking his wife plotted against him, bullied and hectored her, till her doctor, for the sake of her health, advised her to leave home without her husband's consent); *Mytton* v. *Mytton* (1886), 11 P. D. 141 (a similar case); *Bethune* v. *Bethune*, [1891] P. 205 (systematic neglect and insult, injuring health); *Walmesley* v. *Walmesley* (1893), 69 L. T. 152 (insulting conduct; danger of melancholia; wife "frightfully changed"); *Le Couteur* v. *Le Couteur* (1896), *Times*, 2nd March (husband installed a woman in wife's house and threatened to elope with her); *Thompson* v. *Thompson* (1901), 85 L. T. 172 (where wife's health completely broke down under the shock of husband's (clergyman) conviction under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5 (1)); compare *Knight* v. *Knight* (1865), 4 Sw. & Tr. 103.

(*r*) *Holden* v. *Holden* (1810), 1 Hag. Con. 453; and see *Suggate* v. *Suggate* (1859), 1 Sw. & Tr. 489; *Birch* v. *Birch* (1873), 42 L. J. (P. & M.) 23.

(*s*) *Neeld* v. *Neeld* (1831), 4 Hag. Ecc. 263; *Hudson* v. *Hudson* (1863), 3 Sw. & Tr. 314 (ill-assorted union).

(*t*) *Cousen* v. *Cousen* (1865), 34 L. J. (P. M. & A.) 139.

(*a*) *Beauclerk* v. *Beauclerk*, [1891] P. 189, C. A.

(*b*) See *Bostock* v. *Bostock* (1858), 1 Sw. & Tr. 221; *Barrett* v. *Barrett* (1903), 20 T. L. R. 73.

(*c*) *D'Aguilar* (*Lady*) v. *D'Aguilar* (*Baron*) (1794), 1 Hag. Ecc. 773, 775; *Kirkman* v. *Kirkman* (1807), 1 Hag. Con. 409; *Knight* v. *Knight* (1865), 34 L. J. (P. M. & A.) 112; *Sarkies* v. *Sarkies* (1884), *Times*, 28th June (husband conceived aversion to bride and wished her to divorce him).

(*d*) *Berry* v. *Berry and Carpenter* (1898), 78 L. T. 688.

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wife, which has the same evidential effect as a decree of judicial separation (*e*), though not the depositions then taken (*f*), may be used to corroborate her allegations of cruelty. Mere vulgar, or even obscene, abuse (*g*), or false accusations of adultery (*h*), incestuous adultery (*i*), or unnatural practices (*k*), are not grounds for relief except on the principle of cumulative, or of constructive, cruelty (*l*).

Insults in public.

977. Insulting a wife in the street, so grossly as to cause her to be taken to be a prostitute, was formerly allowed to be cruelty (*m*); but it is submitted, since the adoption of the definition above given, that neither this, nor spitting in her face (*n*), nor such conduct as would justify her refusal to cohabit (*o*), is, by itself, a sufficient cause for relief, nor is drunkenness, *per se*, cruelty (*p*), but a wife or husband is entitled to the protection of the court against acts of cruelty, committed by a husband or wife, when under the influence of drink (*q*), although not, it seems, if suffering from absolute insanity (*r*); yet as long as such insane person is at liberty, and there is danger of further cruelty, the court scarcely entertains the question of sanity (*s*).

Drunkenness.

Insanity.

Evidence.

978. A decree in a former suit may be referred to by the court, but it must not be assumed that the judge has judicial knowledge

(*e*) *Harriman* v. *Harriman* (1909), 25 T. L. R. 291, C. A.

(*f*) *Judd* v. *Judd*, [1907] P. 241.

(*g*) *D'Aguilar* (*Lady*) v. *D'Aguilar* (*Baron*) (1794), 1 Hag. Ecc. 773, 775; *Dysart* (*Earl*) v. *Dysart* (*Countess*) (1844), 1 Rob. Eccl. 106; *Chesnutt* v. *Chesnutt* (1854), 1 Ecc. & Ad. 196; and see *Barlee* v. *Barlee* (1822), 1 Add. 301, 305.

(*h*) *Durant* v. *Durant* (1825), 1 Hag. Ecc. 733; *Walker* v. *Walker* (1898), 77 L. T. 715 (premarital); *Jeapes* v. *Jeapes* (1903), 89 L. T. 74.

(*i*) *Gale* v. *Gale* (1852), 2 Rob. Eccl. 421; *Bray* v. *Bray* (1828), 1 Hag. Ecc. 163, which apparently differs, merely decided that a further charge could be added.

(*k*) *Russell* v. *Russell*, [1895] P. 315, C. A.; [1897] A. C. 395.

(*l*) If a husband be proved to have made charges against his wife, which are alleged to be false, in order to clear himself he must prove that he believed they were true (*Walker* v. *Walker*, *supra*).

(*m*) *Milner* v. *Milner* (1861), 4 Sw. & Tr. 240.

(*n*) *Cloborn* v. *Cloborn* (1629), Het. 149; *D'Aguilar* (*Lady*) v. *D'Aguilar* (*Baron*), *supra*; *Saunders* v. *Saunders* (1847), 1 Rob. Eccl. 549, 562 (an outrage . . . more than equivalent to any threat).

(*o*) *Russell* v. *Russell*, *supra* (discussed but not decided upon in the House of Lords, [1897] A. C. 395); compare *Holmes* v. *Holmes* (1755), 2 Lee, 116 (a wife ordered to return to a husband who had, in the presence of two men, threatened to have forcible connection with her); and see p. 426, *ante*.

(*p*) *Chesnutt* v. *Chesnutt*, *supra*; *Scott* v. *Scott* (1860), 29 L. J. (P. M. & A.) 64 (wife's); *Hudson* v. *Hudson* (1863), 3 Sw. & Tr. 314; but see the more modern view expressed in *Walker* v. *Walker*, *supra*.

(*q*) *Marsh* v. *Marsh* (1858), 1 Sw. & Tr. 312; *Power* v. *Power* (1865), 34 L. J. (P. M. & A.) 137; *Walker* v. *Walker*, *supra*.

(*r*) *Hall* v. *Hall* (1864), 3 Sw. & Tr. 347 (the remedy lies in the restraint of the insane husband, not the release of the wife); and see p. 484, *post*.

(*s*) *Hanbury* v. *Hanbury*, [1892] P. 222 (recurrent mania); compare *Baron* v. *Baron* (1908), 24 T. L. R. 273; see also *Martin* v. *Martin* (1860), 29 L. J. (P. M. & A.) 106; *White* v. *White* (1859), 1 Sw. & Tr. 591 (wife's assaults, when drunk or insane); *Curtis* v. *Curtis* (1858), 1 Sw. & Tr. 192 (ungovernable passion); and compare *Radford* v. *Radford* (1869), 20 L. T. 279 (restitution).

of what then took place, even if the case was tried before himself, and any facts brought to his knowledge must be proved (*t*). A decree of judicial separation on account of cruelty, properly proved, is accepted as *primâ facie* evidence of that cruelty (*a*). But a respondent is entitled to object to evidence of a specific act of cruelty, of which particulars have not been given when applied for, although it is otherwise as to evidence of other acts throwing light on the matter (*b*), and in such case an adjournment may be granted to enable the petition to be amended, and the respondent to meet the charge (*c*).

(b) *Unnatural Offences.*

Attempt to commit may entitle to judicial separation.

979. An attempt to commit either sodomy or bestiality is apparently sufficient to found a decree of judicial separation (*d*); but the words (*e*) making these offences a ground for dissolution of marriage on the petition of a wife are not thus qualified (*f*).

Full corroboration.

Charges so grave must be fully corroborated (*g*), whether alleged in the greater or less degree.

(c) *Adultery.*

Definition.

980. For purposes of relief, adultery which is charged must have been committed (*h*); but it is immaterial that the marriage has not been consummated (*i*), unless, perhaps, the offender seeks, in answer, to avoid the marriage on that ground (*k*). Moreover, although a wife may have had connection with a co-respondent,

(*t*) *Robinson* v. *Robinson* (1877), 2 P. D. 75. A judgment in an English court is not conclusive as to anything but the point decided (*Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, *per* BLACKBURN, J., at p. 434; and compare *In the Estate of Crippen*, [1911] P. 108, *per* EVANS, P., at p. 114.

(*a*) *Bland* v. *Bland* (1866), L. R. 1 P. & D. 237; and see p. 476, *ante*, and p. 496, *post*.

(*b*) *Jewell* v. *Jewell* (1862), 2 Sw. & Tr. 573.

(*c*) *Brook* v. *Brook* (1886), 12 P. D. 19.

(*d*) *Bromley* v. *Bromley* (1793), 2 Add. 158, n.

(*e*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 27.

(*f*) But, it seems, in a suit for dissolution an attempt might be put forward as the foundation of a charge of cruelty; see *Mogg* v. *Mogg* (1824), 2 Add. 292.

(*g*) *N.* v. *N.* (1862), 3 Sw. & Tr. 234, *per* Sir CRESSWELL CRESSWELL, at p. 238 (a petition for judicial separation, where an attempt was alleged, though not proved; but the distinction between an attempt and the full offence was not considered); and see *Geils* v. *Geils* (1848), 6 Notes of Cases, 97, 101, 146, where the subject is considerably discussed. Where a husband forced his wife and committed an unnatural offence with her, this enabled her to obtain a decree of dissolution (*C.* v. *C.* (1905), 22 T. L. R. 26). In this case the judge made a declaration, under the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 7, that the husband was unfit to have the custody of the children.

(*h*) See Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 27; compare *Styles* v. *Styles and Jackson* (1890), 62 L. T. 613; and see *Reeves* v. *Reeves* (1813), 2 Phillim. 125; *Perrin* v. *Perrin* (1822), 1 Add. 1; *Dillon* v. *Dillon* (1842), 3 Curt. 86; *Graves* v. *Graves* (1842), 3 Curt. 235; *Weatherley* v. *Weatherley* (1854), 1 Ecc. & Ad. 193, corrected by *Fitzgerald* v. *Fitzgerald* (1862), 32 L. J. (P. M. & A.) 12; *Mawford* v. *Mawford* (1866), 14 W. R. 516.

(*i*) *Patrick* v. *Patrick* (1820), 3 Phillim. 496; *Waters* v. *Waters and Gentel* (1875), 33 L. T. 579; *Ousey* v. *Ousey* (1874), L. R. 3 P. & D. 223; *Graves* v. *Graves* (1864), 3 Sw. & Tr. 350.

(*k*) *Serrell* v. *Serrell and Bamford* (1862), 2 Sw. & Tr. 422; and see pp. 514, 515, *post*.

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that does not constitute adultery on her part, unless she consents to the act (*l*); and a co-respondent or a respondent may be found guilty of adultery, although the respondent or co-respondent be found not guilty (*m*).

Circumstantial evidence.

981. It is not necessary, in order to succeed on a charge of adultery, to prove the direct fact, and indeed direct evidence is apt to be disbelieved (*n*). In nearly every case the fact is inferred from circumstances, which lead to it, by fair inference, as a necessary conclusion (*o*). The court will closely scrutinise a case where only a single witness is called to prove a charge of this nature, particularly if that witness be a loose woman, with whom the adultery is alleged to have been committed (*p*), and it looks with strong suspicion on the evidence of paid detectives (*q*):

Corroboration.

The evidence of the husband or the wife alone must be corroborated, either by a witness or, at least, by strong surrounding circumstances (*r*), especially (the presence of witnesses notwithstanding (*s*)) where a respondent has made admissions, or a confession (*a*); and even where a co-respondent has also confessed, a decree will be granted only if the court is satisfied that there is no ground for suspicion (*b*).

Presumption of adultery.

982. Adultery is presumed if a married woman goes to a brothel with a man, but the fact of a married man doing so may not raise

(*l*) *Long* v. *Long and Johnson* (1890), 15 P. D. 218.

(*m*) *Ibid.*; and see *Crawford* v. *Crawford* (1886), 11 P. D. 150, 151 (wife found guilty on her own confession and co-respondent dismissed from suit); *Miller* v. *Miller* (1907), *Times*, 23rd July (an undefended case where the issue of a co-respondent's adultery had been decided in his favour by a jury, although the wife gave evidence against him; see *Miller* v. *Miller and Fowler* (1905), *Times*, 8th, 9th, 10th March).

(*n*) See *Alexander* v. *Alexander and Amos* (1860), 2 Sw. & Tr. 95, where the court refused to believe a wife, who had behaved with propriety for twenty years, guilty of a flagrant act.

(*o*) *Allen* v. *Allen and Bell*, [1894] P. 248, C. A., approving *Loveden* v. *Loveden* (1810), 2 Hag. Con. 1, *per* Sir WILLIAM SCOTT, at p. 2; see also *Davidson* v. *Davidson* (1856), Dea. & Sw. 132; *Grant* v. *Grant* (1840), 2 Curt. 16, affirmed by Judicial Committee of the Privy Council); *Chambers* v. *Chambers* (1810), 1 Hag. Con. 439.

(*p*) *Evans* v. *Evans* (1844), 1 Rob. Eccl. 165; *Simmons* v. *Simmons* (1847), 1 Rob. Eccl. 566 (affirmed on appeal to the Court of Arches); *Ginger* v. *Ginger* (1865), L. R. 1 P. & D. 37.

(*q*) *Sopwith* v. *Sopwith* (1859), 4 Sw. & Tr. 243; and see *Worsley* v. *Worsley and Worsley* (1904), 20 T. L. R. 171.

(*r*) *Curtis* v. *Curtis* (1905), 21 T. L. R. 676; *Getty* v. *Getty*, [1907] P. 334 compare *Warwick* v. *Warwick and Giovanni* (1907), *Times*, 25th July (cruelty).

(*s*) *White* v. *White and Jerome* (1890), 62 L. T. 663.

(*a*) *Robinson* v. *Robinson and Lane* (1859), 1 Sw. & Tr. 362 (although the wife's diary admitted misconduct, the petition was dismissed); see also *Noverre* v. *Noverre* (1846), 1 Rob. Eccl. 428 (where a decree was granted); *Owen* v. *Owen* (1831), 4 Hag. Ecc. 261 (unsuspected letters to third parties); *Mortimer* v. *Mortimer* (1820), 2 Hag. Con. 310 (confession *in articulo mortis*); *Williams* v. *Williams* (1798), 1 Hag. Con. 299, 304; *Crewe* v. *Crewe* (1800), 3 Hag. Ecc. 123; *Weinberg* v. *Weinberg* (1910), 27 T. L. R. 9.

(*b*) *Williams* v. *Williams and Padfield* (1865), L. R. 1 P. & D. 29 (the co-respondent, and then the respondent, confessed independently to his mother); *Le Marchant* v. *Le Marchant and Radcliff* (1876), 45 L. J. (P.) 43 (the respondent having confessed, the co-respondent by his counsel admitted the offence in court).

an irrebuttable presumption against him, although the *onus* on him would scarcely be discharged by the denial of himself and of a woman with whom he was alone (*c*).

Although evidence as to certain acts of familiarity may be insufficient in itself to prove charges of adultery made in a petition, the court is at liberty to consider the fact that, since the date of the petition, the man and woman charged have lived together as husband and wife (*d*).

Presumption in favour of legitimacy.

983. If a wife give birth to a child, of which her husband could not possibly be the father, that is sufficient proof. Cases, however, sometimes arise (*e*) where there is a doubt, but the presumption is in favour of legitimacy, though, after more than nine months after a decree or order of separation, the presumption is reversed (*f*).

Letters as evidence.

The letters, before suit, of a wife tending to show that her child is a bastard are admissible in evidence as part of the *res gestæ*, although she could not be put into the witness box for the purpose of proving that fact (*g*); so, too, letters written by her to a medical man as to the state of her health are evidence thereof, and the doctor may be compelled to produce them (*h*); but a communication made by a party to a divorce suit to his or her solicitor is generally (*i*) privileged (*k*), because the suit is a civil, not a criminal, proceeding (*l*).

Decree *nisi*, when evidence of adultery.

984. The observations of a judge at a criminal trial are not evidence against a respondent to whom they are addressed (*m*); nor, except by consent, which is sometimes insisted on as a condition of an indulgence, are the judge's notes of the evidence of witnesses, since deceased, in a previous matrimonial suit (*n*). A decree *nisi* for dissolution of marriage is evidence of adultery in subsequent proceedings, but, as against a co-respondent (*o*), only if it states that he has committed adultery (*p*). A transcript of the official shorthand writer's notes (*q*) is not evidence *per se*.

(*c*) *Astley* v. *Astley* (1828), 1 Hag. Ecc. 714; *Williams* v. *Williams* (1798), 1 Hag. Con. 299, 302.

(*d*) *Wales* v. *Wales*, [1900] P. 63; *Boddy* v. *Boddy and Grover* (1860), 30 L. J. (P. M. & A.) 23.

(*e*) See *Bosvile* v. *A.-G.* (1887), 12 P. D. 177.

(*f*) *Hetherington* v. *Hetherington* (1887), 12 P. D. 112; and see *St. George's, Westminster* v. *St. Margaret's, Westminster* (1706), 1 Salk. 123.

(*g*) *The Aylesford Peerage* (1885), 11 App. Cas. 1.

(*h*) *Atkinson* v. *Atkinson* (1825), 2 Add. 468. It is submitted that *Witt* v. *Witt and Klindworth* (1862), 3 Sw. & Tr. 143, could not be supported.

(*i*) See note (*p*), p. 531, *post*.

(*k*) *Branford* v. *Branford* (1878), 4 P. D. 72. As to such privilege, see title EVIDENCE, Vol. XIII., pp. 571, 572.

(*l*) *Mordaunt* v. *Moncreiffe* (1874), L. R. 2 Sc. & Div. 374.

(*m*) *Coffey* v. *Coffey* (1898), 67 L. J. (P.) 86.

(*n*) *Conradi* v. *Conradi* (1867), L. R. 1 P. & D. 391, 514; and see *Ling* v. *Ling and Croker* (1858), 1 Sw. & Tr. 180; but compare *Stoate* v. *Stoate* (1861), 2 Sw. & Tr. 223.

(*o*) See p. 478, *ante*; and compare *Ruck* v. *Ruck*, [1896] P. 152.

(*p*) See p. 478, *ante*.

(*q*) *Nottingham Guardians* v. *Tomkinson* (1879), 4 C. P. D. 343; and see p. 530, *post*.

SECT. 2. What Relief can be obtained and on what Grounds.

(ii.) *For Statutory Offences.*

(a) *Incestuous Adultery.*

Definition.

985. Incestuous adultery is defined (*r*) to be adultery committed by a husband with a woman whom, if his wife were dead, he could not lawfully marry, by reason of her being within the prohibited degrees of consanguinity or affinity (*s*). This prohibition does not include a woman so related to one with whom the husband has had illicit intercourse (*t*); but it still (*a*) includes a wife's sister during the life of such wife for as long as that marriage subsists (*a*), or even, it would seem, if it has been dissolved (*b*) and the man has remarried (*c*).

(b) *Bigamy with Adultery.*

Definition.

986. The marriage of any person, being married, to any other person during the life of her or his husband or wife, whether the second marriage shall have taken place within the dominions of His Majesty or elsewhere (*d*), followed by cohabitation with such other person (*e*), constitutes the statutory offence of bigamy with adultery. The second marriage must be one which, but for the former marriage, would be valid (*f*).

(c) *Rape.*

Proof.

987. As this offence is not specially defined in the Matrimonial Causes Acts (*g*), the very few reported cases on the subject in the Matrimonial Courts should be carefully examined before a charge of this nature is launched, so as to ascertain the minimum of proof which is accepted (*h*). Where there has already been a conviction, proof of such conviction is not sufficient; at the hearing the offence must be proved *de novo* (*i*).

(*r*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 27.

(*s*) See p. 283, *ante*.

(*t*) *Wing* v. *Taylor* (*falsely calling herself Wing*) (1861), 2 Sw. & Tr. 278; and *Pagani* v. *Pagani* (1866), L. R. 1 P. & D. 223.

(*a*) Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), s. 3 (1). A niece is not mentioned, nor does the Act say whether sister includes illegitimate sister (*ibid.*, s. 4).

(*b*) *Ibid.*, s. 3 (2).

(*c*) Compare *D'Etchegoyen* v. *D'Etchegoyen* (1908), 25 T. L. R. 85.

(*d*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 27; *Russell's (Earl) Trial*, [1901] A. C. 446. Observe that the saving clause in the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57, as to seven years' continual absence, does not appear in this definition.

(*e*) The bigamy and adultery must be with the same woman (*Horne* v. *Horne* (1858), 2 Sw. & Tr. 48); and be definitely proved (*Ellam* v. *Ellam* (1889), 58 L. J. (P.) 56); see *Bonaparte* v. *Bonaparte* (1891), 65 L. T. 795).

(*f*) *Burt* v. *Burt* (1860), 2 Sw. & Tr. 88; and see pp. 278 *et seq.*, *ante*.

(*g*) See p. 468, *ante*.

(*h*) *Virgo* v. *Virgo* (1893), 69 L. T. 460; *Coffey* v. *Coffey*, [1898] P. 169; *Bosworthick* v. *Bosworthick* (1901), 50 W. R. 217 (conduct short of rape may, it appears, form a good foundation for a charge of cruelty); compare *Thompson* v. *Thompson* (1901), 85 L. T. 172; *Collins* v. *Collins* (1884), 9 P. D. 231.

(*i*) *Virgo* v. *Virgo*, *supra*.

(d) *Desertion.*

SECT. 2. What Relief can be obtained and on what Grounds.

988. It is desertion if one party to a marriage, without the consent (*k*) or against the will of the other, wilfully (*l*), without cause or reasonable excuse (*m*), makes the other live apart for two years or more; but this definition is not exhaustive (*n*).

Primary definition.

Until 1858 the only remedy for desertion (*o*) was a suit for restitution of conjugal rights; but now desertion without cause for two years and upwards is a ground whereon a husband, or wife, may obtain a decree of judicial separation (*p*), and desertion without reasonable excuse for two years or upwards, if coupled with adultery, is a ground whereon a wife may obtain dissolution of marriage (*q*).

Desertion before and since 1858.

989. Desertion begins when the intention to desert is complete (*r*), the question of intention being one of fact (*s*), or of

Instances of desertion.

(*k*) *Smith* v. *Smith* (1859), 1 Sw. & Tr. 359; *Haviland* v. *Haviland* (1863), 32 L. J. (P. M. & A.) 65 ("go to your mistress if you like, and when you are sick of her come back to me," not necessarily a consent); *Buckmaster* v. *Buckmaster* (1869), L. R. 1 P. & D. 713 (wife consented for £100); *Parkinson* v. *Parkinson* (1869), L. R. 2 P. & D. 25 (a wife who had executed a deed of separation during the two years was held to have bargained away her relief); *Taylor* v. *Taylor* (1881), 44 L. T. 31 (husband came and went as a visitor; no desertion); *Dagg* v. *Dagg* (1882), 7 P. D. 17 (agreement to live apart signed before marriage; husband found guilty of desertion).

(*l*) *Fitzgerald* v. *Fitzgerald* (1869), L. R. 1 P. & D. 694 (wife alleging husband's adultery refused to live with him, and he never returned; no desertion by him); *Townsend* v. *Townsend* (1873), L. R. 3 P. & D. 129, 131 (husband left wife to avoid arrest, but was imprisoned and afterwards was unable to support her; no desertion); compare *Henty* v. *Henty* (1875), 33 L. T. 263 (husband's difficulties and enlistment; discharge; no return; desertion); *Cock* v. *Cock* (1864), 3 Sw. & Tr. 514 (desertion by husband; although a deed of separation (never acted on) had been executed by wife).

(*m*) *Beer* v. *Beer* (1906), 54 W. R. 564 (wife's habitual drunkenness a reasonable excuse); *Synge* v. *Synge*, [1900] P. 180; affirmed [1901] P. 317, C. A. (wife's refusal of intercourse a reasonable excuse); *Mackenzie* v. *Mackenzie*, [1895] A. C. 384, 389 (same point); *Williamson* v. *Williamson* (1882), 7 P. D. 76 (wife's conviction for criminal offence not a reasonable excuse on part of husband); *Ousey* v. *Ousey* (1874), L. R. 3 P. & D. 223 (non-consummation of marriage, believed by husband to be wife's fault, reasonable excuse for leaving her); *Du Terreaux* v. *Du Terreaux* (1859), 1 Sw. & Tr. 555 (an heiress of sixteen entrapped into marriage, and then sent abroad by her friends; reasonable excuse); and see cases relating to refusal to render conjugal rights, p. 473, *ante*, and to conduct conducing to adultery, p. 493, *post*.

(*n*) *Thompson* v. *Thompson* (1858), 1 Sw. & Tr. 231.

(*o*) See *Brookes* v. *Brookes* (1858), 1 Sw. & Tr. 326.

(*p*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 16.

(*q*) There appears to be no practical difference in the meaning of the words used in the two sections; see *Yeatman* v. *Yeatman* (1868), L. R. 1 P. & D. 489; *Oldroyd* v. *Oldroyd*, [1896] P. 175, 182.

(*r*) *Gatehouse* v. *Gatehouse* (1867), L. R. 1 P. & D. 331 (time fixed when husband repudiated wife in favour of mistress), followed in *Stickland* v. *Stickland* (1876), 35 L. T. 767. A husband is not entitled to prevent his wife from leaving him by forcibly shutting her up (*R.* v. *Jackson*, [1891] 1 Q. B. 671, C. A.); see also as to custody of wife *Atwood* v. *Atwood* (1718), Prec. Ch. 492; *Lister's Case* (1721), 8 Mod. Rep. 22; *R.* v. *Brooke* (1766), 4 Burr. 1991; *Ex parte M'Clellan* (1831), 1 Dowl. 81; *Re Cochrane* (1840), 8 Dowl. 630; *R.* v. *Leggatt* (1852), 18 Q. B. 781; and p. 318, *ante*.

(*s*) *French-Brewster* v. *French-Brewster*, *French-Brewster* v. *French-Brewster and Gore* (1889), 62 L. T. 609 (intention left to jury).

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inference from facts (*t*), necessarily varying with the position of the parties (*a*).

Desertion, once begun, may continue although imprisonment, or the fear of it, may prevent return (*b*).

If absence for a time be agreed to, and that time be exceeded, desertion may afterwards arise (*c*); while if one spouse be forced by the conduct of the other to leave home, that may, in due time, become desertion by the offender (*d*), sometimes called "constructive desertion." Living secretly with another woman, and occasionally visiting his wife, without intercourse, may amount to desertion (*e*), and if either husband or wife fail to comply with a reasonable requirement, insisted upon by the other as a condition of return to cohabitation, desertion will continue (*f*), although it would be otherwise if the condition were unreasonable (*g*).

Constructive desertion.

Disobedience to a decree of restitution of conjugal rights, although two years have not elapsed, at once constitutes desertion (*h*), with precisely the same incidents, and such desertion, if coupled with the husband's adultery, whether committed before or after the decree of restitution, is a ground for granting to the wife a decree of dissolution of marriage (*i*).

Instances which are not desertion.

990. On the other hand, neglect or refusal to pay an allowance under a deed does not constitute desertion (*k*), a deed of separation being only *primâ facie* proof of a separation by mutual consent (*l*); nor does the mere living with another woman (*m*), nor even the living apart of the spouses (*n*); but in those circumstances the

(*t*) *Lawrence* v. *Lawrence* (1862), 2 Sw. & Tr. 575 (desertion inferred from husband's letters and actions).

(*a*) *Williams* v. *Williams* (1864), 3 Sw. & Tr. 547 (both domestic servants).

(*b*) *Drew* v. *Drew* (1888), 13 P. D. 97 (a husband arranged to elope; fled from justice instead; was arrested and imprisoned); *Wynne* v. *Wynne*, [1898] P. 18 (similar case); and see p. 481, *ante*.

(*c*) *Basing* v. *Basing* (1864), 3 Sw. & Tr. 516 (wife to follow husband to Australia; he never sent money, and formed adulterous connection there); see *Mahoney* v. *M'Carthy*, [1892] P. 21, 25 (it is a matter of evidence).

(*d*) *Graves* v. *Graves* (1864), 3 Sw. & Tr. 350 (husband neglected wife; even brought mistress into house; wife left); *Dickinson* v. *Dickinson* (1889), 62 L. T. 330; *Pizzala* v. *Pizzala* (1896), *Times*, 5th June; *Koch* v. *Koch*, [1899] P. 221 (husband refused to discharge servant with whom he had committed adultery; wife left); *Sickert* v. *Sickert*, [1899] P. 278 (immaterial that adultery not in the home; a wife not bound to stay with husband who persists in adultery).

(*e*) *Garcia* v. *Garcia* (1888), 13 P. D. 216.

(*f*) *Gibson* v. *Gibson* (1859), 29 L. J. (P. & M.) 25; *Pizzala* v. *Pizzala*, *supra*.

(*g*) *Dallas* v. *Dallas* (1874), 43 L. J. (P. & M.) 87; *Dickinson* v. *Dickinson*, *supra*.

(*h*) Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 5. As to the comparative advantages of taking the new relief offered by this Act or proceeding to obtain a judicial separation, see *Theobald* v. *Theobald* (1889), 15 P. D. 26, *per* BUTT, J., at p. 28.

(*i*) *Bigwood* v. *Bigwood* (1888), 13 P. D. 89; *Beauclerk* v. *Beauclerk*, [1895] P. 220; compare *Smith* (*C. C.*) v. *Smith* (*R. J.*) (1888), 58 L. T. 639.

(*k*) *Pape* v. *Pape* (1887), 20 Q. B. D. 76.

(*l*) *Cock* v. *Cock* (1864), 3 Sw. & Tr. 514; and as to separation deeds generally, see p. 439 *et seq.*, *ante*.

(*m*) *Ward* v. *Ward* (1858), 1 Sw. & Tr. 185 (wife, content with cruel husband's absence, ultimately obtained decree of dissolution).

(*n*) *Ward* v. *Ward*, *supra*.

making of a monetary allowance does not exonerate (*o*), nor does an allowance by a wife to a husband who has left her necessarily have that effect (*p*).

Intermittent intercourse usually prevents systematic absences from becoming desertion (*q*), and a wife who has refused a *bonâ fide* offer of her husband to return cannot, even if he has committed adultery, allege desertion (*r*), unless the desertion has continued for two years, for, once the offence is complete, an offer to return is nugatory (*s*). An offer to return, however, must be distinct and *bonâ fide* (*t*), but, when so made and neglected, the *onus* of proof is shifted from the party making such offer (*a*).

Desertion where no consummation.

991. There may be desertion even where the marriage has never been consummated (*b*), though desertion cannot have its inception when the parties are living in a state of separation (*c*); and it appears that, if a party who has brought about a separation wishes to put an end to it, and is refused, the process is a suit for restitution of conjugal rights; for the other party's refusal of a request to return does not constitute desertion (*d*). Moreover, in order to maintain desertion, there must exist a state of things which keeps it up during the whole period of two years (*e*), so that the filing of a petition, praying dissolution of marriage or judicial separation, prevents the desertion of the respondent from running during the pendency of the suit, because that step practically puts it out of the respondent's power to return; unless, perhaps, the respondent's conduct has been such as to show that the petitioner is not bound to have the respondent back (*f*).

(*o*) *Macdonald* v. *Macdonald* (1859), 4 Sw. & Tr. 242 (wife is entitled to society and protection of husband); *Yeatman* v. *Yeatman* (1868), L. R. 1 P. & D. 489 (desertion aggravated by leaving her destitute).

(*p*) *Nott* v. *Nott* (1866), L. R. 1 P. & D. 251 (where the wife provided money in order that husband might not starve).

(*q*) *Farmer* v. *Farmer* (1884), 9 P. D. 245; but see *Thurston* v. *Thurston* (1910), 26 T. L. R. 388.

(*r*) *Lodge* v. *Lodge* (1890), 15 P. D. 159.

(*s*) *Cargill* v. *Cargill* (1858), 1 Sw. & Tr. 235.

(*t*) *Cudlipp* v. *Cudlipp* (1858), 1 Sw. & Tr. 229; *Lodge* v. *Lodge*, *supra*; but the *onus* of showing that the offer is not *bonâ fide* lies on the petitioner (*Martin* v. *Martin* (1898), 78 L. T. 568).

(*a*) *Keech* v. *Keech* (1868), L. R. 1 P. & D. 641; *Fitzgerald* v. *Fitzgerald* (1869), L. R. 1 P. & D. 694.

(*b*) *De Laubenque* v. *De Laubenque*, [1899] P. 42; *Lee Shires* v. *Lee Shires* (1910), 54 Sol. Jo. 874.

(*c*) *Fitzgerald* v. *Fitzgerald*, *supra*; *Pape* v. *Pape* (1887), 20 Q. B. D. 76, *per* STEPHEN, J., at p. 79 (desertion at any rate implies that the parties are living together at the time when the desertion takes place); *R.* v. *Leresche*, [1891] 2 Q. B. 418, C. A.; *Bradshaw* v. *Bradshaw*, [1897] P. 24; *Kay* v. *Kay*, [1904] P. 382; but see *Harrison* v. *Harrison* (1910), 54 Sol. Jo. 619 (separation procured from wife *malâ fide*).

(*d*) *Kay* v. *Kay*, *supra*, *per* GORELL BARNES, J., at p. 390; but see *Fitzgerald* v. *Fitzgerald* (1874), L. R. 3 P. & D. 136, 137 (an undefended case, between the same parties as in (1869), L. R. 1 P. & D. 694, which appears to have rested on the husband's refusal to resume cohabitation).

(*e*) *Kay* v. *Kay*, *supra*, at p. 395; *Dodd* v. *Dodd*, [1906] P. 189, 194.

(*f*) *Kay* v. *Kay*, *supra* (considering, at p. 390, the two reports of *Fitzgerald* v. *Fitzgerald*; see note (*d*), *supra*); *Kettlewell* v. *Kettlewell* (1880), 41 L. T. 737 (where leave was given to amend to "desertion" instead of "cruelty," although

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992. The Summary Jurisdiction (Married Women) Act, 1895 (*g*), does not operate in lieu of, alter, or enlarge the Matrimonial Causes Act, 1857 (*h*), as regards desertion (*i*); and, accordingly, a magistrate's order for non-cohabitation puts an end to desertion (*k*).

Magistrate's order terminates desertion.

SECT. 3.—*Bars to Relief.*

SUB-SECT. 1.—*In General. Insanity.*

No judgment by default.

993. A decree must be refused, even if the suit be not defended, where there is no jurisdiction to make it, or where the allegations put forward are not proved (*l*); for judgment by default, or by consent, or by admission, is unknown in matrimonial causes (*m*).

Insanity no bar to divorce.

May be partial defence.

994. Although it is established that a divorce may be granted in the unavoidable absence, by reason of mental derangement, of one of the parties (*n*), it has never yet been broadly decided whether insanity is a defence to a suit for dissolution (*o*); but, if a respondent was capable, at the time adultery was committed, of understanding (*p*) its nature and what the probable result would be, the fact of his or her having been, at the time, subject to insane delusions is not a good defence. It is still, however, undecided whether

two years were not complete when petition filed); *Knapp* v. *Knapp* (1880), 6 P. D. 10 (where the husband had gone off with a woman, and a petition alleging adultery and cruelty was withdrawn, and a new one filed, alleging adultery and desertion, which had not occurred at the date of the former petition); *Wood* v. *Wood* (1887), 13 P. D. 22 (a similar case, except that a supplemental, and not a new, petition was filed when two years had elapsed); *Lapington* v. *Lapington* (1888), 14 P. D. 21 (where BUTT, J., held that a fresh petition must be filed in such circumstances); see also *Farmer* v. *Farmer* (1884), 9 P. D. 245; and compare *Drew* v. *Drew* (1888), 13 P. D. 97.

(*g*) 58 & 59 Vict. c. 39.

(*h*) 20 & 21 Vict. c. 85.

(*i*) *Smith* v. *Smith*, [1905] P. 249; *Dodd* v. *Dodd*, [1906] P. 189, 198, 201; and see *Wilson* v. *Wilson* (1908), 24 T. L. R. 256.

(*k*) *Harriman* v. *Harriman*, [1909] P. 123, C. A., approving *Dodd* v. *Dodd*, *supra*, passing over *Levy* v. *Levy* (1904), 21 T. L. R. 157, and *Smith* v. *Smith*, *supra*, on the ground that in the Divorce Division decisions in undefended cases without argument have not been treated as binding. See also the remarks of COCKBURN, C.J., in *Ward* v. *Ward* (1858), 1 Sw. & Tr. 185. *Dodd* v. *Dodd*, *supra*, was followed in *Taylor* v. *Taylor* (1907), 23 T. L. R. 566. In *Lett* v. *Lett* (1907), 23 T. L. R. 569, a decree was made because two years had expired before the separation order. *Failes* v. *Failes*, [1906] P. 326, is perhaps explained as coming within the exception (alluded to in *Kay* v. *Kay*, [1904] P. 382, 396) that if a wife, owing to her husband's conduct, is not bound to go back, she is entitled to treat the desertion as continuing.

(*l*) See p. 533, *post*, and pp. 472, 476, 478, 480, 482, *ante*.

(*m*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 29, 30, 31; *Harriman* v. *Harriman*, *supra*; *Lyne* v. *Lyne* (1867), L. R. 1 P. & D. 508; and compare *Dolby* v. *Dolby and Hewitt* (1861), 2 Sw. & Tr. 228.

(*n*) *Mordaunt* v. *Moncreiffe* (1874), L. R. 2 Sc. & Div. 374; *Baker* v. *Baker* (1880), 5 P. D. 142, affirmed 6 P. D. 12, C. A.; *Johnson* v. *Johnson*, [1901] P. 193. These cases dispose of *Bawden* v. *Bawden* (1862), 2 Sw. & Tr. 417, and *Mordaunt* v. *Mordaunt* (1872), L. R. 2 P. & D. 109, 382, on this point.

(*o*) *Hanbury* v. *Hanbury*, [1892] P. 222. The fact of a wife's insanity, however, has been held to be no defence to a suit for restitution of conjugal rights (*Hayward* v. *Hayward* (1858), 1 Sw. & Tr. 81); but this was doubted in *Radford* v. *Radford* (1869), 20 L. T. 279.

(*p*) See *Long* v. *Long and Johnson* (1890), 15 P. D. 218.

the amount of insanity necessary to secure an acquittal on an indictment would constitute a valid defence to a charge of adultery (*q*), and the extent to which a person charged with cruelty is protected by his or her insanity has not yet been laid down (*r*). The question of insanity as bearing on cruelty is considered elsewhere (*s*); as is also the procedure in such case for citation, service, and appearance (*t*), as to wife's costs (*a*), and as to persons representing lunatics (*b*).

SUB-SECT. 2.—*Absolute Bars.*

(i.) *Res judicata. Estoppel.*

995. A decree absolute of dissolution of marriage, pronounced by a court of competent jurisdiction, cannot be impeached, even for fraud, by a person not a party to the proceedings (*c*). Decree absolute.

Charges, which have been unsuccessfully put forward and disposed of in one suit, cannot be repeated in a second between the same parties; for not only does the common law doctrine of estoppel apply (*d*), but since, in matrimonial causes, a wife usually brings her suit at the expense of her husband, a repetition of charges would act as a peculiar hardship (*e*). Such a point must be raised by pleading (*f*), unless the charges are absolutely identical, when the matter may be disposed of on a summons. Estoppel.

996. A husband convicted of desertion under the Summary Jurisdiction (Married Women) Act, 1895 (*g*), is not debarred from denying statutory desertion in subsequent proceedings in the High Court, nor is that court debarred from satisfying itself as to the existence of offences (*h*). Statutory desertion.

A verdict or judgment against a respondent, once obtained, is not any the less *res judicata* because the decree which follows is rescinded (*i*) on the ground that material facts have been withheld from the court (*k*); and it seems that, if a party does not traverse the *factum* of marriage in a first suit, that may be taken as an admission in a second (*l*). Evidence. Admissions.

(*q*) *Yarrow* v. *Yarrow*, [1892] P. 92; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 241.

(*r*) See *Hanbury* v. *Hanbury*, [1892] P. 222.

(*s*) See p. 476, *ante*; and as to the legal consequences of mental incapacity, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 241; LUNATICS AND PERSONS OF UNSOUND MIND.

(*t*) See pp. 504, 509, *post*.

(*a*) See p. 523 *post*.

(*b*) See p. 504, *post*.

(*c*) *Bater* v. *Bater*, [1906] P. 209, 228, C. A.; and see title ESTOPPEL, Vol. XIII., pp. 328, 338.

(*d*) See *Conradi* v. *Conradi* (1868), L. R. 1 P. & D. 514, 518; *Sopwith* v. *Sopwith* (1861), 2 Sw. & Tr. 160; but see *Hall* v. *Hall and Richardson* (1879), 48 L. J. (P.) 57; and title ESTOPPEL, Vol. XIII., pp. 324, 326.

(*e*) *Finney* v. *Finney* (1868), L. R. 1 P. & D. 483.

(*f*) *Robinson* v. *Robinson* (1877), 2 P. D. 75.

(*g*) 58 & 59 Vict. c. 39, s. 5 (a).

(*h*) In accordance with the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31; see *Harriman* v. *Harriman*, [1909] P. 123, C. A.

(*i*) See pp. 554 *et seq.*, *post*.

(*k*) *Butler* v. *Butler*, [1893] P. 185.

(*l*) *Guest* v. *Shipley* (1820), 2 Hag. Con. 321.

SECT. 3. Bars to Relief.

Decree of judicial separation.

Separation deeds.

Agreements.

Covenants not to sue.

997. A decree of judicial separation on the ground of cruelty obtained by a wife is not an absolute bar to a suit against her for dissolution of marriage (*m*); nor is a deed of separation a bar to a suit for judicial separation, as the latter may give greater rights (*n*). In either case (*o*) the objection should be pleaded. But a written, or even a verbal, agreement to live separate may be a bar to a suit for restitution of conjugal rights (*p*) or for dissolution on the ground of desertion coupled with adultery (*q*), and an agreement entered into by the parties, even though not by deed, not to institute proceedings for nullity, on the ground of impotence, is a valid answer to a petition (*r*). So, too, a covenant not to take proceedings in respect of offences already committed (*a*), or not to sue for restitution of conjugal rights (*b*), may act as an estoppel.

What does not prevent covenants being pleaded.

998. A slight default in paying an allowance under a deed (*c*) does not prevent the covenants in the deed from being successfully pleaded, nor does a reconciliation *pro tanto* by occasional sexual intercourse (*d*); but the repudiation by one party of the obligations of a deed deprives him or her of the benefits thereby secured to him or her, and the other is no longer estopped by them (*e*).

Effect of deed of separation.

If a deed of separation is, or has been, in existence, the court should be informed of it, even though the party whose interest it apparently is to produce it does not do so; for the court is at

(*m*) *Yeatman* v. *Yeatman and Rummell* (1870), 21 L. T. 733.

(*n*) *Brown* v. *Brown* (1874), L. R. 3 P. & D. 202; but this was doubted in *Besant* v. *Wood* (1879), 12 Ch. D. 605, and in *Gandy* v. *Gandy* (1882), 7 P. D. 77, 168, C. A.; see also *Kunski* v. *Kunski and Josephs* (1907), 23 T. L. R. 615.

(*o*) *Yeatman* v. *Yeatman and Rummell, supra; Williams* v. *Williams* (1866), L. R. 1 P. & D. 178.

(*p*) See *Spering* v. *Spering* (1863), 3 Sw. & Tr. 211; *Stanes* v. *Stanes* (1877), 3 P. D. 42. It was laid down in 1824 that deeds of separation were not a bar to suits for restitution or on account of adultery (*Sullivan* v. *Sullivan* (1824), 2 Add. 299); see *Hayward* v. *Hayward* (1859), 1 Sw. & Tr. 333; *Crabb* v. *Crabb* (1868), L. R. 1 P. & D. 601; *Parkinson* v. *Parkinson* (1869), L. R. 2 P. & D. 25. Although in 1860 the full court would not say a deed was an estoppel, it dismissed a petition, brought six years after the alleged cruelty and desertion, on the ground that it was for a collateral purpose (*Matthews* v. *Matthews* (1860), 3 Sw. & Tr. 161; compare *Williams* v. *Williams, supra*). In *Anquez* v. *Anquez* (1866), L. R. 1 P. & D. 176, it was held that, although a deed was not a bar to a suit for restitution, it might be good cause for living apart; and see *Flower* v. *Flower* (1873), L. R. 3 P. & D. 132 (judicial separation).

(*q*) *Buckmaster* v. *Buckmaster* (1869), L. R. 1 P. & D. 713; and as to the nature of the consideration for such deeds, see p. 443, *ante*.

(*r*) *Aldridge* v. *Aldridge* (1888), 13 P. D. 210.

(*a*) *Rowley* v. *Rowley* (1864), 3 Sw. & Tr. 338; affirmed (1866), L. R. 1 Sc. & Div. 63 (a compromise by deed reaches farther than condonation which is conditional); *Rose* v. *Rose* (1882), 7 P. D. 225; affirmed (1883), 8 P. D. 98, C. A.; but a covenant not to revive the suit in any manner whatever has been held insufficient (*Norman* v. *Norman*, [1908] P. 6; compare *Harris* v. *Harris and Woodden* (1872), 21 W. R. 80).

(*b*) See p. 451, *ante*. As to the grounds upon which such agreements will be held void if contemplating future misconduct, see p. 441, *ante*.

(*c*) *Kunski* v. *Kunski* (1898), 68 L. J. (P.) 18.

(*d*) *Rowell* v. *Rowell*, [1900] 1 Q. B. 9; *Rowell* v. *Rowell* (1903), 89 L. T. 288, C. A.; see also *Randle* v. *Gould* (1857), 8 E. & B. 457; *Nicol* v. *Nicol* (1886), 31 Ch. D. 524, C. A.

(*e*) *Balcombe* v. *Balcombe*, [1908] P. 176.

liberty to consider its effect in cases of restitution of conjugal rights (*f*), or of divorce (*g*); but, where the respondent has so acted as to make a deed practically a nullity, the court may be thereby influenced so to treat it (*h*).

(ii.) *Connivance.*

Contrasted with condonation.

999. Connivance, which must precede the event, is clearly distinguishable from condonation (*i*), after it. The former necessarily involves criminality on the part of the conniver, while the latter may be meritorious, especially in the case of a wife (*k*). The dividing line, however, between connivance and conduct conducing (*l*) to adultery is more difficult to draw (*m*); though it is obvious that, if adultery has been committed by one spouse with the collusion (*n*) of the other in order to assist the latter to obtain relief, it must also have been connived at (*o*). If a deed of separation contains what amounts to a licence to commit adultery (*p*), the *onus* is on the person so covenanting to displace the presumption of connivance which thus arises (*q*); but an innocent construction will, if possible, be placed on the words used (*r*).

Conduct conducing and collusion.

Effect.

1000. A petition for dissolution of marriage must be dismissed (*s*) if the court finds that the petitioner has been accessory to, or has connived at, the adultery of the respondent, and petitions brought under the ecclesiastical practice (*t*) fall within a similar rule (*a*).

The presumption of law, however, is against the existence of

(*f*) *Kennedy* v. *Kennedy*, [1907] P. 49 (which places a greater responsibility on the court than was thought necessary in *Tress* v. *Tress* (1887), 12 P. D. 128, or in *Hardie* v. *Hardie* (1901), 17 T. L. R. 190); see also *Gleig* v. *Gleig* (1906), 22 T. L. R. 716.

(*g*) *Dowling* v. *Dowling*, [1898] P. 228 (covenant not to sue; suggestion made that such a deed might have been obtained improperly); see *Adamson* v. *Adamson* (1907), 23 T. L. R. 434.

(*h*) *Waller* v. *Waller* (1910), 26 T. L. R. 223 (allowance unpaid; covenant not to sue for restitution disregarded); *Moore* v. *Moore* (1887), 12 P. D. 193 (desertion complete before deed executed); *Adamson* v. *Adamson*, *supra* (wife not really consenting to deed); compare *Williams* v. *Baily* (1866), L. R. 2 Eq. 731, 734.

(*i*) See p. 489, *post*,

(*k*) *Angle* v. *Angle* (1848), 6 Notes of Cases, 192 (wife alleged to have connived at and condoned adultery); *Turton* v. *Turton* (1830), 3 Hag. Ecc. 338; *Beeby* v. *Beeby* (1799), 1 Hag. Ecc. 789, *per* Lord STOWELL, at p. 793.

(*l*) See p. 493, *post*.

(*m*) *Brown* v. *Brown and Robey* (1869), 21 L. T. 181; *Barnes* v. *Barnes* (1867), L. R. 1 P. & D. 505; see also *Duberley* v. *Gunning* (1792), 4 Term Rep. 651.

(*n*) See p. 489, *post*.

(*o*) See *Todd* v. *Todd* (1866), L. R. 1 P. & D. 121.

(*p*) *Thomas* v. *Thomas* (1860), 2 Sw. & Tr. 113.

(*q*) *Barker* v. *Barker* (1824), 2 Add. 285.

(*r*) *Studdy* v. *Studdy* (1858), 1 Sw. & Tr. 321; and see note (*a*), p. 486, *ante*.

(*s*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 30.

(*t*) *Ibid.*, s. 22; *Boulting* v. *Boulting* (1864), 3 Sw. & Tr. 329; *Ross* v. *Ross* (1869), L. R. 1 P. & D. 734 (both cases of judicial separation).

(*a*) *Timmings* v. *Timmings* (1792), 3 Hag. Ecc. 76, *per* Lord STOWELL, at p. 77.

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connivance (*b*), which must be clearly shown (*c*); but if, for instance, a husband invited the adulterer and then decamped and gave him the opportunity for, or otherwise actively promoted, the adultery (*d*), that would constitute the offence (*e*); and connivance at adultery with one person precludes relief in respect of adultery with another (*f*).

(*b*) *Rix* v. *Rix* (1777), 3 Hag. Ecc. 74; *Moorsom* v. *Moorsom* (1792), 3 Hag. Ecc. 87, 107. In the following cases it was held that the conduct alleged did not amount to connivance:—*Hodges* v. *Hodges* (1795), 3 Hag. Ecc. 118 (countenancing wife's indelicate conduct before separation; adultery by her four years later); *Crewe* v. *Crewe* (1800), 3 Hag. Ecc. 123 (passive sufferance not established); *Hoar* v. *Hoar* (1801), 3 Hag. Ecc. 137 (conduct injudicious, but intention honest); *Reeves* v. *Reeves* (1813), 2 Phillim. 125 (leaving a wife when convinced of her adultery and waiting for proof; being unable to support her); *Rogers* v. *Rogers* (1830), 3 Hag. Ecc. 57 (negligence or over confidence; but not passive acquiescence with the expectation that adultery would result); *Glennie* v. *Glennie and Bowles* (1862), 32 L. J. (P. M. & A.) 17 (not only was the husband not an accessory before the fact, but it was not proved that he tolerated conduct from which adultery would naturally result); *Marris* v. *Marris and Burke* (1862), 2 Sw. & Tr. 530 (husband not willingly consenting before the fact, though all but criminally weak); *Ross* v. *Ross* (1869), L. R. 1 P. & D. 734 (execution of a deed of separation by a wife does not imply a licence to her husband to commit adultery; but otherwise, if she consents to the adultery in order to get an allowance).

(*c*) In the following cases connivance was established:—*Michelson* v. *Michelson* (1804), 3 Hag. Ecc. 147 (husband's absence and conduct indicated consent); *Denniss* v. *Denniss* (1808), 3 Hag. Ecc. 348, n. (husband's toleration of adultery with his brother, to whom he owed money); *Palmer* v. *Palmer* (1859), 1 Sw. & Tr. 551 (a woman, who had obtained a dissolution of marriage in the United States, not heard to complain of her husband's remarriage); *Allen* v. *Allen and D'Arcy* (1859), 30 L. J. (P. M. & A.) 2 (where the jury believed that there was a conspiracy against the wife); *Gipps* v. *Gipps and Hume* (1863), 3 Sw. & Tr. 116 (petitioner brought a suit, but did not prosecute it in consideration of the promise of a sum of money, and on non-payment he, having made no provision for her nor taken any steps to prevent further misconduct, brought a second suit, and was found to have tacitly consented to subsequent adultery. In approving this decision the House of Lords (*Gipps* v. *Gipps* (1864), 11 H. L. Cas. 1) seem to have extended connivance to wilfully abstaining, even without corrupt intention, from preventing adulterous intercourse, which might reasonably be expected to occur); *Boulting* v. *Boulting* (1864), 3 Sw. & Tr. 329 (deed; wife's willingness that the offence should continue); see *Forster* v. *Forster* (1790), 1 Hag. Con. 144, 146 (husband's suit dismissed on various grounds, including, it seems, connivance); also *Gilpin* v. *Gilpin* (1804), 3 Hag. Ecc. 150 (allegation of encouragement of such intimacy as might lead to adultery held to be a good allegation of connivance); *Picken* v. *Picken and Simmonds* (1864), 34 L. J. (P. M. & A.) 22 (where the wife's adultery was manufactured by an agent of the petitioner's father); a case with which *Sugg* v. *Sugg and Moore* (1861), 31 L. J. (P. M. & A.) 41, seems inconsistent; *Gower* v. *Gower* (1872), L. R. 2 P. & D. 428 (wife induced to commit adultery by an agent of the husband, though without his authority); *Bell* v. *Bell* (1889), 58 L. J. (P.) 54 (husband's adultery brought about by a clerk to wife's solicitors without her knowledge; she was nevertheless held to be entitled to apply for a judicial separation on the ground of cruelty; and, to enable her to do so, although decree was rescinded, petition was not dismissed); compare *Pollard* v. *Pollard* (1904), *Times*, 17th—31st March, 21st, 22nd April (a similar case in which detectives figured largely).

(*d*) *Reeves* v. *Reeves*, *supra*.

(*e*) *Timmings* v. *Timmings* (1792), 3 Hag. Ecc. 76.

(*f*) *Gipps* v. *Gipps*, *supra*, *per* Lord WESTBURY, L.C., at p. 13; and compare Lord CHELMSFORD, at p. 29; see also *Lovering* v. *Lovering* (1792), 3 Hag. Ecc. 85; and compare *Hodges* v. *Hodges*, *supra*; *Rogers* v. *Rogers*, *supra*.

(iii.) *Collusion.*

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1001. Collusion is not, like condonation (*g*), a well-understood term; but it is held to exist (*h*) where the initiation of a suit for dissolution of marriage is procured, or its conduct provided for by agreement or bargain (*i*) between the spouses or their agents, as, for instance, an agreement not to defend (*k*), even where the agreement is disclosed to the court, and where no one is able to indicate any fact which is being falsely dealt with or withheld (*l*); because the court will not be hampered in ascertaining (*m*), for itself, whether there is danger of a husband or wife obtaining a divorce contrary to the justice of the case (*n*). Meaning.

1002. Collusion, although an absolute bar to dissolution of marriage (*o*) or judicial separation (*p*), does not prevent a fresh suit, free from collusion, being afterwards brought (*q*); and the fact that both spouses desire a divorce *a vinculo* does not make them guilty of collusion, provided they have not entered into any agreement obnoxious to the court (*r*). Effect in dissolution.

(iv.) *Condonation (in the Absence of Revival).*

1003. Condonation of matrimonial offences means the complete (*s*) forgiveness (*t*) of all (*a*) such offences as are known to (*b*), or believed by (*c*), the offended spouse, so as to restore as between the spouses the *status quo ante* (*d*); subject, unless it appears (*e*) that there is a specific arrangement to the contrary (*f*), to the Definition.

(*g*) See *infra.*

(*h*) *Jessop* v. *Jessop* (1861), 2 Sw. & Tr. 301; *Guest* v. *Shipley* (1820), 2 Hag. Con. 321. Collusion was first made an offence by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31, though no definition is there given.

(*i*) *Lloyd* v. *Lloyd and Chichester* (1859), 1 Sw. & Tr. 567, 573.

(*k*) *Bacon* v. *Bacon and Ashby* (1877), 25 W. R. 560; *Barnes* v. *Barnes* (1867), L. R. 1 P. & D. 505.

(*l*) *Butler* v. *Butler* (1890), 15 P. D. 66, C. A.; *Butler* v. *Butler*, [1894] P. 25, C. A.

(*m*) *Churchward* v. *Churchward*, [1895] P. 7; *Hunt* v. *Hunt and Wright* (1877), 47 L. J. (P.) 22.

(*n*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7.

(*o*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 30.

(*p*) *Butler* v. *Butler and Burnham* (1890), 63 L. T. 256, where, after the Queen's Proctor had shown cause against a decree obtained by a wife, the jury found collusion, but disagreed as to her adultery.

(*q*) *Churchward* v. *Churchward, supra.*

(*r*) *Gethin* v. *Gethin* (1861), 31 L. J. (P. M. & A.) 43; *Harris* v. *Harris and Lambert* (1862), 31 L. J. (P. M. & A.) 160 (respondent wife received small sum for providing her photograph and attending court); *Malley* v. *Malley* (1909), 25 T. L. R. 662 (wife received money from her husband's sister and then brought her suit).

(*s*) *Ellis* v. *Ellis and Smith* (1865), 4 Sw. & Tr. 154.

(*t*) *Hall* v. *Hall and Kay* (1891), 64 L. T. 837.

(*a*) *Alexandre* v. *Alexandre* (1870), L. R. 2 P. & D. 164.

(*b*) *Dempster* v. *Dempster* (1861), 2 Sw. & Tr. 438.

(*c*) *Ellis* v. *Ellis and Smith, supra.*

(*d*) *Keats* v. *Keats and Montezuma* (1859), 1 Sw. & Tr. 334.

(*e*) *Dowling* v. *Dowling*, [1898] P. 228; but see *Norman* v. *Norman* (1907), 24 T. L. R. 37.

(*f*) *Rose* v. *Rose* (1882), 7 P. D. 225, affirmed (1883), 8 P. D. 98, C. A.

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express (*g*) or implied (*h*) condition that no further matrimonial offence shall occur (*i*). If, however, such a subsequent offence should arise, the forgiveness is cancelled, and the old cause of complaint is revived (*k*), even if the offence is not *ejusdem generis* with the original offence (*l*). If there be condonation, and no revival, neither a decree of dissolution (*m*) nor of judicial separation (*n*) can be obtained.

Revival.

Effect of judicial separation.

1004. Cruelty, or, it is submitted, desertion, is not condoned by a wife obtaining a decree of judicial separation on the ground of adultery; so that, on the husband committing adultery after such decree, the wife may obtain a decree of dissolution (*o*).

Revival of offence.

To revive an offence which has been condoned, an offence less than would be required to found a petition may be sufficient (*p*); but this doctrine does not go the length of making mere familiarities revive adultery, which carries a change of status as its result (*q*).

The effect of disobedience to an order for restitution of conjugal rights can be revived, after subsequent cohabitation, by a further matrimonial offence (*r*).

When condonation not cancelled by subsequent adultery.

1005. Condonation of a wife's adultery with one man is not cancelled, as regards him, by her subsequent adultery with

(*g*) *Blandford* v. *Blandford* (1883), 8 P. D. 19; *Cooke* v. *Cooke* (1863), 3 Sw. & Tr. 126, 246.

(*h*) *Durant* v. *Durant* (1825), 1 Hag. Ecc. 733; *Dent* v. *Dent* (1865), 4 Sw. & Tr. 105.

(*i*) Where a petition for judicial separation on the ground of adultery had been dropped and a deed entered into, the wife was granted a dissolution of marriage on fresh adultery with the same woman (*Binney* v. *Binney* (1893), 69 L. T. 498).

(*k*) *Palmer* v. *Palmer* (1860), 2 Sw. & Tr. 61; *Wilton* v. *Wilton and Chamberlain* (1859), 1 Sw. & Tr. 563. As to the effect of renewed adultery, after bigamy with adultery has been condoned, see *Furness* v. *Furness* (1860), 2 Sw. & Tr. 63; and as to the effect of revival of misconduct not being pleaded, see *Braddock* v. *Braddock* (1910), 27 T. L. R. 94.

(*l*) *Worsley* v. *Worsley* (1730), 2 Lee, 572; *Durant* v. *Durant*, *supra*; *Dent* v. *Dent*, *supra* (cruelty revives adultery); *Blandford* v. *Blandford*, *supra* (adultery revives cruelty and also desertion); *Moore* v. *Moore*, [1892] P. 382; *Collins* v. *Collins* (1884), 9 App. Cas. 205, 241 (does not overrule *Dent* v. *Dent*, *supra*); *Houghton* v. *Houghton*, [1903] P. 150 (desertion by husband revives adultery); *Copsey* v. *Copsey*, [1905] P. 94 (desertion by wife revives adultery). These cases dispose of *Hart* v. *Hart* (1855), 2 Ecc. & Ad. 193.

(*m*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 22, 29, 30, 31; *Dent* v. *Dent*, *supra*; *Beeby* v. *Beeby* (1799), 1 Hag. Ecc. 789; *Durant* v. *Durant*, *supra*.

(*n*) See note (*h*), *supra*.

(*o*) *Green* v. *Green* (1873), L. R. 3 P. & D. 121.

(*p*) *Durant* v. *Durant*, *supra*; *Bostock* v. *Bostock* (1858), 1 Sw. & Tr. 221 (threats reviving cruelty); *Cooke* v. *Cooke*, *supra* (judicial separation; husband's failure to treat the petitioner as a wife as promised); *Winscom* v. *Winscom and Plowden* (1864), 3 Sw. & Tr. 380 (not deciding whether familiarities revive adultery); *Newsome* v. *Newsome* (1871), L. R. 2 P. & D. 306 (simple adultery reviving incestuous adultery); compare *Ex parte Aldridge* (1858), 1 Sw. & Tr. 88 (as to short absence not reviving desertion).

(*q*) In *Ridgway* v. *Ridgway* (1881), 29 W. R. 612, taking liberties with a maid servant was held to revive husband's adultery; but see *Collins* v. *Collins*, *supra*, on this point.

(*r*) *Paine* v. *Paine*, [1903] P. 263.

another (*s*); but it seems that the first man must again be made a co-respondent, if the husband institutes proceedings against the wife with both adulterers (*t*). The court, however, is not precluded from taking notice of a condoned offence (*a*), and, if condonation be proved, will act on it though it be not pleaded (*b*).

May be express or implied.

1006. Condonation may be express (*c*) or implied (*d*). The best evidence of the latter is the continuance or resumption of sexual intercourse (*e*); but this is not absolutely conclusive (*f*), especially in the case of a wife (*g*). It is a question of fact, which may be decided by a jury (*h*), for knowledge and forgiveness of an offence are not presumed (*i*).

SUB-SECT. 3.—*Discretionary Bars.*

(i.) *Undue Delay.*

Void and voidable marriages.

1007. In cases of void marriages neither delay nor insincerity constitute a bar (*k*); but in suits for nullity of voidable marriages by reason of impotence (*l*), although delay is not in itself a bar, it is not permissible for the competent party to approbate a marriage in spite of the other's defect, and, having thereby obtained advantages, afterwards to repudiate it (*m*).

Delay.

Where there is a want of sincerity (*n*) in seeking a decree of nullity of this kind, a petition may be refused, after long delay during which the remedy was known, when the true motive of the

(*s*) *Bernstein* v. *Bernstein*, [1892] P. 375, affirmed, [1893] P. 292, C. A. (following *Story* v. *Story and O'Connor*, (1887), 12 P. D. 196, and overruling *Pomero* v. *Pomero* (1884), 10 P. D. 174).

(*t*) *Norris* v. *Norris, Lawson and Mason* (1861), 30 L. J. (P. M. & A.) 111.

(*a*) *Goode* v. *Goode and Hamson* (1861), 2 Sw. & Tr. 253.

(*b*) *Curtis* v. *Curtis* (1859), 4 Sw. & Tr. 234.

(*c*) *Gooch* v. *Gooch*, [1893] P. 99 (a covenant in a deed, not to commence proceedings on the ground of past offences, does not preclude their being pleaded in answer).

(*d*) *Beeby* v. *Beeby* (1799), 1 Hag. Ecc. 789.

(*e*) Though it may be pleaded up to a certain date (*Windham* v. *Windham and Giuglini* (1863), 32 L. J. (P. M. & A.) 89).

(*f*) The fact of living again under the same roof does not necessarily imply condonation (*Bateman* v. *Ross* (*Countess*) (1813), 1 Dow, 235, H. L.). But there may be cohabitation although the parties do not reside in the same house (*Bradshaw* v. *Bradshaw*, [1897] P. 24; *Huxtable* v. *Huxtable* (1899), 68 L. J. (P.) 83).

(*g*) *D'Aguilar* v. *D'Aguilar* (1794), 1 Hag. Ecc. 773; *Durant* v. *Durant* (1825), 1 Hag. Ecc. 733; *Turner* v. *Turner* (1854), 2 Ecc. & Ad. 201, n.; *Keats* v. *Keats and Montezuma* (1859), 1 Sw. & Tr. 334.

(*h*) *Peacock* v. *Peacock* (1858), 1 Sw. & Tr. 183.

(*i*) *Durant* v. *Durant*, *supra*.

(*k*) See pp. 469, 470, *ante*.

(*l*) For other cases in which decrees have been refused, and as to suits for nullity, see pp. 469, 470, *ante*.

(*m*) See the judgment of Lord SELBORNE, L.C., in *G.* v. *M.* (1885), 10 App. Cas. 171, 186. The case of *E.* v. *T.* (*falsely called E.*) (1863), 3 Sw. & Tr. 312, does not clash with this; for there the husband (petitioner), though he had delayed eleven years, had done all he could in his wife's interests; but see *S.* v. *B.* (*falsely called S.*) (1905), 21 T. L. R. 219, where a clergyman who had delayed seventeen years, on account of his office, was granted a decree.

(*n*) *Anon.* (1857), Dea. & Sw. 295.

SECT. 3. Bars to Relief.

Insincerity.

petitioner (this particularly applies to a wife) appears to be of a collateral nature (*o*). The fact of a woman bringing such a suit after undue intimacy with another man shows no want of sincerity (*p*); nor does delay occasioned by poverty (*q*) affect a suit for restitution of conjugal rights, but unaccountable delay in bringing it might influence the mind of the court in a subsequent suit for dissolution of marriage (*r*).

Long after a wife has left her husband because of his cruelty she may succeed in a suit for judicial separation, brought principally for the purpose of getting the custody of her children (*s*); but, if she brings it after a deed of separation, there being no further offence on his part, she must satisfy the court of her *bona fides* (*t*).

Relief given *vigilantibus non dormientibus*.

1008. The courts may look with great suspicion on suits prosecuted on the ground of adultery after long delay by a husband, though in a wife (*a*) such delay may be considered almost a virtue. Relief is given *vigilantibus non dormientibus* (*b*), and a husband is (*c*) required to come to the court with clean hands, a real grievance, and present wrong; but delay on his part will generally be excused if it is due to poverty (*d*).

Unreasonable delay is a bar to a decree.

1009. In a suit for dissolution of marriage the court is not bound to pronounce a decree if the petitioner is guilty of unreasonable delay (*e*) in presenting a petition (*f*). Poverty is almost always a sufficient excuse (*g*), but it must be convincingly established (*h*).

Reasonable excuses.

The following excuses have also been accepted:—exigencies of domestic service (*i*), a wife waiting till her son was grown up (*k*), insanity of respondent wife (*l*), ignorance of law (*m*), consideration by a wife for her mother's feelings in a case of

(*o*) *H.* (*falsely called C.*) v. *C.* (1860), 1 Sw. & Tr. 605; *Castleden* v. *Castleden* (1861), 9 H. L. Cas. 186 (financial reasons); *M.* (*falsely called B.*) v. *B.* (1864), 3 Sw. & Tr. 550 (wife left after ten years because of a quarrel); *T.* (*falsely called D.*) v. *D.* (1866), L. R. 1 P. & D. 127 (wife left after eight years because of cruelty); *W.* v. *R.* (1876), 1 P. D. 405 (after mutual separation for sixteen years); *M.* v. *C.* (1872), L. R. 2 P. & D. 414 (after deed); compare *M.* v. *M.* (*otherwise H.*) (1906), 22 T. L. R. 719 (deed executed in ignorance of remedy).

(*p*) *M.* (*otherwise D.*) v. *D.* (1885), 10 P. D. 75.

(*q*) *Pearson* v. *Pearson* (1864), 33 L. J. (P. M. & A.) 156.

(*r*) *Beauclerk* v. *Beauclerk*, [1895] P. 220.

(*s*) *Cooke* v. *Cooke* (1863), 3 Sw. & Tr. 246.

(*t*) *Matthews* v. *Matthews* (1859), 1 Sw. & Tr. 499.

(*a*) *Kirkwall* (*Lady*) v. *Kirkwall* (*Lord*) (1818), 2 Hag. Con. 277.

(*b*) *Mortimer* v. *Mortimer* (1820), 2 Hag. Con. 310.

(*c*) *Boulting* v. *Boulting* (1864), 3 Sw. & Tr. 329.

(*d*) *Coode* v. *Coode* (1838), 1 Curt. 755.

(*e*) *Pellew* v. *Pellew and Berkeley* (1859), 1 Sw. & Tr. 553 (insensibility).

(*f*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31.

(*g*) *Harrison* v. *Harrison* (1864), 3 Sw. & Tr. 362; *Mason* v. *Mason* (1882), 7 P. D. 233, reversed (1883), 8 P. D. 21, C. A.; *Edwards* v. *Edwards and Doncaster* (1900), 17 T. L. R. 38.

(*h*) *Short* v. *Short* (1874), L. R. 3 P. & D. 193.

(*i*) *Davies* v. *Davies and Hughes* (1863), 3 Sw. & Tr. 221 (*sed quære*).

(*k*) *Beauclerk* v. *Beauclerk*, *supra*; but see *Beauclerk* v. *Beauclerk*, [1891] P. 189, C. A.

(*l*) *Johnson* v. *Johnson*, [1901] P. 193.

(*m*) *Tollemache* v. *Tollemache* (1859), 1 Sw. & Tr. 557.

incest (*n*), patient endurance of cruelty by a wife (*o*); but delay for two years, after knowledge of misconduct, might, in the absence of explanation (*p*), be fatal to a decree. The court will inquire when a husband first knew, and when he first took action (*q*), and a man who, believing his wife dead, has remarried, must immediately take proper steps on discovering that she is alive (*r*).

(ii.) *Conduct conducing to Adultery.*

In cases of dissolution.

1010. In a petition for dissolution of marriage the court is not bound to pronounce a decree, if it finds that the petitioner has been guilty of such wilful neglect, or misconduct, as has conduced to the adultery charged (*s*); but, though it may (*t*) do so in its discretion (*a*), it will refuse relief if a husband, although he intended no wrong, saw danger and recklessly allowed his wife to remain exposed to it (*b*).

(*n*) *Newman* v. *Newman* (1870), L. R. 2 P. & D. 57.

(*o*) *Green* v. *Green* (1873), L. R. 3 P. & D. 121 (after judicial separation).

(*p*) *Nicholson* v. *Nicholson* (1873), L. R. 3 P. & D. 53; *Faulkes* v. *Faulkes and Stainton* (1891), 64 L. T. 834.

(*q*) *Brougham* v. *Brougham*, [1895] P. 288.

(*r*) *Pegg* v. *Pegg and Gowing* (1904), 20 T. L. R. 353.

(*s*) Petitions were dismissed on this ground in the following cases:—*Coulthart* v. *Coulthart and Gouthwaite* (1859), 28 L. J. (P. & M.) 21 (petitioner had knowingly married a loose woman, and after three months left her for four years without subsistence); *Groves* v. *Groves and Tompson* (1859), 28 L. J. (P. & M.) 108 (wife quarrelled with mother-in-law and went into lodgings with a small allowance; husband remained with mother); *Jeffreys* v. *Jeffreys and Smith* (1864), 3 Sw. & Tr. 493 (husband, a butler, visited wife, when he could, for ten years; then ceased without sufficient reason, and continued to support her for a time only); *Boreham* v. *Boreham* (1866), L. R. 1 P. & D. 77 (wife's cruelty and wilful separation); *Baylis* v. *Baylis* (1867), L. R. 1 P. & D. 395 (marriage to mistress; money quarrels; made her live alone in chambers near Regent Street); *Yeatman* v. *Yeatman* (1870), L. R. 2 P. & D. 187 (wife's adultery after she had obtained a judicial separation for desertion); *Wildey* v. *Wildey and Ryder* (1878), 26 W. R. 239 (wife infected by husband with venereal disease); *Heyes* v. *Heyes* (1887), 13 P. D. 11 (wife drank; husband sold furniture to make her leave; no allowance for several years; see also S. C. (1888), 36 W. R. 527); *Starbuck* v. *Starbuck and Oliver* (1889), 59 L. J. (P.) 20 (leaving wife because she got into debt); *Robinson* v. *Robinson*, [1903] P. 155 ("voluntary blindness").

(*t*) The court made decrees in the following cases:—*Beavan* (*an infant*) v. *Beavan* (1862), 2 Sw. & Tr. 652 (a prostitute married a ward of court aged sixteen; he was sent abroad and she was not maintained); *Proctor* v. *Proctor, Smith and Pitman* (1865), 34 L. J. (P. M. & A.) 99 (an undergraduate married a prostitute; his father arranged deed of separation and allowed her £1 per week); *Stevens* v. *Stevens and Field* (1890), 61 L. T. 844 (wife refused to accompany husband to New Zealand; in this case the papers were sent to the Queen's Proctor); *Lander* v. *Lander, Temple, Fox and Fox* (1890), 63 L. T. 257 (husband wrote to wife—at times insane—that he would make no inquiries; decree subject to an allowance being made to the wife); *Parry* v. *Parry*, [1896] P. 37 (husband, a butler, supported wife, during his long absences, till she took to drink and had an illegitimate child; the jury found conduct conducing; decree on condition of an allowance *dum sola et casta*); compare *Cox* v. *Cox* (1893), 70 L. T. 200, C. A. (wife allowed to plead her husband's flirtations).

(*a*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31.

(*b*) *Dering* v. *Dering* (1868), L. R. 1 P. & D. 531. The court is not bound by any rigid rules to the exercise of its discretion (*Bullock* v. *Bullock* (1910), 103 L. T. 847, *per* EVANS, P., at p. 848).

SECT. 3. Bars to Relief.

In other suits.

1011. On other petitions for relief by reason of adultery, it seems that the Ecclesiastical Courts, the practice of which still prevails (*c*), did not refuse a decree, although a man had been guilty of culpable negligence and inertness when his honour demanded active interposition, provided his conduct did not amount to connivance (*d*); nor did they so refuse although the husband was guilty of wilful desertion (*e*). But a man who has lived with his wife before marriage is bound to exercise more than ordinary care of her (*f*), although conduct, which occurred before marriage, cannot be said to conduce to adultery (*g*). The conduct complained of must have brought about the adultery; for, after that has occurred, such conduct may be the effect rather than the cause of the trouble (*h*), and the fact that a husband is imprisoned is no breach of his marital duty, although the result be that his wife commits adultery (*i*).

Conduct before marriage.

Wife's treatment of husband.

A husband, however, accused of adultery may plead that, in addition to deserting him, his wife treated him with insolence and neglect, and absented herself without informing him of her whereabouts (*k*); but a wife's refusal of intercourse, although reprehensible, is not, it seems, conduct conducing (*l*).

(iii.) *Petitioner's Adultery.*

Effect in :—
(a) Judicial separation;
(b) restitution.

1012. A petitioner, who is proved to have committed adultery which has not been condoned (*m*), cannot obtain a judicial separation (*n*), even if the offence be committed after that of the respondent (*o*), or a decree of restitution of conjugal rights (*p*), unless there has been condonation of his or her offence (*q*) or, it seems, unless both have committed adultery (*r*).

(*c*) See *Duplany* v. *Duplany*, [1892] P. 53; *Synge* v. *Synge*, [1900] P. 180.

(*d*) *Phillips* v. *Phillips* (1844), 1 Rob. Eccl. 144; but see *Drew* v. *Drew* (1842), 1 Notes of Cases, 315 (corrupt facility, if not actual permission, a bar).

(*e*) *Sullivan* v. *Sullivan* (1824), 2 Add. 299; *Morgan* v. *Morgan* (1841), 2 Curt. 679; but see *Hodgson* v. *Hodgson*, [1905] P. 233 (judicial separation refused on the ground of desertion conducing to adultery).

(*f*) *Dillon* v. *Dillon* (1842), 3 Curt. 86; *Hawkins* v. *Hawkins* (1885), 10 P. D. 177.

(*g*) *Allen* v. *Allen and D'Arcy* (1859), 28 L. J. (P. & M.) 81.

(*h*) *St. Paul* v. *St. Paul* (1869), L. R. 1 P. & D. 739; *Millard* v. *Millard and Bastone* (1898), 78 L. T. 471.

(*i*) *Cunnington* v. *Cunnington and Noble* (1859), 1 Sw. & Tr. 475.

(*k*) *Hughes* v. *Hughes* (1866), L. R. 1 P. & D. 219.

(*l*) *Synge* v. *Synge*, *supra*; but see, *contra*, *Dixon* v. *Dixon* (1892), 67 L. T. 394.

(*m*) *Anichini* v. *Anichini* (1839), 2 Curt. 210; *Seller* v. *Seller* (1859), 1 Sw. & Tr. 482.

(*n*) *Forster* v. *Forster* (1790), 1 Hag. Con. 144; *Proctor* v. *Proctor* (1819), 2 Hag. Con. 292.

(*o*) *Otway* v. *Otway* (1887), 13 P. D. 12, 141, C. A.; and see *Dixon* v. *Dixon*, *supra*.

(*p*) *Hope* v. *Hope* (1858), 1 Sw. & Tr. 94; see p. 473, *ante*.

(*q*) See *Proctor* v. *Proctor*, *supra*, where it was suggested that the judge in such a case might *ex officio* order restitution *ne propter separationem jaceant in peccato*; though in *Denniss* v. *Denniss* (1808), 3 Hag. Ecc. 348, n., 353, n., it had been doubted if a husband, who had connived at his wife's incest, would be ordered to return to her bed.

(*r*) *Seaver* v. *Seaver* (1846), 2 Sw. & Tr. 665, Appendix II. (an Irish case).

Discretion in cases of dissolution.

In a petition for dissolution of marriage, however, the court may, in such circumstances, pronounce a decree, although it is not bound to do so (*s*), even if the adultery be condoned (*t*). Such applications are refused (*a*), except in very rare (*b*) cases (*c*), though the court has not infrequently exercised its discretion, in favour both of husbands (*d*)

(*s*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31.

(*t*) *Goode* v. *Goode and Hamson* (1861), 2 Sw. & Tr. 253; *Boucher* v. *Boucher and Judd* (1892), 67 L. T. 720; *Pretty* v. *Pretty*, [1911] P. 83.

(*a*) Decrees were refused to husbands in:—*Clarke* v. *Clarke and Clarke* (1865), 34 L. J. (P. M. & A.) 94 (petitioner voluntarily confessed to court that, after his wife's incest, he had committed one act of adultery); *Hutchinson* v. *Hutchinson and Barker* (1866), 14 L. T. 338 (drink is no excuse for frequenting a brothel and contracting a venereal disease); *McCord* v. *McCord* (1875), L. R. 3 P. & D. 237 (single act condoned); *Youell* v. *Youell, Terrass and Burleigh* (1875), 33 L. T. 578 (repeated acts); *Wildey* v. *Wildey and Ryder* (1878), 26 W. R. 239 (venereal disease); *Grosvenor* v. *Grosvenor* (1885), 34 W. R. 140 (single act, when drunk, condoned); *Story* v. *Story and O'Connor* (1887), 12 P. D. 196 (adultery with maid servant; child born; confession and condonation; effect on wife's character); *Stoker* v. *Stoker* (1889), 14 P. D. 60 (incest condoned); *Craven* v. *Craven and Robinson* (1909), 26 T. L. R. 4 (a single act, but wilfully committed); see also *Evans* v. *Evans and Elford*, [1906] P. 125 (former decree having been rescinded at the instance of the King's Proctor, second suit was brought—apparently on the strength of *Constantinidi* v. *Constantinidi*, [1903] P. 246—on fresh adultery of wife and disclosing husband's adultery); *Todd* v. *Todd and Cunniam* (1906), 23 T. L. R. 9, affirmed (1907), 24 T. L. R. 28, C. A. (wife's leaving husband does not justify his committing adultery afterwards). The two last cases and the remarks of the Court of Appeal in *Constantinidi* v. *Constantinidi*, [1905] P. 253, C. A. (variation of settlement) practically discredit *Constantinidi* v. *Constantinidi*, [1903] P. 246 (after wife left husband for co-respondent, the husband committed adultery with a prostitute; but nevertheless a decree was granted), and *Coombs* v. *Coombs and Hopkins*, [1903] W. N. 180, which followed it (though petitioner also alleged mistake as to the law), and leave untouched *Latour* v. *Latour and Weston* (1861), 2 Sw. & Tr. 524.

Decrees were refused to wives in:—*Wyke* v. *Wyke*, [1904] P. 149; *Shaw* v. *Shaw* (1904), 20 T. L. R. 795; *Tulk* v. *Tulk* (1906), 23 T. L. R. 120 (in these cases the husband's conduct, though very bad, was not the direct cause of the adultery).

(*b*) *Barnes* v. *Barnes* (1868), L. R. 1 P. & D. 572.

(*c*) Decrees were granted to husbands in:—*Conradi* v. *Conradi* (1868), L. R. 1 P. & D. 514 (evidence of petitioner's single act of adultery had been not very satisfactorily, proved in a former suit by witnesses since deceased); and in *Rosenz* v. *Rosenz and Josten* (1909), 25 T. L. R. 473 (not argued, where the husband alleged that his only misconduct was brought about by his wife's treatment of him), decree *nisi* rescinded, on the motion of the King's Proctor (26 T. L. R. 14), the court having been entirely misled. This was referred to in *Craven* v. *Craven and Robinson*, *supra*, and in *Wain* v. *Wain and Eves* (1909), 26 T. L. R. 131.

Decrees were granted to wives in:—*Collins* v. *Collins* (1884), 9 P. D. 231 (wife's adultery; husband's decree, but rescinded; re-cohabitation, cruelty, adultery and rape of child by husband); *Symons* v. *Symons*, [1897] P. 167 (husband's cruelty and desertion; wife after eight years lived with another man and continued after she knew husband alive; he was convicted of an offence on a child; she obtained a decree which was made absolute); *Bullock* v. *Bullock* (1910), 103 L. T. 847; *Pretty* v. *Pretty*, *supra* (in spite of young wife's concealment and perjury).

(*d*) Decrees were granted in:—*Joseph* v. *Joseph and Wentzell* (1865), 34 L. J. (P. M. & A.) 96 (wife's supposed death); *Noble* v. *Noble* (1869), L. R. 1 P. & D. 691; *Snook* v. *Snook and Woolacott* (1892), 67 L. T. 389 (belief that decree *nisi* was final); *Freegard* v. *Freegard* (1883), 8 P. D. 186 (husband believed wife dead, separated from second wife on discovery); *Whitworth* v. *Whitworth*, [1893] P. 85 (mutual leave to re-marry believed in and acted on; on discovery cohabitation renewed; wife's adultery).

Decrees were refused in:—*Pegg* v. *Pegg and Gowing* (1904), 20 T. L. R. 353

SECT. 3. Bars to Relief.

and of wives (*c*), where there has been a second marriage ceremony under a *bonâ fide* mistake, and, in favour of a wife, who has been forced to prostitution by her husband (*f*), notwithstanding that she has also committed bigamy (*g*), and even in some cases where, the fact not having at first been disclosed to the court, the King's Proctor has shown cause against the decree (*h*). Adultery between decree *nisi* and decree absolute is adultery during the marriage (*i*).

(iv.) *Petitioner's Cruelty, Desertion etc.*

Effect.

1013. A petitioner who has been guilty of cruelty (*k*) or desertion (*l*) is not debarred from obtaining a decree (*m*) of judicial separation (*n*), on the ground of adultery (*o*), unless, it seems, such conduct on his part has conduced to adultery (*p*). He is debarred if the ground be any offence less than adultery. In suits for dissolution of marriage, the court may, in its discretion (*q*), grant or refuse a decree to a husband so guilty (*r*).

Sexual crimes.

Rape (*s*), which necessarily implies adultery, is, therefore, on the

(where the man had no reasonable ground for believing his wife was dead, and continued after her reappearance); *Hynes* v. *Hynes and Lake* (1904), 20 T. L. R. 781 (continuing after discovery of wife).

(*e*) *Wickham* v. *Wickham* (1880), 6 P. D. 11 (belief that decree had been made absolute); *Moore* v. *Moore*, [1892] P. 382 (belief that decree absolute at end of six months); *Potter* v. *Potter* (1892), 67 L. T. 721 (belief in death; separation on discovery).

(*f*) *Coleman* v. *Coleman* (1866), L. R. 1 P. & D. 81; *Dodson* v. *Dodson* (1905), 54 W. R. 220; *Barker* v. *Barker* (1907), 24 T. L. R. 31.

(*g*) *Northover* v. *Northover* (1910), 26 T. L. R. 224.

(*h*) *Burdon* v. *Burdon*, [1901] P. 52; *Hunter* v. *Hunter*, [1905] P. 217; but see *Roche* v. *Roche*, [1905] P. 142; *Pretty* v. *Pretty*, [1911] P. 83 (in spite of young wife's concealment and perjury).

(*i*) *Hulse* v. *Hulse* (1871), L. R. 2 P. & D. 259; *Ellis* v. *Ellis* (1883), 8 P. D. 188, C. A.

(*k*) *Moorsom* v. *Moorsom* (1792), 3 Hag. Ecc. 87, 92; *Chambers* v. *Chambers* (1810), 1 Hag. Con. 439, 452; *Arkley* v. *Arkley* (1821), 3 Phillim. 500; *Eldred* v. *Eldred* (1840), 2 Curt. 376, 379; *Dillon* v. *Dillon* (1842), 3 Curt. 86, 94; *Badham* v. *Badham and Gorst* (1890), 62 L. T. 663 (after wife had obtained a judicial separation for cruelty); *Forsyth* v. *Forsyth, Eccles and Foster* (1890), 63 L. T. 263 (provoked by wife's intemperate habits); *Sergent* v. *Sergent and Weaver* (1891), 64 L. T. 236 (after aggravated assault).

(*l*) *Evans* v. *Evans* (1790), 1 Hag. Con. 35, 120; *Sullivan* v. *Sullivan* (1824), 2 Add. 299, 302; *Morgan* v. *Morgan* (1841), 2 Curt. 679, 691; *Dillon* v. *Dillon*, *supra*; *Clowes* v. *Clowes* (1845), 4 Notes of Cases, 1, 12; *Duplany* v. *Duplany*, [1892] P. 53; *Synge* v. *Synge*, [1900] P. 180.

(*m*) See p. 515, *post*.

(*n*) See p. 500, *post*.

(*o*) See p. 477, *ante*.

(*p*) *Hodyson* v. *Hodgson*, [1905] P. 233, which seems a new departure; but the suit was originally for dissolution.

(*q*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31.

(*r*) This discretion has been exercised in cases of desertion:—*Ousey* v. *Ousey* (1874), L. R. 3 P. & D. 223 (wife's refusal to consummate); *Mulley* v. *Mulley and Shaw* (1909), 53 Sol. Jo. 469 (husband had refused restitution, see p. 473, *ante*); and in cases of cruelty: *Pearman* v. *Pearman and Burgess* (1860), 1 Sw. & Tr. 601; *Edwards* v. *Edwards*, [1894] P. 33 (subject to allowance *dum sola et casta* by deed); *Pryor* v. *Pryor*, [1900] P. 157 (generally unless cruelty conduces); *Squire* v. *Squire*, [1905] P. 4 (after judicial separation for cruelty subject to allowance).

(*s*) See p. 480, *ante*.

same footing *qua* defence; but there does not seem to be any authority for dealing with an unnatural offence (*t*) committed by the petitioner as a defence to a suit for dissolution; though it is submitted that such an offence might be considered as conduct conducing (*a*), or that the court might grant a wife a decree of dissolution on a cross prayer (*b*) in spite of adultery (*c*) committed (*d*).

SECT. 4.—*Institution and Defence of Proceedings.*

SUB-SECT. 1.—*Institution.*

(i.) *Petitions in General.*

1014. A suit in the Divorce Division is commenced by filing (*e*) a petition (*f*) signed by the petitioner (*g*), and supported by his or her affidavit (*h*), verifying the facts of which he or she has personal cognisance (*i*), and deposing to belief in the truth of the other facts alleged (*k*); and where a petition is presented in a suit of jactitation of marriage (*l*), or for nullity (*m*) or dissolution (*n*) of marriage, for judicial separation (*o*), or for a declaration of legitimacy (*p*), the affidavit further states that there is no collusion or connivance between the petitioner and the other party to the marriage in question or the marriage alleged (*q*). Petitions for restitution of conjugal rights (*r*), and for damages (*s*), can also be presented, as well as petitions for the reversal of decrees of judicial

How presented.

Various kinds.

(*t*) See p. 477, *ante*.
(*a*) See p. 493, *ante*.
(*b*) See p. 515, *post*.
(*c*) See p. 477, *ante*.
(*d*) But, on adultery as a defence to restitution, see *Geils* v. *Geils* (1848), 6 Notes of Cases, 97, 101.
(*e*) In the Registry (see p. 463, *ante*); but not in a district registry; see *Re Binstead, Ex parte Dale*, [1893] 1 Q. B. 199, C. A.
(*f*) Divorce Rule 1.
(*g*) Or, by leave, by his solicitor, in which case the necessary affidavit must be sworn by the petitioner himself as soon as possible (*Ex parte Bruce* (1881), 6 P. D. 16 (petitioner on military service); *Ex parte Hobson* (1894), 70 L. T. 816 (petitioner employed abroad); *Russell* v. *Russell and Maclaren* (1889), 59 L. J. (P.) 13 (petitioner British consul in remote place); but see *Ex parte Tartt* (1886), 34 W. R. 368 (petitioner voluntarily abroad).
(*h*) Intituled "In the matter of the petition of A. B. for of marriage" (*Gapp* v. *Gapp and Leverson* (1859), 4 Sw. & Tr. 273; *Steed* v. *Steed* (1867), L. R. 1 P. & D. 364); and see p. 535, *post*.
(*i*) Including the places and dates of marriage, and of cohabitation, and names of issue, if any, with dates of birth. See *Tourle* v. *Tourle* (1858), 1 Sw. & Tr. 165; *Nokes* v. *Milward* (1824), 2 Add. 386; and see p. 534, *post*.
(*k*) Divorce Rule 2; Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 41; and see *Deane* v. *Deane* (1858), 1 Sw. & Tr. 90; *Forster* v. *Forster and Evans* (1858), 1 Sw. & Tr. 167 (unnecessary length).
(*l*) See p. 498, *post*.
(*m*) See p. 499, *post*.
(*n*) See p. 500, *post*.
(*o*) *Ibid.*
(*p*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 3; Divorce Rule 174 (see p. 501, *post*); see also the Greek Marriages Act, 1884 (47 & 48 Vict. c. 20), s. 1; Divorce Rule 213.
(*q*) Divorce Rule 3; and see pp. 487 *et seq.*, *ante*.
(*r*) See p. 499, *post*, detailing further requirements as to affidavit.
(*s*) See p. 500, *post*.

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separation (*t*), and certain subsidiary petitions (*a*) dealing with interlocutory matters.

Guardians.

The registrar must be satisfied that the petitioner is of age (*b*). Otherwise the petition must be presented by a guardian (*c*), as is also necessary in the case of a lunatic (*d*), where no committee has been appointed.

Contents of petition.

1015. The petition (*e*) must set out distinctly with reasonable certainty (*f*), though without pleading evidence, the facts and the alleged grounds for relief (*g*), and must state the residence and domicil of the husband and wife at inception, and the occupation of the former (*h*), and whether or not there have been any previous proceedings between them with reference to their marriage in the Divorce Division (*i*). The prayer for relief need not ask for costs (*k*), but should ask for the custody of the children, if that be desired (*l*).

Proceedings after previous proceedings.

After a successful suit for judicial separation, irrespective of whether further offences were committed either before or since, a suit for dissolution of marriage may be brought (*m*), and where, at petitioner's instance, a suit for dissolution of marriage has been dismissed, apparently a fresh suit may be brought alleging the same facts (*n*).

(ii.) *Petitions Founded on Ecclesiastical Practice.*

(a) *Jactitation of Marriage.*

Jactitation.

1016. If any one falsely and maliciously assert a marriage with another, the latter may present a petition praying for a decree enjoining the offender to be perpetually silent on the subject (*o*).

(*t*) See p. 562, *post*.

(*a*) As to alimony, see pp. 516, 563, *post*; as to maintenance, allowance on refusal to cohabit, settlements by wife in fault and increasing and decreasing allowances, see pp. 564 *et seq.*, *post*; as to variation of settlements, see p. 571, *post*; and as to maintenance of children, see pp. 521, 577, *post*.

(*b*) If the petition is brought so soon after the marriage as to make this doubtful, it is the practice to require the solicitor to make a certificate on the subject.

(*c*) And signed by the guardian, as well as by petitioner; and see p. 504, *post*.

(*d*) *Ibid.*

(*e*) In practice it is necessary to file a certificate of marriage with the petition.

(*f*) *Porter* v. *Porter and Jaggard* (1864), 3 Sw. & Tr. 596; and see the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 27.

(*g*) *Pyne* v. *Pyne* (1858), 1 Sw. & Tr. 80; *Matison* v. *Matison* (1860), 29 L. J. (P. M. & A.) 80 (allegation that husband father of illegitimate children struck out); see also note (*k*), p. 497, *ante*.

(*h*) Divorce Rule 220; see *Ogden* v. *Ogden*, [1908] P. 46, 83, C. A.

(*i*) Divorce Rule 219; see *Re Clark's Petition* (1905), 75 L. J. (P.) 7; and compare *Yeatman* v. *Yeatman and Rummell* (1869), 21 L. T. 401. As to proof of domicil, see *Freer* v. *Freer* (1910) 27 T. L. R. 13.

(*k*) *Finlay* v. *Finlay and Rudall* (1861), 30 L. J. (P. M. & A.) 104; *Goldsmith* v. *Goldsmith, Dalrymple, Nicolls and Wooley* (1862), 31 L. J. (P. M. & A.) 163.

(*l*) *Seymour* v. *Seymour* (1859), 1 Sw. & Tr. 332; *Boddy* v. *Boddy and Grover* (1860), 30 L. J. (P. M. & A.) 163.

(*m*) *Green* v. *Green* (1873), L. R. 3 P. & D. 121; *Mason* v. *Mason* (1883), 8 P. D. 21, C. A.

(*n*) *Hall* v. *Hall and Richardson* (1879), 48 L. J. (P.) 57.

(*o*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 2, 6, 16, 17, 22;

(b) *Nullity of Marriage.*

Nullity.

Void and voidable marriages.

1017. These petitions are of two classes according as they relate to marriages which are void *ab initio*, or only voidable (*p*).

As void marriages have, even in the absence of judicial proceedings, no effect in law, it is not absolutely necessary to obtain a decree, particularly in cases of bigamy or consanguinity, where there can be no doubt, though this does not apply with equal force if want of consent (including insanity) be the ground. But a decree may be obtained, as of right, whatever the merits of the parties, and is often of great importance by way of preserving evidence of the facts alleged.

A prayer for the custody of children of a void marriage may be inserted in the petition (*q*).

(c) *Restitution of Conjugal Rights.*

Procedure before petition.

1018. Before a petition (*r*) is presented by a husband or wife for restitution of conjugal rights, a written demand (*s*) for cohabitation (*a*) and restitution of conjugal rights must be made by the intending petitioner to the party to be cited; and the affidavit in support of the petition (*b*) must state sufficient facts to satisfy the registrar that this has been done, and that, after a reasonable opportunity for compliance therewith, such restitution has been withheld (*c*). If necessary, substituted service of the demand may be allowed (*d*).

see *Hawke* (*Lord*) v. *Corri* (1820), 2 Hag. Con. 280; *Thompson* v. *Rourke*, [1893] P. 11.

(*p*) As to this distinction, see p. 469, *ante*.

(*q*) *Langworthy* v. *Langworthy* (1886), 11 P. D. 85, C. A., *per* COTTON, L.J., at p. 88, explaining the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 35; *Jackson* v. *Jackson*, [1908] P. 308. See p. 578, *post*; and as to recognition of foreign divorce court decrees in nullity suits in England, see *Cass* v. *Cass* (*otherwise Pfaff*) (1910), 102 L. T. 397.

(*r*) HANNEN, P., remarked in *Marshall* v. *Marshall* (1879), 5 P. D. 19, at p. 23, that he had never known an instance in which it appeared that such a suit was instituted for any other purpose than to enforce a money demand; this, however, was before the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68). Compare *Winkworth* v. *Winkworth* (1908), 25 T. L. R. 54.

(*s*) Divorce Rule 175; see *Field* v. *Field* (1888), 14 P. D. 26, C. A. (the demand must be friendly in form, though not necessarily written by the hand of the complaining party, and its receipt and contents must be proved); *Mason* v. *Mason* (1889), 61 L. T. 304 (letter from wife, then one from solicitor, sufficient); *Smith* v. *Smith* (1890), 15 P. D. 11, 47, C. A. (demand written by wife held sufficient, though alluding to High Court proceedings); *Elliott* v. *Elliott* (1901), 85 L. T. 648 (sufficient, though rather peremptory).

(*a*) Matrimonial cohabitation, not matrimonial intercourse, is what the court seeks to enforce (*Forster* v. *Forster* (1790), 1 Hag. Con. 144, 154); without cohabitation merely maintaining is not sufficient (*Weldon* v. *Weldon* (1883), 9 P. D. 52). As to husband's reply to suit by wife, see *West* v. *West* (1910), 55 Sol. Jo. 48.

(*b*) See p. 497, *ante*.

(*c*) Divorce Rule 175; and as to bars to relief, see p. 494, *ante*, and p. 514, *post*.

(*d*) *Waters* v. *Waters* (1875), 34 L. T. 33 (on father and by advertisement); *O'Sheehy* v. *O'Sheehy* (1876), 34 L. T. 367 (on solicitor); and see p. 509, *post*.

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(iii.) *Petitions Founded on Statute.*

(a) *Judicial Separation.*

On what grounds.

1019. A husband or wife may petition for a decree of judicial separation (*e*) on the ground of adultery (*f*), of cruelty (*g*), or of desertion without cause for two years and upwards (*h*).

(b) *Dissolution of Marriage.*

Husband's petition.

Wife's petition.

1020. A husband or wife may present a petition for dissolution of marriage (*i*) on the ground (*k*) that since the celebration thereof, in the case of a husband's petition, the wife has been guilty of adultery (*l*), or, in the case of a wife's petition, the husband has been guilty of incestuous adultery (*m*), bigamy with adultery (*m*), rape (*m*), sodomy, bestiality (*n*), or of adultery coupled with cruelty (*o*), or desertion (*p*). A decree of judicial separation for cruelty or desertion, coupled with alleged adultery, is often the foundation for this petition (*q*).

(c) *Damages.*

With or without other relief.

1021. A husband may, in a petition either for dissolution of marriage or for judicial separation, or in a petition limited to one such object (*r*) only, claim damages from any person on the ground of his having committed adultery with his wife (*s*). The amount claimed must be stated in the petition (*a*), and the court is prayed

(*e*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 7, 16.

(*f*) See p. 477, *ante*.

(*g*) See pp. 473, 477, *ante*.

(*h*) See p. 481, *ante*; *Harding* v. *Harding* (1886), 11 P. D. 111. For a case of desertion by a wife, see *Millar* v. *Millar* (1883), 8 P. D. 187.

(*i*) Popularly known as a divorce, but more accurately as a divorce *a vinculo matrimonii*; because what is now called judicial separation was also known as divorce (*a mensâ et thoro*) up to 1857 in England, and even now in Ireland, where a divorce *a vinculo* can still only be obtained by Act of Parliament.

(*k*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 27.

(*l*) See p. 477, *ante*.

(*m*) See p. 480, *ante*.

(*n*) See p. 477, *ante*.

(*o*) See p. 473, *ante*.

(*p*) See p. 481, *ante*.

(*q*) As in *Bland* v. *Bland* (1866), L. R. 1 P. & D. 237.

(*r*) Claims for damages in petitions, other than for dissolution of marriage, hardly ever occur, but *Mason* v. *Mason* (1882), 7 P. D. 233, reversed (1883), 8 P. D. 21, C. A., was originally a suit for judicial separation and damages; and in *Cox* v. *Cox and Warde*, [1906] P. 267, the prayer was for damages only. See also *Malcolmson* v. *Givins* (1873), *Times*, 27th February; *West* v. *West* (1870), L. R. 2 P. & D. 196.

(*s*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 33.

(*a*) *Spedding* v. *Spedding and Smith* (1862), 31 L. J. (P. M. & A.) 96; *Pegler* v. *Pegler and Russell* (1901), 85 L. T. 649. A liberal amount should be claimed, as it is not permissible to inform the jury of the amount claimed, and if they give a larger sum, the petition may have to be amended and re-served (*Beckett* v. *Beckett and Jones*, [1901] P. 85 (leave to amend obtained by summons served on the co-respondent)); but, it seems, the position as to the

to ascertain by the verdict of a jury (*b*) what amount shall be paid, and to direct how it shall be applied (*c*).

(d) *Legitimacy Declaration etc.*

Declaration of legitimacy.

1022. A petition, similar to that in proceedings to establish the validity of a marriage, may be presented to the court (*d*) for a decree declaring that the petitioner is the legitimate child of his parents, or that he is a natural-born British subject; and the court may make a declaratory decree accordingly (*e*).

(iv.) *Protection Orders.*

Application and effect.

1023. A wife deserted (*f*) by her husband (*g*) may (*h*) at any time after such desertion apply to a police magistrate, or to justices in petty sessions (*i*), or to the Divorce Division (*k*), for an order to protect any money or property (*l*), which has, or may, lawfully come to her after such desertion, against her husband and his creditors and any person claiming under him; and, if the court be satisfied of the desertion, the order may be made so that such money or property shall belong to her as if she were a *feme sole* (*m*).

Penalty for disobedience.

If the husband or his creditors or any person claiming under him take or keep such property after notice, he or they is or are

marriage settlements may be alluded to (*Bell* v. *Bell and Anglesey* (*Marquis*) (1859), 1 Sw. & Tr. 565).

(*b*) See p. 528, *post*.

(*c*) See p. 579, *post*.

(*d*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93); Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 31 to 34; and see pp. 315, 316, *ante*, and title BASTARDY, Vol. II., pp. 433, 434.

(*e*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), ss. 1, 2; and as to similar petitions by parties to Greek marriages, see pp. 315, 316, *ante*; and title BASTARDY, Vol. II., pp. 433, 434.

(*f*) See *Ex parte Aldridge* (1858), 1 Sw. & Tr. 88 (case of a seafaring man).

(*g*) If he has absented himself, left his wife unprovided for, continued his absence and made no *bonâ fide* offer to return (*Cargill* v. *Cargill* (1858), 1 Sw. & Tr. 235, *per* Sir CRESSWELL CRESSWELL, at p. 236).

(*h*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21.

(*i*) According as she is resident within the metropolitan district or not. As to police magistrates and courts of petty sessions, see title MAGISTRATES.

(*k*) Irrespectively of where she is living in England: the application is made in writing, to a judge, supported by an affidavit (Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 6; Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 34; Divorce Rule 124). The information must be precise as to desertion (*Ex parte Sewell* (*Dorothy*) (1858), 28 L. J. (P. & M.) 8).

(*l*) Including property acquired as executrix, administratrix, or trustee (Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 7).

(*m*) If the order be made by a magistrate or justices, it must be registered within ten days at the county court of the district in which the wife resides; compare *In the Goods of Faraday* (*Betty*) (1861), 2 Sw. & Tr. 369. The application, if in the High Court, is made to the judge in chambers (Divorce Rule 124), the practice being to leave the application and affidavit at the registry for approval. The applicant must state what she knows of her husband's residence. If he be within the jurisdiction, he must be served personally with a summons (Divorce Rule 197); and see *Matthew* v. *Matthew* (1869), 19 L. T. 662). The order made states the commencement of the desertion (Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 9), and must be in general terms, to avoid deciding rights as to property (*Ex parte Mullineux* (1858), 1 Sw. & Tr. 77). As to the effect of such order upon the property of a wife and upon her rights as such, see p. 346, *ante*.

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liable to restore it, and also to pay twice the value thereof (*n*). The order is operative from the date of the desertion (*o*).

(v.) *Amended Pleadings and Supplemental Petitions.*

Amendment. Re-service.

1024. A petition or other pleading, either before or after (*a*) it has been served or delivered, may, by leave of the court (*b*), be altered or amended (*c*); but, if any other than an immaterial (*d*) alteration be made in a petition after (*e*) it has been served, it must be personally re-served on any party affected by such alteration (*f*). Further charges of cruelty are open to grave objection (*g*), and generally amendments should refer to evidence obtained since the petition was filed (*h*).

A petition for judicial separation may be converted into one for dissolution of marriage (*i*), and *vice versâ* (*k*), even after decree

(*n*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21.

(*o*) *In the Goods of Elliott* (*Ann*) (1871), L. R. 2 P. & D. 274; and see p. 346, *ante*.

(*a*) If appearance has been entered, notice must be given to opponents (*Wright* v. *Wright* (1858), 1 Sw. & Tr. 80). The amendment of a petition, after being set down, may cause it to lose its place in the list (*Milner* v. *Milner* (1861), 30 L. J. (P. M. & A.) 103). As to amendment of pleadings, see further, title PLEADING.

(*b*) Registrar's summons (Divorce Rules 187, 34) supported by affidavit (*Rowley* v. *Rowley* (1859), 1 Sw. & Tr. 487). If there be new or extended charges, the affidavit verifies these and states when they came to the knowledge of petitioner. The collusion and connivance clause is repeated.

(*c*) This is liable to be refused where charges of cruelty are made at a late stage (*Jayne* v. *Jayne and Prothero* (1869), 21 L. T. 401 (by co-respondent); *Austin* v. *Austin* (1871), 41 L. J. (P. & M.) 8 (by respondent)). A husband's becoming bankrupt, and his failure to pay his wife's taxed costs, does not prevent his amending his answer by alleging her adultery (*Greatorex* v. *Greatorex* (1864), 34 L. J. (P. M. & A.) 9).

(*d*) *Ambler* v. *Ambler and Hoghton* (1862), 32 L. J. (P. M. & A.) 6 (respondent not prejudiced); *Smith* v. *Smith* (1863), 3 Sw. & Tr. 216 (where there had been substituted service and the amendment did not affect the citation as advertised); *Skeats* v. *Skeats and White* (1865), 35 L. J. (P. M. & A.) 47 (mistake as to church where married); *Bunyard* v. *Bunyard* (1863), 32 L. J. (P. M. & A.) 176 (respondent having pleaded denial of cruelty, but not defending; date of allegation altered). Where the respondent (husband) was in India, and the name of the lady charged was corrected, personal re-service was dispensed with (*Roberts* v. *Roberts* (1909), 53 Sol. Jo. 304).

(*e*) *Reuss* v. *Reuss and Applegarth* (1862), 32 L. J. (P. M. & A.) 168.

(*f*) *Rowley* v. *Rowley*, *supra* (charges of cruelty added); *Wallace* v. *Wallace, Guiter and Macnamara* (1862), 32 L. J. (P. M. & A.) 47 ("person unknown" added); *Cotton* v. *Cotton and Kinnis* (1862), 4 Sw. & Tr. 275 (name misspelt); *Spilsbury* v. *Spilsbury* (1863), 3 Sw. & Tr. 210; *Forman* v. *Forman and Davis* (1863), 32 L. J. (P. M. & A.) 80 (indirect charges amended); *Love* v. *Love* (1863), 32 L. J. (P. M. & A.) 134; and *Kisch* v. *Kisch* (1864), 33 L. J. (P. M. & A.) 115 (mistakes in Christian name); *Charter* v. *Charter* (1889), 60 L. T. 872 (date of charge of adultery altered); *Harding-Cox* v. *Harding-Cox* (1908), 24 T. L. R. 634 (wrongly named intervener dismissed). As to notice and time, see *Hitchcock* v. *Hitchcock* (1867), 36 L. J. (P. & M.) 40; and Divorce Rules 115, 116.

(*g*) *Austin* v. *Austin*, *supra*; *Topper* v. *Topper* (1869), 38 L. J. (P. & M.) 36.

(*h*) *Bannister* v. *Bannister and Davis* (1860), 29 L. J. (P. M. & A.) 53.

(*i*) *Cartledge* v. *Cartledge* (1862), 4 Sw. & Tr. 249. *Lewis* v. *Lewis* (1860), 29 L. J. (P. M. & A.) 123 (petition for judicial separation first dismissed), no longer holds good. In *Parkinson* v. *Parkinson* (1869), L. R. 2 P. & D. 27, a wife, having failed to prove desertion, was offered a judicial separation, but, having learnt meanwhile the legal effect of communication of syphilis, she was allowed to plead cruelty and re-serve petition. In *Corpataux* v. *Corpataux and Staub* (1875), 23 W. R. 456, the amendment was made after verdict.

(*k*) *Duplany* v. *Duplany*, [1892] P. 53; *Parsons* v. *Parsons*, [1907] P. 331 (at

nisi (*l*); but it may have to be re-served, although a fresh citation is not necessary. If a pleading be embarrassing, the court may order it to be amended (*m*).

On the day on which an amendment is filed, a copy of it is delivered to all opponents, who may, within four days (*n*) of receiving it (*o*), amend their pleadings already delivered (*p*).

Damages.

1025. A claim for damages may be added or abandoned by an amendment (*q*), but the addition of a co-respondent will not be allowed unless *bonâ fide* (*r*). The name of an unknown adulterer must be added on his identity being discovered (*s*), and a co-respondent has been allowed to add counter-charges during the hearing to enable him to cross-examine as to them (*t*).

Supplemental petitions.

1026. When a petitioner desires to add allegations of events which have happened since the date of the petition (*a*), a supplemental petition (*b*) must be filed, and served personally, or as ordered, whether an appearance has been entered or not, and a fresh affidavit filed in support, containing the collusion and connivance clause, although a new citation need not be extracted (*c*). The procedure is similar to that for amendment (*d*). It does not follow that, because an original petition is still on the file, a supplemental petition may be filed, regardless of lapse of time or other circumstances (*e*).

Further advertisement.

Where, after citation by advertisement, and no appearance,

any time before decree absolute); see also *Smith* v. *Smith* (1859), 1 Sw. & Tr. 359; *Boreham* v. *Boreham* (1866), L. R. 1 P. & D. 77. In *Dent* v. *Dent* (1865), 4 Sw. & Tr. 105, and *Bromfield* v. *Bromfield* (1871), 41 L. J. (P. & M.) 17, an amended prayer for judicial separation was allowed, although opposed by the husband; whilst in *Lempriere* v. *Lempriere* (1868), L. R. 1 P. & D. 569, the husband was refused either a decree *nisi* or a judicial separation. In *Mycock* v. *Mycock* (1870), L. R. 2 P. & D. 98, a wife, who had proved cruelty and adultery, was not allowed to amend prayer to one for judicial separation until husband had time to investigate a charge of adultery against her. The prayer is not allowed to be altered to one for judicial separation in order to defeat the King's Proctor (*Drummond* v. *Drummond* (1861), 2 Sw. & Tr. 269).

(*l*) *Parsons* v. *Parsons*, [1907] P. 331.

(*m*) *Green* v. *Green* (1864), 33 L. J. (P. M. & A.) 83.

(*n*) Divorce Rule 36; but further time may be allowed.

(*o*) *Ibid.*, 35.

(*p*) *Ibid.*, 36; except in the case of withdrawal of a claim for damages (*Chamberlain* v. *Chamberlain and Hartwell* (1907), 51 Sol. Jo. 357).

(*q*) *Bartlett* v. *Bartlett and Balmanno* (1864), 34 L. J. (P. M. & A.) 64; *Symonds* v. *Symonds and Hannan* (1870), 23 L. T. 568; *Henslow* v. *Henslow and Beardsley* (1871), 40 L. J. (P. & M.) 31.

(*r*) *Codrington* v. *Codrington and Anderson* (1864), 3 Sw. & Tr. 368.

(*s*) Divorce Rule 6; and see pp. 506, 507, *post*.

(*t*) *Plumer* v. *Plumer and Bygrave* (1859), 4 Sw. & Tr. 257.

(*a*) *Borham* v. *Borham* (1870), L. R. 2 P. & D. 193 (fresh acts of adultery); compare *Webb* v. *Webb* (1828), 1 Hag. Ecc. 349.

(*b*) Intituled in the suit and reciting the fact of the original petition. See *Farmer* v. *Farmer* (1884), 9 P. D. 245; *Wood* v. *Wood* (1887), 13 P. D. 22 (where desertion had not existed for two years at the date of original petition).

(*c*) *Holmes* v. *Holmes and Bawls* (1909), 25 T. L. R. 263.

(*d*) See p. 502, *ante*; *Lapington* v. *Lapington* (1888), 14 P. D. 21, distinguishes amended from supplemental petitions.

(*e*) *Scharrer* v. *Scharrer* (1909), *Times*, 7th July, C. A.

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further charges of a similar nature are added, the court does not require further advertisement (*f*), but it is otherwise if the new charges, in an amended or supplemental petition, are of a different nature.

SUB-SECT. 2.—*Parties.*

(i.) *Persons under Age, and of Unsound Mind.*

Minors.

Election or assignment of guardians.

1027. A minor, other than a co-respondent (*g*), proceeding as a party to a suit in the Divorce Division may elect any one or more next of kin, or next friends, to act as his or her guardian or guardians (*h*) therein (*i*); but before any such guardian can extract a citation or enter an appearance, the instrument of election must be filed (*k*). Application to a registrar (*l*) to assign a guardian is only necessary where the guardian elected is not one of the next of kin (*m*), or when an infant (*n*) becomes a party to a suit (*o*).

Lunatic's committee.

1028. A committee (*p*) of a lunatic so found (*q*) may take out a citation and prosecute a suit (*r*), or enter an appearance, or intervene and defend, on behalf of the lunatic, but if no committee has been appointed (*s*) application must be made to a registrar to

(*f*) *Smith* v. *Smith* (1863), 3 Sw. & Tr. 216; because it is the citation only which is advertised, and this does not specify the charges in detail.

(*g*) Divorce Rule 108.

(*h*) A father may in some cases petition to have his child's marriage set aside (*Wells* v. *Cottam* (*falsely called Wells*) (1863), 3 Sw. & Tr. 364); but if he do so, on the strength of his liability under the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 7, it is not as guardian (*Ray* v. *Sherwood and Ray* (1836), 1 Curt. 173, 193, 231, and (*sub nom. Sherwood* v. *Ray*) 1 Moo. P. C. C. 353, 402); see also *Tongue* v. *Allen* (1835), 1 Curt. 38; *Tongue* v. *Tongue* (1836), 1 Moo. P. C. C. 90; and *Templeton* v. *Tyree* (1872), L. R. 2 P. & D. 420. A married woman cannot be guardian.

(*i*) Divorce Rule 105. On a party attaining majority, or on change of guardian through death or otherwise, it is the practice for the correction in the title of the suit to be effected by a summons on affidavit (*ibid.*, 196).

(*k*) *Ibid.*, 106. It must be filed in the registry. In a matrimonial suit, on the election or appointment of a guardian it is not the usual practice for the registrars to require a formal consent by such guardian to be filed either in the case of a petitioner or of a respondent; there is no rule requiring it, but the papers should show that the proposed guardian is willing. And see p. 508, *post*.

(*l*) No summons is necessary in the case of an intending petitioner (though notice of the application is sent to the next of kin); but it is otherwise in the case of a respondent or would-be intervener.

(*m*) In this case a renunciation of the next of kin, and an affidavit of fitness of the proposed guardian, must be filed.

(*n*) Under the age of seven years; see *Re Upton's* (*H. E. M. D. C.*) *Petition* (1860), 6 Jur. (N. S.) 404 (a case of legitimacy declaration).

(*o*) Divorce Rule 107. The application is founded on an affidavit. As to the practice in cases of declarations of legitimacy, see title BASTARDY, Vol. II., p. 434.

(*p*) Of the estate rather than of the person (*Baker* v. *Baker* (1880), 5 P. D. 142, affirmed 6 P. D. 12, C. A.).

(*q*) By leave of the Lords Justices (*Baker* v. *Baker*, *supra*). He becomes the petitioner or the respondent. As to the general powers of a committee of such person, see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*r*) Divorce Rule 196. See *Woodgate* v. *Taylor* (1861), 2 Sw. & Tr. 512 (committee of person and estate); compare *Re Stoer* (1884), 9 P. D. 120, C. A. (a committee petitioning to perpetuate testimony of illegitimacy); and see p. 508, *post*.

(*s*) *Burrell* v. *Burrell and Blake* (1900), 17 T. L. R. 41 (petitioner detained under magistrate's reception order).

assign a guardian (*a*) for such purpose. A summons is necessary if the opposite party is already before the court (*b*), but a guardian is not appointed if there is a *bonâ fide* dispute as to the insanity (*c*). If no appearance has been entered for a lunatic, the court may insist on representation by the official solicitor at the expense of the petitioner (*d*).

Official solicitor.

(ii.) *Pauper Suitors.*

1029. To obtain leave to prosecute or defend a suit *in formâ pauperis* (*e*), a case in writing must be laid before counsel and, when he has given an opinion that there are sufficient grounds for proceeding, a registrar may make the order, or refer the matter to the judge.

Procedure.

No court fees are payable by a pauper (*f*), but neither counsel nor solicitor is assigned (*g*), and if a pauper acts vexatiously he may be dispaupered (*h*).

If a pauper husband neglects to proceed with his petition, he may be ordered, on summons, to pay costs, with a stay till payment (*i*); and if, after being ordered to pay costs, a petitioner obtains leave to proceed *in formâ pauperis*, it seems that the suit may be stayed till he pays them (*j*).

Delay.

Stay.

(iii.) *Co-Respondents.*

1030. In a petition for dissolution of marriage presented by a husband every (*k*) alleged adulterer must be named as a

Must be named, except by leave.

(*a*) As to matrimonial proceedings for and against lunatics generally, see *Mordaunt* v. *Mordaunt* (1870), L. R. 2 P. & D. 103, 109, 382; *Mordaunt* v. *Moncreiffe* (1874), L. R. 2 Sc. & Div. 374; and see p. 484, *ante*.

(*b*) Divorce Rule 196; and see *Parnell* v. *Parnell* (1814), 2 Hag. Con. 169. The procedure is similar to that in the case of a minor; the affidavit must describe the condition of the lunatic.

(*c*) *Fry* v. *Fry* (1890), 15 P. D. 25, 50, C. A.; compare *Mordaunt* v. *Mordaunt*, *supra* (guardian assigned to a respondent). In *Re Petition for Judicial Separation, Ex parte Beecham*, [1901] P. 65, an order (unopposed) was made on the Commissioners in Lunacy for facilities for a patient to proceed with her petition.

(*d*) *Giles* v. *Giles*, [1900] P. 17 (GORELL BARNES, J., observing that the practice under R. S. C., Ord. 13, r. 1, ought to be followed by the Divorce Division), an illustration of the principle enunciated at p. 468, *ante*; *Johnson* v. *Johnson*, [1901] P. 193; and as to the general duties of the official solicitor, see title COURTS, Vol. IX., p. 71.

(*e*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 54; compare R. S. C., Ord. 16, rr. 22—31; and see Divorce Rules 25, 26, 208, 209, 210, 211.

(*f*) Who must have less than £25 (exclusive of clothes). The husband's income must not exceed 32*s.* a week.

(*g*) *Hamer* v. *Boreham* (1858), 1 Sw. & Tr. 26, no longer applies. It is the custom for the proposed pauper to pay counsel a guinea for his opinion. There is nothing to prevent either counsel or solicitor from being retained by, and accepting other fees from, the pauper, or from conducting the case without charge; see 90 L. T. Jo. 79, and *Richardson* v. *Richardson and Plowman*, [1895] P. 276. Pauper cases (particularly if undefended) are not infrequently conducted in person.

(*h*) *Daintree* v. *Haines* (1848), 12 Jur. 594.

(*i*) Divorce Rule 27.

(*j*) *Joseph* v. *Joseph and Burnhill* (1897), 76 L. T. 236 (where a husband, without paying his wife's costs as ordered, proceeded *in formâ pauperis*; stay granted, but leave to appeal).

(*k*) *Carryer* v. *Carryer and Watson* (1865), 4 Sw. & Tr. 94.

SECT. 4. Institution and Defence of Proceedings.

co-respondent (*l*), and served personally (*m*), except when, on special grounds, the court on motion (*n*) excuses this (*o*). One co-respondent named, or described as unknown, is, however, sufficient, though, if others be referred to (*p*) in the petition, they must also be named and served, unless leave be obtained, on motion (*q*), to proceed without naming them, even if dead or unknown (*r*).

Service of co-respondent.

In the case of any petition (*s*) in which damages are claimed, the alleged adulterer against whom they are claimed must be served, unless service be dispensed with (*t*).

Where a husband in his answer to a petition for dissolution of marriage seeks relief (*a*) on the ground of his wife's adultery, the alleged adulterer, except by leave (*b*), must be named and served, but he need not be served where no relief is asked, though he may be allowed to intervene (*c*).

If, after leave to proceed has been given, the identity of an

(*l*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 28; Divorce Rule 4. If no evidence has been offered against an intervener, or, it is submitted, a co-respondent, the name of such person should not be included in the title of the suit in subsequent proceedings (*Connemara* v. *Connemara*, [1892] P. 102).

(*m*) See pp. 508 *et seq.*, *post*.

(*n*) See p. 465, *ante*, on the affidavit (Divorce Rule 5) of the petitioner (*Drinkwater* v. *Drinkwater* (1889), 60 L. T. 398), sufficiently corroborated (*Leader* v. *Leader* (1863), 32 L. J. (P. M. & A.) 136; *Pitt* v. *Pitt* (1868), L. R. 1 P. & D. 464; *Barber* v. *Barber*, [1896] P. 73). It seems that the wife cannot be heard to object (*Hook* v. *Hook* (1858), 1 Sw. & Tr. 183); though see *Jeffers* v. *Jeffers* (1877), 2 P. D. 90 (the application may be made after answer filed).

(*o*) Leave was given in *Tomkin* v. *Tomkin* (1858), 1 Sw. & Tr. 182; *Edwards* v. *Edwards*, [1897] P. 316 (on evidence that the co-respondent did not wish to defend); *Hook* v. *Hook*, *supra* (wife living in brothel); *Peters* v. *Peters and Willett* (1861), 3 Sw. & Tr. 264 (wife a prostitute): *Jinkings* v. *Jinkings* (1867), L. R. 1 P. & D. 330; *Gill* v. *Gill* (1889), 60 L. T. 712 (wife's confession); *Bagot* v. *Bagot* (1890), 62 L. T. 612. Leave was refused in *Ex parte Armitage* (1858), 1 Sw. & Tr. 71 (no special ground); *Quicke* v. *Quicke* (1861), 2 Sw. & Tr. 419 (the inability to discover must be proved); *Payne* v. *Payne*, *Rodway and Eddels* (1888), 60 L. T. 238; *Cornish* v. *Cornish* (1890), 15 P. D. 131; *Jones* v. *Jones*, [1896] P. 165 (confession by wife). In *Grose* v. *Grose* (1897), 78 L. T. 89, the court required that inquiry should be made of the wife as to who the man was before granting the application. The rather contradictory cases are considered in *Saunders* v. *Saunders*, [1897] P. 89, C. A., where, after comment on *Jones* v. *Jones*, *supra*, leave was given, as each case must be decided on its own facts.

(*p*) *Hunter* v. *Hunter and Vernon* (1858), 28 L. J. (P. & M.) 3 (one is enough); *Carryer* v. *Carryer and Watson* (1865), 4 Sw. & Tr. 94; and *Penty* v. *Penty*, *Johnson and Sabingie* (1882), 7 P. D. 19.

(*q*) See p. 465, *ante*. The affidavits in support must include one by the petitioner and must be precise (*Evans* v. *Evans* (1859), 28 L. J. (P. & M.) 20.

(*r*) *Slaytor* v. *Slaytor*, [1897] P. 85 (his name should not appear in title and citation, but only in the body of the petition); *Tollemache* v. *Tollemache* (1858), 28 L. J. (P. & M.) 2.

(*s*) See *Pitt* v. *Pitt*, *supra*.

(*t*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 33; and he is in the same position as a co-respondent (see *ibid.*, s. 34). He must be served (see p. 508, *post*). As to whether an unknown adulterer, in a case where relief is claimed by a husband in his answer, is a co-respondent, see *Curling* v. *Curling* (1888), 14 P. D. 13.

(*a*) Under the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 2.

(*b*) *Curling* v. *Curling*, *supra* (wife suffering from venereal disease).

(*c*) See p. 507, *post*.

unknown adulterer be discovered, the matter must be brought to the notice of the court (*d*).

Foreign co-respondents.

1031. The jurisdiction of the court over a co-respondent, both as to damages and costs, in a suit properly instituted, does not depend on domicil, allegiance, or residence, so that, if a foreign co-respondent is served in England, or even, if properly served, abroad, the court has jurisdiction over him (*e*). A petitioner may, however, obtain leave to proceed without citing him (*f*); or notice of the proceedings may be given to him, so that he may come in and defend or apply to be dismissed, if he so desires (*g*); but in the latter case he will not, as a rule, be allowed his costs (*h*).

(iv.) *Parties by Intervention etc.*

Accused woman may become a respondent.

1032. In any petition presented by a wife for dissolution of marriage the court may direct that the woman accused of adultery with the husband be made a respondent (*i*). In other cases in which any person is so charged, or in which the court may consider that, in the interest of any person, such person should be made a party, it may permit that person to intervene, either absolutely or upon terms (*k*).

(v.) *Under the Legitimacy Declaration and Greek Marriages Acts.*

Petitions for declaration of legitimacy.

1033. The procedure upon presentation of a petition for a declaration of the validity of a marriage and legitimacy (*l*) is dealt with elsewhere (*m*).

(*d*) Divorce Rule 6. The registrar will consider the question of service; see *Muspratt* v. *Muspratt* (1861), 31 L. J. (P. M. & A.) 28; *Miles* v. *Miles* (1896), *Times*, 20th March; compare title CONFLICT OF LAWS, Vol. VI., p. 264, and see p. 503, *ante*.

(*e*) *Rayment* v. *Rayment and Stuart, Chapman* v. *Chapman and Buist*, [1910] P. 271; but see *Levy* v. *Levy and De Romance*, [1908] P. 256; and compare *Grange* v. *Grange*, [1892] P. 245; *Gaynor* v. *Gaynor and Degliantoni* (1862), 31 L. J. (P. M. & A.) 116.

(*f*) *Baker* v. *Baker and Dwyer*, [1908] P. 257, where a co-respondent was dismissed, although he had entered an absolute appearance; see also *Fairfax* v. *Fairfax and De la Cruz* (1909), 99 L. T. 892.

(*g*) *Boger* v. *Boger*, [1908] P. 300.

(*h*) *Fairfax* v. *Fairfax and De la Cruz, supra; I'Anson* v. *I'Anson and Oldbury* (1909), *Times*, 12th January; *Walter* v. *Walter and Bergmann* (1909), 25 T. L. R. 473.

(*i*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 28; *Bell* v. *Bell* (1883), 8 P. D. 217; *Wade* v. *Wade*, [1903] P. 16 (husband at hearing having abandoned defence as to adultery, accused woman given leave to intervene; case adjourned).

(*k*) Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 3; disposing of *Crawford* v. *Crawford and Dilke* (1886), 55 L. T. 305, C. A.; *Wheeler* v. *Wheeler and Rhodes* (1889), 14 P. D. 154; *Grieve* v. *Grieve*, [1893] P. 288; *Carew* v. *Carew*, [1894] P. 31; *Farrell* v. *Farrell* (1896), 76 L. T. 167; *Harrop* v. *Harrop*, [1899] P. 61; and *Lowe* v. *Lowe*, [1899] P. 204, C. A.; so that in such matters leave to intervene may now be obtained. See *Davison* v. *Davison*, [1909] P. 308.

(*l*) See Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93); Greek Marriages Act, 1884 (47 & 48 Vict. c. 20).

(*m*) See pp. 315, 316, *ante*, and title BASTARDY, Vol. II., pp. 433, 434.

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SUB-SECT. 3.—*Subsequent Procedure.*

(i.) *Service.*

Service of citation.

Lis pendens.

1034. On filing a petition (*n*) and affidavit at the registry, a sealed citation (*o*) for service on each respondent (*p*) must be extracted (*a*); and until this is done there is no *lis pendens* (*b*). A citation must, if possible, be served personally (*c*), by delivering a true copy thereof (the original being produced if required (*d*)), together with a sealed copy of the petition (*e*). After service, the citation is indorsed with a certificate of service (*f*) annexed, if there be no appearance, to an affidavit of service (*g*) and filed (*h*) in the registry. If served by advertisement, copies of newspapers are filed (*i*). Without a certificate a citation cannot be filed except by leave (*k*). Service may be effected within or without the King's dominions (*l*) for which no leave is necessary, but not by the

(*n*) But not a petition for reversal of a decree of judicial separation (see p. 562, *post*), nor an application for a protection order (*Ex parte Hall* (1858), 27 L. J. (P. & M.) 19; *Re Morris*, [1902] P. 104); and see *Matthew* v. *Matthew* (1869), 19 L. T. 662 (if a suit for dissolution be pending, notice of application for a protection order must be served).

(*o*) Not now on parchment. A *præcipe* with an address within three miles of the General Post Office is left the day before (Divorce Rule 9), together with an engrossment of the citation for sealing. The citation states the relief sought (*e.g.*, judicial separation) and the grounds for it (*e.g.*, cruelty or desertion), but does not give particulars (*Woolley* v. *Morgan* (1843), 3 Curt. 338), or refer to damages, custody etc. Duplicate citations can be obtained if necessary (*Chilcott* v. *Chilcott and Smith* (1873), 43 L. J. (P. & M.) 8 (where original was lost)); but not unless the court is satisfied that service has been effected (*Perret* v. *Perret and Allt* (1876), 35 L. T. 910; and see *Cridland* v. *Cridland* (1889), 60 L. T. 398 (where it was alleged that the citation was lost in the registry after return). The full name and address of the person cited should be stated; but "late of" might be accepted (*Forster* v. *Forster* (1863), 32 L. J. (P. M. & A.) 134); or the Christian name of the co-respondent might be in blank (*Molyneux* v. *Molyneux, Boyd and Rawlinson* (1859), 28 L. J. (P. & M.) 3 n.); but the matter would probably be referred.

(*p*) Which includes co-respondent, if applicable (Divorce Rule 7).

(*a*) Divorce Rule 8.

(*b*) *Ray* v. *Sherwood and Ray* (1836), 1 Curt. 173, 193; *Sherwood* v. *Ray* (1836), 1 Moo. P. C. C. 353, 395.

(*c*) Divorce Rule 10. Acceptance is not allowed (*Milne* v. *Milne* (1865), 4 Sw. & Tr. 183); nor can appearance and pleading cure this defect (*De Niceville* v. *De Niceville* (1868), 37 L. J. (P. & M.) 43).

(*d*) Divorce Rule 11.

(*e*) *Ibid.*, 12. This copy is made at the registry, and, even if it is not, is charged for.

(*f*) *Ibid.*, 14.

(*g*) *Ibid.*, 17, 18.

(*h*) *Cooke* v. *Cooke and Quaile* (1859), 2 Sw. & Tr. 50.

(*i*) Divorce Rule 15; and see p. 510, *post*.

(*k*) *Coghill* v. *Coghill and Lauriero* (1865), L. R. 1 P. & D. 26.

(*l*) *Rayment* v. *Rayment and Stuart*, *Chapman* v. *Chapman and Buist*, [1910] P. 271, *per* EVANS, P., at pp. 285 *et seq.*; Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 42, which, however, does not include restitution of conjugal rights (*Firebrace* v. *Firebrace* (1878), 4 P. D. 63, commenting on *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574, 586; *Chichester* v. *Chichester* (1885), 10 P. D. 186; though see now *Bateman* v. *Bateman*, [1901] P. 136 (service of citation and also of order for restitution in cases where the person cited could reasonably come within the jurisdiction), approving *Dicks* v. *Dicks*, [1899] P. 275, in which case GORELL BARNES, J., states (at p. 277) that the law with regard to these citations is altered by the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), and points out that in some earlier cases the respondent was domiciled abroad, though not in *Pearson* v.

petitioner personally, and the court does not approve of a person, who is serving a citation, interrogating a respondent in the hope of obtaining an admission of misconduct (*m*). Service on a minor (*n*), or on the committee of a lunatic, is sufficient service; but a lunatic, who has no committee, must be served personally in the presence of the person in charge of him or her (*o*), and, if the respondent be in prison, leave to serve must be obtained from the Home Secretary (*p*).

On persons not *sui juris*.

1035. If a pleading, alteration, or amendment be served or delivered out of time, unless by leave obtained on summons at the applicant's expense (*q*), it may be treated as a nullity. Service of pleadings, notices (which must be in writing signed by the party or his or her solicitor (*r*)), and of other instruments, need be personal only where expressly directed (*s*); in other cases the papers can be left at the address given (*t*). Until notice of change of solicitor (*a*) (for which no order is required) is served, the former solicitor is considered the party's solicitor (*b*).

Pleadings, notices etc.

(ii.) *Substituted Service.*

1036. Service of citation and petition (*c*) may be effected in such special manner as the court may direct, or may be dispensed

Leave on motion.

Pearson (1864), 33 L. J. (P. M. & A.) 156, where the decree was ordered to be served on the respondent when he returned from Shanghai. The difficulty of enforcing the decree, if the respondent is neither resident nor domiciled here, is apparent; but in *Firebrace* v. *Firebrace* (1878), 4 P. D. 63, 68, though this was mentioned, the decision was on the ground that the respondent, a foreigner, had quitted England. It must not be forgotten that in some countries (*e.g.*, Germany) there is a danger of coming into collision with the authorities; see *Trubner* v. *Trubner and Cristiani* (1889), 15 P. D. 24; *Stumpel* v. *Stumpel and Zepfel* (1900), 17 T. L. R. 17; *Wray* v. *Wray*, [1901] P. 132.

(*m*) *Hallam* v. *Hallam* (1903), 20 T. L. R. 34.

(*n*) The practice differs from that in probate; see *Brown* v. *Wildman* (1859), 28 L. J. (P. & M.) 54.

(*o*) *Bawden* v. *Bawden* (1862), 2 Sw. & Tr. 417 (service in workhouse); *Giles* v. *Giles*, [1900] P. 17 (service in county lunatic asylum).

(*p*) *Bland* v. *Bland* (1875), L. R. 3 P. & D. 233 (service on the governor is not sufficient unless by leave).

(*q*) Divorce Rule 37; and see p. 513, *post*.

(*r*) Divorce Rule 113; such as change of solicitor; see, as to alimony, pp. 516, 563, *post*; as to commissions etc., pp. 535 *et seq.*, *post*; as to setting down etc., pp. 528 *et seq.*, *post*; as to confirming reports, p. 566, *post*; as to appeals, p. 559, *post*; and compare, as to amendments, p. 503, *ante*, and as to summonses, p. 466, *ante*.

(*s*) Any order of the court (particularly as to payments or custody of children), which it may be necessary to enforce by process, must be personally served. See, as to orders for support of wife etc., pp. 516, 563, *post*; variation of settlements, p. 571, *post*; costs, pp. 525, 550, *post*; custody, p. 545, *post*; in these cases the rules as to citations apply (Divorce Rule 16; and see as to affidavit of service, *ibid.*, 117); compare, as to restitution, p. 499, *ante*.

(*t*) Divorce Rules 39, 114.

(*a*) Through death, or otherwise; or notice of solicitor, instead of party in person, and *vice versâ*; compare *Grice* v. *Grice and Penfold* (1863), 32 L. J. (P. M. & A.) 134.

(*b*) Divorce Rules 127, 128.

(*c*) Including one for restitution of conjugal rights (*Hardie* v. *Hardie* (1901), 17 T. L. R. 190; see *Ex parte Sheehy* (1876), 1 P. D. 423; *Macarthur* v. *Macarthur* (1889), 58 L. J. (P.) 70; *Waters* v. *Waters* (1875), 34 L. T. 33; *Re Tucker*, [1897] P. 83); and see p. 502, *ante*, and p. 572, *post*.

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with altogether (*d*). In cases where personal service cannot be effected (*e*), leave may be obtained on motion (*f*) to substitute some other mode of service (*g*), even where the necessity is caused by the delay of the petitioner (*h*)), the application being supported by an affidavit by the petitioner (*i*), sufficiently corroborated, showing ignorance either of respondent's whereabouts (*k*), or of co-respondent's true name (*l*). Advertisements, when service thereby is ordered, are settled by the registrar, and may be addressed to the respondent and the co-respondent jointly.

(iii.) *Appearance, Absolute or under Protest.*

Appearance, absolute or under protest.

1037. Any person (*m*) who is served with a citation in a suit and who wishes to take any step in the matter (*n*) must enter an appearance (*o*) either under protest, if the jurisdiction be disputed (*p*),

(*d*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 42. The extreme discretion has rarely, if ever, been exercised; but see *Parker* v. *Parker and Macleod* (1859), 5 Jur. (N. S.) 103; *Cooke* v. *Cooke and Quaile* (1859), 2 Sw. & Tr. 50.

(*e*) *Rowbotham* v. *Rowbotham* (1858), 1 Sw. & Tr. 73 (practical impossibility of personal service); *Lacey* v. *Lacey* (1858), 28 L. J. (P. & M.) 24 (proof of inquiries at last residence).

(*f*) See p. 465, *ante*.

(*g*) Divorce Rule 13; *Chandler* v. *Chandler* (1858), 27 L. J. (P. & M.) 35; 28 L. J. (P. & M.) 6 (service ordered on respondent's brother); *Peckover* v. *Peckover and Jolly* (1858), 1 Sw. & Tr. 219 (advertisements in *Times* and *Morning Post*); *Nuttall* v. *Nuttall* (1862), 31 L. J. (P. M. & A.) 164 (leaving at last address and attorney's office); *Appleyard* v. *Appleyard* (1875), L. R. 3 P. & D. 257 (on step-mother, and by advertisement); also *Trubner* v. *Trubner and Cristiani* (1889), 15 P. D. 24; *Stumpel* v. *Stumpel and Zepfel* (1900), 70 L. J. (P.) 6; *Wray* v. *Wray*, [1901] P. 132 (by registered letter abroad). Compare *Cox* v. *Cox* (1889), 61 L. T. 698 (where the court had to be satisfied that the document had been received in Mexico). As to advertising, see *Elsley* v. *Elsley, Beacham, and Bagshaw* (1863), 32 L. J. (P. M. & A.) 145.

(*h*) *Jenson* v. *Jenson* (1898), 78 L. T. 764.

(*i*) *Williams* v. *Williams and Pocock*, [1896] P. 153.

(*k*) *Martin* v. *Martin and Velleman* (1898), 78 L. T. 170; but see *Schraml* v. *Schraml* (1899), 68 L. J. (P.) 47; and only after means of discovery are exhausted (*Sudlow* v. *Sudlow* (1858), 28 L. J. (P. & M.) 4).

(*l*) *Nicolas* v. *Nicolas* (1899), 68 L. J. (P.) 66 (service by advertisement in name given).

(*m*) As to those not *sui juris*, see p. 509, *ante*; and as to cross prayers etc., see p. 515, *post*.

(*n*) The entry of an absolute appearance entitles a respondent to be heard at the trial on questions of custody of children or of costs (*Lyne* v. *Lyne* (1867), L. R. 1 P. & D. 508), but not on the main issue; nor may he produce any evidence touching such main issue, unless an answer be filed (Divorce Rule 50, which disposes of *Norris* v. *Norris and Gyles* (1858), 1 Sw. & Tr. 174; *Tourle* v. *Tourle and Renshaw* (1858), 1 Sw. & Tr. 176). In *Letts* v. *Letts* (1869), L. R. 2 P. & D. 16, the husband, who had not entered an appearance, was allowed to attend taxation, there being no opposition.

(*o*) In person or by a solicitor, in a book provided at the registry. An address must be given within three miles of the General Post Office (Divorce Rules 19, 21).

(*p*) *Ibid.*, 22. After an absolute appearance no objection can be raised to the jurisdiction; and see *Forster* v. *Forster and Berridge* (1862), 3 Sw. & Tr. 144; *Gaynor* v. *Gaynor and Degliantoni* (1862), 31 L. J. (P. M. & A.) 116; but the practice is now (but see *Garstin* v. *Garstin* (1865), 4 Sw. & Tr. 73) to give leave to amend when necessary; and not infrequently, after an absolute appearance, the question of domicil is raised in the answer (*Wilson* v. *Wilson*

or absolutely, within the time named in the citation, or at any time before a proceeding has been taken in default (*q*), or within such further time as may be allowed, sometimes on terms (*r*), on a summons for that purpose before a registrar (*s*). A respondent or co-respondent who has not entered an appearance will not be allowed to do so if, after a decree *nisi*, the King's Proctor shows cause against it (*t*).

(iv.) *Act on Petition.*

Act on petition.

1038. A party cited who wishes to raise any question as to the jurisdiction of the court, and has therefore entered an appearance under protest, must within eight days file in the registry an act on petition (*a*), setting out the objection, and on the same day deliver a copy of it to the petitioner (*b*). Any party to a cause who has entered an appearance may apply to a registrar, by summons, to be heard on his petition touching any collateral question which may arise in the suit (*c*), and, on leave being granted, must file an act on petition, delivering a copy to the parties in the cause required to answer it (*d*)

Delivery of pleadings.

1039. A party served with a copy of an act on petition must file any answer to it within eight days and deliver a copy to the opposite party, and the same course must be pursued with respect to the reply, rejoinder etc., until the pleadings are closed (*e*). The pleadings are not supported by affidavit, and it appears that a petitioner has the right to withdraw his answer to a co-respondent's act on petition on payment of his costs (*f*). The petition may be heard by a judge alone or with a jury, in the same way as a cause (*g*), and it should be ascertained on motion whether the evidence should be oral or by affidavit (*h*).

(1871), L. R. 2 P. & D. 341); compare *Taylor* v. *Morley* (1837), 1 Curt. 470. See now, as to appearance under protest, *Rayment* v. *Rayment and Stuart*, *Chapman* v. *Chapman and Buist*, [1910] P. 271, 279; and compare title CONFLICT OF LAWS, Vol. VI., p. 264.

(*q*) *I.e.*, the filing of an affidavit of due citation and no appearance thereto, with the original citation annexed. It is not necessary, on default of appearance, to wait till the twenty-one days allowed for an answer (Divorce Rule 28) have expired; see *Wood* v. *Wood and Hutchins* (1866), L. R. 1 P. & D. 266.

(*r*) *Hindmarsh* v. *Hindmarsh and Hussey* (1865), L. R. 1 P. & D. 24 (on condition of facility for identification); or on payment of costs.

(*s*) Divorce Rules 185, 20.

(*t*) *Crawford* v. *Crawford and Dilke* (1886), 55 L. J. (P.) 42; *sed quære*, since the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 3.

(*a*) This is somewhat similar to an answer (see p. 513, *post*), but is signed by the solicitor.

(*b*) Divorce Rule 22.

(*c*) *Ibid.*, 56. This practice is now seldom, if ever, resorted to.

(*d*) *Ibid.*, 57.

(*e*) *Ibid.*, 58.

(*f*) *Wilson* v. *Wilson* (second case) (1872), L. R. 2 P. & D. 353.

(*g*) The judge has a discretion, as to this, in spite of Divorce Rule 61 (*Löwenfeld* v. *Löwenfeld*, [1903] P. 177, C. A.; see *Tollemache* v. *Tollemache* (1859), 1 Sw. & Tr. 557; and p. 541, *post*).

(*h*) See p. 465, *ante*; compare Divorce Rules 40, 60; and R. S. C., Ord. 38, rr. 25 *et seq.*

SECT. 4. Institution and Defence of Proceedings.

(v.) *Obtaining Particulars and Striking out Pleadings.*

Applications for particulars.

1040. If allegations in a pleading are in such general terms (*i*), or are so vague (*k*), that they cannot be properly met, application may (*l*) be made by summons before the registrar, in the first instance, for particulars (*m*), or that such allegations be struck out (*n*). Such particulars, if ordered, must be supported by an affidavit of the party that no more can be supplied, and if, after delivery, further information is obtained, a fresh affidavit and particulars must be filed; failing this, if the opponent be taken by surprise at the trial, an adjournment may be ordered (*o*).

When and by whom made.

1041. An application for particulars is usually made before the answer or other pleadings are filed, but not necessarily so if a simple denial is pleaded. If the particulars, when delivered, do not on the face of them (*p*) appear to be sufficient, a fresh application may be made, upon which it is frequently ordered that if no further information can be given after the intended witnesses have been carefully questioned the party and the solicitor (*q*) must file an affidavit in explanation; failing which, the charge may be struck out. Leave may be given to a petitioner to deliver particulars even though the respondent oppose (*r*).

Explanatory affidavit.

Striking out.

1042. Particulars of a charge of adultery, alleging acts short of adultery, will be allowed to stand (*s*); but if the particulars delivered have no reference to the charges made, such particulars may be struck out (*t*), as also may a plea which is irrelevant to the issue (*a*), or scandalous (*b*).

(*i*) *Leete* v. *Leete* (1862), 2 Sw. & Tr. 568.

(*k*) *Hartopp* v. *Hartopp and Cowley (Earl)* (1902), 71 L. J. (P.) 78, C. A.; see, however, *Boddy* v. *Boddy and Grover* (1858), 28 L. J. (P. & M.) 16; *Smith* v. *Smith and Liddard* (1859), 29 L. J. (P. M. & A.) 62.

(*l*) But the applicant should himself be in order (*Burrell* v. *Burrell* (1863), 32 L. J. (P. M. & A.) 136).

(*m*) Divorce Rules 38, 181—184. The court was formerly more inclined to draw an arbitrary line between particulars and amendment than is now the practice; see *Goldney* v. *Goldney* (1862), 32 L. J. (P. M. & A.) 13; *Wodehouse* v. *Wodehouse and Farrow* (1863), 32 L. J. (P. M. & A.) 90, n.; but now, if it is desired to make an allegation which is not covered by any general charge, an amendment becomes necessary (*Grafton* v. *Grafton* (1873), 28 L. T. 144; *Sanderson* v. *Sanderson, Stephens, and Hiscox* (1871), 41 L. J. (P. & M.) 24); though an amendment will not be ordered where particulars will suffice (*Hunt* v. *Hunt and Duke* (1862), 2 Sw. & Tr. 574).

(*n*) In *Hepworth* v. *Hepworth* (1860), 6 Jur (N. S.) 831, this was refused where time to answer had twice been given.

(*o*) *Bancroft* v. *Bancroft and Rumney* (1864), 3 Sw. & Tr. 610; *Codrington* v. *Codrington and Anderson* (1865), 4 Sw. & Tr. 63.

(*p*) See *Hepworth* v. *Hepworth* (1860), 30 L. J. (P. M. & A.) 215.

(*q*) An explanatory affidavit, filed in lieu of particulars of charges in a petition, should be made by the solicitor who has seen the witnesses (*C.* v. *C. and M.* (1910), 55 Sol. Jo. 141).

(*r*) *E.* v. *E.* (1907), 23 T. L. R. 364.

(*s*) *Cox* v. *Cox* (1893), 70 L. T. 200, C. A. (flirtation; allowing liberties; desire to elope).

(*t*) *Sanderson* v. *Sanderson, Stephens and Hiscox, supra.*

(*a*) *Green* v. *Green* (1869), 21 L. T. 401.

(*b*) *Northover* v. *Northover* (1910), 26 T. L. R. 224.

If it be alleged that the acts charged took place in the presence of certain persons described, the names of such persons may be ordered to be disclosed (*c*).

(vi.) *Costs of Applications as to Time etc.*

Incidence of costs.

1043. If an application be made in court which should be made in chambers, the extra expense is disallowed (*d*). So, too, are the costs of a wife's application for time, especially if necessitated by her own *laches* (*e*), her costs of a motion to convert a petition for dissolution of marriage into one for a judicial separation (*f*), and her costs of an unsuccessful application for particulars, or for access to children (*g*), or when she is allowed to correct an unexplained mistake in her petition for alimony (*h*). Where the name of a woman is by mistake included in an allegation of adultery, if she intervenes as a respondent, the petition may be amended, and she may be allowed her costs properly incurred (*i*), but where insufficient particulars have been given, partly by the fault of both sides, probably no order as to the costs of a necessary adjournment will be made (*k*).

SUB-SECT. 4.—*Defence.*

(i.) *Answer to Petition.*

Filing and delivery.

1044. A respondent who has entered an appearance absolutely (*l*) may, within twenty-one days (*m*) after service of citation, file an answer (*n*) to the petition, and on the same day must deliver a copy to the petitioner or the petitioner's solicitor (*o*). If the answer be more than a simple traverse, the respondent (*p*) must

(*c*) *Bishop* v. *Bishop*, [1901] P. 325; thus following the ecclesiastical rather than the common law practice.

(*d*) *Higgs* v. *Higgs and Hopkins* (1862), 32 L. J. (P. M. & A.) 64.

(*e*) *Harding* v. *Harding and Lance* (1862), 2 Sw. & Tr. 549.

(*f*) *Cartledge* v. *Cartledge* (1862), 4 Sw. & Tr. 249.

(*g*) *Hepworth* v. *Hepworth* (1861), 30 L. J. (P. M. & A.) 253.

(*h*) *Harker* v. *Harker* (1868), 37 L. J. (P. & M.) 11.

(*i*) *Harding-Cox* v. *Harding-Cox* (1908), 24 T. L. R. 634.

(*k*) *Bancroft* v. *Bancroft and Rumney* (1864), 3 Sw. & Tr. 610.

(*l*) See p. 510, *ante;* respondent includes co-respondent or party cited; see Divorce Rule 7.

(*m*) Or within fourteen days from time allowed for appearance, if over eight days (Divorce Rule 186); compare *Wood* v. *Wood and Hutchins* (1866), L. R. 1 P. & D. 266. Applications for extension of time (see *Alexander* v. *Alexander and Amos* (1860), 2 Sw. & Tr. 95, where a wife had delayed defending through fear), or for leave to answer, after a proceeding in default, are made by summons to the registrar in the first instance (Divorce Rules 20, 121, 122, 181—185). Sundays, Christmas Day, and Good Friday are *dies non* (*ibid.*, 123). Except by leave, a person made a respondent must join the proceedings as they stand (*ibid.*, 24; compare p. 507, *ante; Avila* v. *Avila* (1861), 30 L. J. (P. M. & A.) 104).

(*n*) In the registry (Divorce Rule 28). The answer is, on the face of it, made by the respondents' solicitors (if any), and is not signed by the respondent; compare *Evans* v. *Evans* (1858), 1 Sw. & Tr. 78.

(*o*) Divorce Rule 29.

(*p*) *Ibid.*, 30.

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also file an affidavit verifying any affirmative allegations (*q*) therein, as in the case of a petition (*r*).

Defences: by respondent;

The answer may consist of an absolute denial of the *factum*, of the legality (*s*) or of the continued existence (*t*) of the marriage alleged, or of all or any of the other allegations (*a*); and it may be pleaded in addition that, if the respondent is guilty, the petitioner's own conduct (*b*) is a bar to relief (*c*), or that the matter is *res judicata*, or that the petitioner is otherwise estopped. The question of insanity may also be raised, or it may be pleaded that the respondent was not responsible for the act committed (*d*).

by co-respondent.

A co-respondent is entitled to put forward every defence which the respondent may plead, but it is often injudicious to do so, especially when damages may thereby be inflamed.

Where damages are sought, with or without dissolution of marriage or judicial separation, a co-respondent may plead, by way of confession and avoidance, that at the time of the alleged adultery he was not aware that the respondent was a married woman (*e*).

Jactitation.

1045. The answer to a petition in a suit for jactitation of marriage may deny either the boasting or the falseness of it, or by way of confession and avoidance may allege that the boasting was authorised by the petitioner (*f*).

Nullity.

It is no answer to a suit for the nullity of a void marriage that the petitioner was aware of the fact when the ceremony was gone through (*g*).

Conjugal rights.

The usual answer in a suit for restitution of conjugal rights is an admission of the leaving and an allegation of good cause therefor (*h*).

It appears to be a good answer to a suit brought in consequence of non-compliance with an order for restitution of conjugal rights that the respondent was *bonâ fide* unable to comply therewith (*i*); but proof of the mere payment of an allowance is not a sufficient defence (*k*).

(*q*) *Tourle* v. *Tourle* (1858), 1 Sw. & Tr. 165; unless they might cause a prosecution (*Silver* v. *Silver* (1870), 21 L. T. 734).

(*r*) See p. 497, *ante;* but the collusion and connivance clause is not required from a co-respondent (Divorce Rule 31).

(*s*) *Silver* v. *Silver*, *supra* (bigamy).

(*t*) *Cohen* v. *Cohen* (1876), 34 L. T. 33 (divorce).

(*a*) See p. 498, *ante;* and *infra*.

(*b*) *Quære* including provocation; as to this, see p. 488, *ante*.

(*c*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 29; see *Seddon* v. *Seddon and Doyle* (1860), 30 L. J. (P. M. & A.) 12; *West* v. *West* (1910), 55 Sol. Jo. 48.

(*d*) See p. 484, *ante*.

(*e*) *Lyne* v. *Lyne* (1867), L. R. 1 P. & D. 508; and see *Millard* v. *Millard and Eastone* (1898), 78 L. T. 471; and p. 542, *post*.

(*f*) *Hawke* (*Lord*) v. *Corri* (1820), 2 Hag. Con. 280; *Thompson* v. *Rourke*, [1893] P. 11; see pp. 470, 498, *ante*.

(*g*) *Miles* v. *Chilton* (1849), 1 Rob. Eccl. 684; *Andrews* v. *Ross* (1888), 14 P. D. 15 (petitioner was the real wife's sister and present at the marriage); see as to defence on the ground of impotence, p. 470, *ante*.

(*h*) See p. 483, *ante*. The former refusal of a wife to submit to his embraces is not a good ground for her husband refusing to receive her (*Rippingall* v. *Rippingall and Delacour*, *Rippingall* v. *Rippingall* (1876), 24 W. R. 967); see also p. 515, *post*.

(*i*) *Harding* v. *Harding* (1886), 11 P. D. 111.

(*k*) *Winkworth* v. *Winkworth* (1908), 25 T. L. R. 54.

If a respondent intends to raise the question of the paternity of a child, this should be done in the answer (*l*).

(ii.) *Cross Petitions and Cross Prayers.*

In general.

1046. If a husband or wife, who has been served with a petition, desires (in addition to resisting, by an answer, the prayer of such petition) to obtain affirmative relief, there are at least two (*m*) ways in which this may be asked for:—(1) by filing a separate petition, and (2) by a prayer for relief in such answer.

Ecclesiastical practice followed.

In suits other than for dissolution of marriage, although the practice of the Ecclesiastical Courts is followed as far as possible (*n*), restitution of conjugal rights is not granted except on an original petition (*o*); and where charges are made of adultery on the one side and of impotence on the other, these should be the subjects of separate petitions (*p*).

Judicial separation, however (though not dissolution, which is a purely statutory remedy), may be prayed in the answer to a petition for judicial separation (*q*) or for restitution of conjugal rights (*r*); and a prayer for nullity may be made in the answer to a petition for nullity (*s*) or for restitution of conjugal rights (*t*)

By statute.

1047. In suits for dissolution of marriage which are opposed on the ground of adultery, cruelty, (or, where the wife is petitioner, desertion), the respondent may obtain, on his or her application, the same relief as might have been obtained by the filing of a petition (*a*). In this connection, restitution of conjugal rights is not the proper relief for desertion, and cannot therefore be prayed for in the answer to a petition for dissolution of marriage (*b*).

If a petitioner gives notice before trial that the petition will not be proceeded with (*c*), this does not preclude the respondent from

(*l*) *Gordon* v. *Gordon*, [1903] P. 92.

(*m*) In *Besant* v. *Wood* (1879), 12 Ch. D. 605, JESSEL, M.R., held (at pp. 612, 630) that, where a husband brings a suit in the Chancery Division to enforce a deed of separation, the wife can counterclaim for a judicial separation. As to suits to enforce deeds of separation, see p. 450, *ante*.

(*n*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22.

(*o*) *Wingfield* v. *Wingfield* (1898), 78 L. T. 568; but compare *Clowes* v. *Clowes* (1842), 3 Curt. 185.

(*p*) *Anon.* (1857), Dea. & Sw. 295; *Ousey* v. *Ousey* (1874), L. R. 3 P. & D. 223; *M.* v. *D.* (1885), 10 P. D. 175; *S.* v. *S.*, [1907] P. 224.

(*q*) *Hunt* v. *Hunt* (1856), Dea. & Sw. 121; *Eldred* v. *Eldred* (1840), 2 Curt. 376; *Best* v. *Best* (1823), 1 Add. 411.

(*r*) *Westmeath* (*Earl*) v. *Westmeath* (*Countess*) (1827), 2 Hag. Ecc. Supplement, 1, 73; *Russell* v. *Russell*, [1895] P. 315, C. A.; *Oldroyd* v. *Oldroyd*, [1896] P. 175.

(*s*) *T.*, *otherwise W.*, v. *T.* (1895), unreported.

(*t*) *C.* v. *C.* (1862), 32 L. J. (P. M. & A.) 12; *Ricketts* v. *Ricketts* (1866), 35 L. J. (P. & M.) 92.

(*a*) Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 2. If relief be claimed in an answer, the adulterer must be served with a citation and sealed copy of the answer, and the respondent with a sealed copy of the answer but not with a fresh citation.

(*b*) *Drysdale* v. *Drysdale* (1867), L. R. 1 P. & D. 365.

(*c*) In which case it appears that a fresh suit may be presented on the same facts (*Hall* v. *Hall and Richardson* (1879), 48 L. J. (P.) 57).

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obtaining the relief sought in a cross prayer; or from obtaining leave to amend the answer by adding a cross prayer (*d*). This, in the case of a wife respondent, is rather to the advantage of her husband, for otherwise she might bring a second suit at his expense (*e*).

SUB-SECT. 5.—*Reply and Subsequent Pleadings.*

Filing and delivering.

1048. Where a reply or any subsequent pleading is necessary, it must be filed within fourteen days (*f*) from the delivery of the previous pleading (*g*), and a copy thereof must be delivered on the same day (*h*); and when there is a cross prayer (*i*) in the answer, the reply and further pleadings, if any, are in a similar position, and subject to similar rules, as an answer to a petition (*k*).

Desertion and offer to return.

If desertion be alleged in a petition, and an offer has been made to return, it is not sufficient to plead a simple denial of the desertion in the answer; but the offer must be there alleged, so as to allow of its sincerity being traversed in a reply (*l*).

SECT. 5.—*Proceedings pending Suit.*

SUB-SECT. 1.—*Alimony.*

Petition and service.

1049. In accordance with the ecclesiastical practice (*m*), a wife may in any cause (*n*) file a petition for alimony pending suit (*o*), after her husband has been served (*p*) or she has entered an appearance (*q*), provided *primâ facie* proof of the *factum* of the marriage has been given (*r*); though, where there is a substantial question of domicil to be decided, it is in the discretion of the court to give or withhold alimony (*s*). Even where there has been no real marriage, an order

(*d*) *Firminger* v. *Firminger and Ollard* (1869), 17 W. R. 335.

(*e*) *Schira* v. *Schira* (1868), L. R. 1 P. & D. 466 (petition for dissolution of marriage; cross-prayer for judicial separation); *Blackborne* v. *Blackborne* (1868), L. R. 1 P. & D. 563 (petition for restitution of conjugal rights; cross prayer for judicial separation). As to the liability of the husband for such suits, see p. 429, *ante*.

(*f*) See p. 513, *ante*.

(*g*) Divorce Rule 32.

(*h*) *Ibid.*, 33.

(*i*) See p. 515, *ante*.

(*k*) See p. 513, *ante*.

(*l*) *Mallinson* v. *Mallinson* (1866), L. R. 1 P. & D. 93. As to pleading estoppel, condonation and other pleas of like nature, see pp. 484 *et seq.*, *ante*.

(*m*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 17, 22; Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1 (3); *L.* v. *L.* (1911), 27 T. L. R. 316. It is not necessary that the petition should be signed by the wife, nor is it supported by affidavit.

(*n*) Including a nullity suit (*Bird* v. *Bird* (1753), 1 Lee, 209, 418). A protection order is no bar (*Hakewill* v. *Hakewill* (1860), 30 L. J. (P. M. & A.) 254); and alimony may be allotted in a suit *in formâ pauperis*, or if the wife be in prison (*Kelly* v. *Kelly* (1863), 4 Sw. & Tr. 227; but see also *Leslie* v. *Leslie* (1907), 24 T. L. R. 148). The whole of the circumstances of the case should be considered (*L.* v. *L.*, *supra*).

(*o*) There is a *lis pendens* from citation to final decree.

(*p*) If she is the petitioner (Divorce Rule 81); also if service has been dispensed with.

(*q*) If she is the respondent (Divorce Rule 82).

(*r*) By the affidavit in support of the petition (Divorce Rule 81), or if an admission has been made (*Smyth* v. *Smyth* (1824), 2 Add. 254; *Miles* v. *Chilton* (1849), 1 Rob. Eccl. 684).

(*s*) *Ronalds* v. *Ronalds* (1875), L. R. 3 P. & D. 259.

may be made (*t*). The petition, which must set out the means of the husband, may be served on his solicitor, but when the husband has not entered an appearance, it must be served personally, unless substituted service is ordered (*a*).

Time. Answer and subsequent pleadings.

1050. A husband must enter an appearance in the suit before he can file an answer (*b*) to the petition for alimony (*c*). Such answer must, except by leave, be filed within eight days after delivery of the petition (*d*), and must be on oath (*e*). The court sometimes orders the husband to deliver an answer (*f*), or a further and fuller one (*g*). Where the husband alleges in his answer that the wife has sufficient separate estate (*h*), including income under a separation deed (*i*), or that she is being supported by the co-respondent (*k*), she may (*l*) file a reply, to which the husband may file a rejoinder (*m*), both on oath.

Appointment.

1051. When the pleadings are completed, or the time for delivering them has expired, in which case an affidavit of service and no answer is filed, a first appointment (*n*) is made with the registrar, and notice thereof given to the husband's solicitor (*o*). On this the matter, if simple, or if there is a consent (*p*), may be decided, or a further appointment may be made. If the answer be not

(*t*) *Foden* v. *Foden*, [1894] P. 307, C. A., disapproving *Blackmore* v. *Mills* (1868), 18 L. T. 586.

(*a*) *Odevaine* v. *Odevaine* (1888), 58 L. T. 564 (by registered letter after substituted service of main petition); compare *Nuttall* v. *Nuttall* (1862), 31 L. J. (P. M. & A.) 164 (service of order to pay).

(*b*) Divorce Rule 98.

(*c*) *Ibid.*, 85.

(*d*) A copy of every petition, answer etc. must be delivered to the other side on the day it is filed (Divorce Rule 88).

(*e*) *Ibid.*, 84.

(*f*) *Snowdon* v. *Snowdon* (1871), L. R. 2 P. & D. 200.

(*g*) Divorce Rules 86, 189.

(*h*) *Goodheim* v. *Goodheim and Frankinson* (1861), 2 Sw. & Tr. 250 (a wife earning a sufficient income would be debarred); *Coombs* v. *Coombs* (1866), L. R. 1 P. & D. 218 (wife possessed of £70 capital, husband's income only £60 a year); *George* v. *George* (1867), L. R. 1 P. & D. 553, 554 (husband's income £225 a year; wife for some years living apart in domestic service); *Burrows* v. *Burrows* (1867), L. R. 1 P. & D. 553 (similar); *Eaton* v. *Eaton* (1870), L. R. 2 P. & D. 51 (husband lieutenant R.N., wife's father had promised to allow her £100 a year); *Bird* v. *Bird* (1753), 1 Lee, 209; *Miles* v. *Chilton* (1849), 1 Rob. Eccl. 684 (sufficient separate estate, a bar).

(*i*) *Weber* v. *Weber and Pyne* (1858), 1 Sw. & Tr. 219 (alimony at same rate as under deed); *Powell* v. *Powell* (1874), L. R. 3 P. & D. 186 (even though husband's means had increased); *Barry* v. *Barry*, [1901] P. 87, C. A. (the deed would not prevent wife applying for a provision for children).

(*k*) *Madan* v. *Madan and De Thoren* (1867), 17 L. T. 326; *Holt* v. *Holt* (1868), L. R. 1 P. & D. 610; and see *Patch* v. *Patch* (1869), 38 L. J. (P. & M.) 27 (alimony continued in absence of sufficient proof of wife keeping a brothel etc.).

(*l*) Within eight days (Divorce Rule 87).

(*m*) But only by leave (*ibid.*). As to the time for filing, see pp. 513, 516, *ante*.

(*n*) Not usually attended by counsel.

(*o*) Divorce Rules 89, 191; compare *Robinson* v. *Robinson* (1871), 41 L. J. (P. & M.) 40; as to business in vacation, see p. 467, *ante*.

(*p*) There can be no consent unless the husband has entered an appearance (*Clarke* v. *Clarke* (1862), 31 L. J. (P. M. & A.) 165)

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satisfactory, a fuller answer may be ordered (*q*). Only such affidavits may be used on either side as are required by the registrar (*r*).

Inquiry.

1052. The registrar investigates the averments in the presence of the parties and their solicitors, and may require the attendance of the husband to be examined or cross-examined (*s*), (if he is served with a *subpœna* at the instance of the wife she adopts him as her witness and cannot cross-examine him (*a*)), may take other oral evidence (*b*), may require production of books (*c*) and documents (*d*), and may direct such order to issue as he thinks fit, or refer the matter to the judge (*e*). Any person who has been heard may, subject to any order as to costs, apply to the judge, on summons, to rescind or vary the order made (*f*).

Assessment

1053. An allotment of alimony *pendente lite* may be made even after the wife has been found guilty of adultery (*g*) or if she has not put in an answer denying her adultery (*h*). The amount may be agreed between the parties (*i*), otherwise it is usual (*k*) to allow to the wife one-fifth (*l*) of the joint incomes; but if the husband's income be very large, the proportion may be smaller (*m*). An allowance may, in addition, be made for the children (*n*). An average of the

(*q*) Divorce Rules 86, 191.

(*r*) *Ibid.*, 90; and see *Mumby* v. *Mumby* (1869), L. R. 1 P. & D. 701.

(*s*) *Senior* v. *Senior* (1866), 15 W. R. 91 (evasive answer); *Parker* v. *Parker* (1871), 26 L. T. 108 (to justify an order for cross-examination, the evasion should be on the face of the answer); *Sykes* v. *Sykes*, [1897] P. 306, C. A. (there is no inherent right to cross-examine).

(*a*) *Anderson* v. *Anderson* (1868), L. R. 1 P. & D. 512.

(*b*) Witnesses at a private inquiry before a registrar are not entitled to have a professional adviser present at their examination (*Allport* v. *Allport* (1909), 25 T. L. R. 588); and if they refuse to answer questions without such assistance, they may be guilty of contempt (*ibid.*); a husband who puts in no answer cannot be heard to contradict any evidence (*Constable* v. *Constable* (1869), L. R. 2 P. & D. 17).

(*c*) *Newton* v. *Newton and Allen* (1872), 27 L. T. 768 (to be inspected at husband's solicitor's offices by a nominee of the registrar).

(*d*) *Carew* v. *Carew*, [1891] P. 360 (a husband and his partner brought a ledger on a *subpœna duces tecum*, but refused inspection of it, and the judge ordered a writ of attachment to issue); *Tonge* v. *Tonge, Anderson and Eykyn*, [1892] P. 51 (although the husband must definitely swear to his net income, to call for partnership accounts is a serious matter). See also the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11); and title BANKERS AND BANKING, Vol. I., pp. 643 *et seq.*

(*e*) Divorce Rule 191.

(*f*) *Ibid.*, 192.

(*g*) *D'Oyley* v. *D'Oyley and Baldie* (1859), 4 Sw. & Tr. 226; *Ellis* v. *Ellis* (1883), 8 P. D. 188, C. A.; and compare *Phillips* v. *Phillips and Medlyn* (1865), 4 Sw. & Tr. 129; though the wife must show the necessity (*Noblett* v. *Noblett* (1869), L. R. 1 P. & D. 651); but compare p. 520, *post*, and *Shewell* v. *Shewell and Fox* (1869), 20 L. T. 404.

(*h*) *Smith* v. *Smith and Tremsaux* (1863), 4 Sw. & Tr. 228.

(*i*) And a consent indorsed on a summons; unless the case be undefended, in which case the husband should be represented before the registrar.

(*k*) *Blackburne* v. *Blackburne* (1867), 36 L. J. (P. & M.) 88.

(*l*) *Hawkes* v. *Hawkes* (1828), 1 Hag. Ecc. 526; *Hill* v. *Hill* (1864), 33 L. J. (P. M. & A.) 104.

(*m*) *Edwards* v. *Edwards* (1868), 17 L. T. 584 (one-eighth).

(*n*) See p. 521, *post*.

income is taken (*o*), usually for three years (*p*), and if the husband is under agreement to invest part of his income in his business, that affects the amount to be considered (*q*); or if he has disposed of his business for an annuity, that is taken to be the amount of his income from that source (*r*). The husband in his answer need not state the value of his tools, stock-in-trade etc. (*s*); but he must include any considerable property, including any reversionary interest (*t*), even if it brings in no income (*a*), as also an income derived from a voluntary allowance (*b*). If, however, the husband be bankrupt (*c*), or has no property nor income (*d*), or has only a very small income (*e*), no order will be made. The guardian *ad litem* of an infant husband who has no property is not liable (*f*).

Deductions.

1054. If the allotment is calculated after the deduction of income tax, the tax must not be again deducted when the wife is paid (*g*). Deductions may be made for repairs and other expenses in connection with real property (*h*), and for instalments of debts agreed to be paid (*i*), but not usually in respect of premiums on life insurance policies (*k*), and never for the keep of children by a former marriage (*l*).

When and how payable.

1055. Alimony *pendente lite* is payable from the date of the service (not the return) of the citation (*m*), and the court may order

(*o*) *Thompson* v. *Thompson* (1867), L. R. 1 P. & D. 553 (though in this case the husband was out of work).

(*p*) *Williams* v. *Williams* (1867), L. R. 1 P. & D. 370.

(*q*) *Wilson* v. *Wilson and Howell* (1872), 26 L. T. 107; and see *Hanbury* v. *Hanbury*, [1894] P. 102, 315, C. A., reversed [1895] A. C. 417.

(*r*) *Moore* v. *Moore* (1864), 3 Sw. & Tr. 606.

(*s*) *Hick* v. *Hick and Kitchin* (1863), 12 W. R. 444, n.

(*t*) *Stone* v. *Stone* (1843), 3 Curt. 341; but see *Brown* v. *Brown and Simpson* (1863), 3 Sw. & Tr. 217 (£500 legacy payable in eleven months; no order).

(*a*) *Crampton* v. *Crampton and Armstrong* (1863), 32 L. J. (P. M. & A.) 142.

(*b*) *Malo* v. *Malo* (1786), 32 L. J. (P. M. & A.) 67, n.; *Moss* v. *Moss and Bush* (1867), 15 W. R. 532 (stay till undertaking to pay); but see *Haviland* v. *Haviland* (1863), 3 Sw. & Tr. 114 (no order).

(*c*) *Bruère* v. *Bruère* (1837), 1 Curt. 566.

(*d*) *Fletcher* v. *Fletcher* (1862), 2 Sw. & Tr. 434 (pilot on leave from India without pay).

(*e*) *Capstick* v. *Capstick, Furness and Winder* (1864), 33 L. J. (P. M. & A.) 105.

(*f*) *Beavan* v. *Beavan* (1862), 2 Sw. & Tr. 652.

(*g*) *Smith* v. *Smith* (1813), 2 Phillim. 152; *Frankfort* (*Viscount*) v. *Frankfort* (*Viscountess*) (1845), 4 Notes of Cases, 280. But where a suit was compromised, and an amount fixed by an arbitrator, the husband was allowed to deduct the tax (*Re Barry's Trusts, Barry* v. *Smart*, [1906] 2 Ch. 358, C. A.).

(*h*) *Hayward* v. *Hayward* (1858), 1 Sw. & Tr. 85; *Nokes* v. *Nokes* (1863), 3 Sw. & Tr. 529.

(*i*) *Patterson* v. *Patterson, Curtis and Dore* (1863), 33 L. J. (P. M. & A.) 36.

(*k*) *Harris* v. *Harris* (1828), 1 Hag. Ecc. 351; *Patterson* v. *Patterson, Curtis and Dore, supra;* but see *Forster* v. *Forster and Thomas* (1862), 2 Sw. & Tr. 553 (policy settled on wife and premiums deducted by employers).

(*l*) *Grafton* v. *Grafton* (1872), 27 L. T. 768; *Hill* v. *Hill* (1864), 33 L. J. (P. M. & A.) 104.

(*m*) *Nicholson* v. *Nicholson and Ratcliffe* (1862), 31 L. J. (P. M. & A.) 165,

SECT. 5 Proceedings pending Suit.

it (*n*) to be paid to the wife or to such trustee on her behalf, from time to time (*o*), and on such terms, as it deems expedient (*p*).

Solicitor's lien.

If the wife voluntarily allows her alimony to come into the hands of her solicitor, the ordinary rule as to his lien may apply (*q*). It is otherwise if it comes into his hands without his acquainting her of her rights (*r*), for the court will not countenance money paid for alimony being so diverted (*s*).

Duration.

1056. The right to alimony of a wife who is accused of adultery continues until there is a decision against her in the court of first instance (*t*); though the judge (if, for instance, an appeal is intended) may continue it (*u*), if reasonable (*a*); but where she is petitioner, and succeeds, it is continued until final decree (*b*). Formerly, when a suit for nullity succeeded, alimony was usually paid until the decree was made absolute (*c*), though the court had a discretion in the matter (*d*), but not afterwards; now (*e*), however, the matter is on the same footing as in a suit for dissolution of marriage. In the case of a wife who is suspected of getting her case postponed to put off the time of her probable conviction of adultery, the court may suspend the payment of the alimony (*f*).

Not assignable.

1057. Alimony *pendente lite* is not assignable (*g*). In default of payment a writ of *fieri facias* or *elegit* (*h*), or of sequestration (*i*), may be issued (*k*), equitable execution (*l*) may be resorted to, or the decree may be suspended till payment (*m*); but judgment cannot

which, on this point, disposes of *Hayward* v. *Hayward* (1858), 1 Sw. & Tr. 85; and see *Foden* v. *Foden*, [1894] P. 307, C. A.

(*n*) This also applies to permanent alimony.

(*o*) As the wife may nominate in writing (Divorce Rule 94), the nominee should not be her solicitor.

(*p*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 24.

(*q*) *Ex parte Bremner* (*Sarah*) (1866), L. R. 1 P. & D. 254. As to a solicitor's lien, see titles LIEN; SOLICITORS.

(*r*) *Leete* v. *Leete* (1879), 48 L. J. (P.) 61.

(*s*) *Cross* v. *Cross* (1880), 43 L. T. 533.

(*t*) *Wells* v. *Wells and Hudson* (1864), 3 Sw. & Tr. 542.

(*u*) *Jones* v. *Jones* (1872), L. R. 2 P. & D. 333.

(*a*) *Dunn* v. *Dunn* (1888), 13 P. D. 91, C. A.; and see *Butler* v. *Butler*, *Butler* v. *Butler and Burnham* (1889), 15 P. D. 13, where a decree *nisi* obtained by a wife on cross petition was rescinded, by reason of collusion.

(*b*) *Ellis* v. *Ellis* (1883), 8 P. D. 188, C. A., overruling *Latham* v. *Latham and Gethin* (1861), 2 Sw. & Tr. 299.

(*c*) *S.* v. *B.* (1884), 9 P. D. 80; *Foden* v. *Foden*, *supra*.

(*d*) *Childers* v. *Childers* (1899), 68 L. J. (P.) 90 (bigamy).

(*e*) Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1.

(*f*) *Rogers* v. *Rogers* (1865), 34 L. J. (P. M. & A.) 87.

(*g*) *Re Robinson* (1884), 27 Ch. D. 160, C. A.; see *Vandergucht* v. *De Blaquiere* (1839), 5 My. & Cr. 229; *Re Henderson*, *Ex parte Henderson* (1888), 20 Q. B. D. 509, C. A., *per* Lord ESHER, M.R., at p. 510; and see title CHOSES IN ACTION, Vol. IV., p. 402.

(*h*) See p. 587, *post*.

(*i*) See p. 586, *post*.

(*k*) Divorce Rule 203.

(*l*) See p. 589, *post*. Where a husband petitioned for divorce, the court stayed the suit on his non-payment to the wife of alimony *pendente lite* ordered in a current suit for judicial separation brought by her (*P.* v. *P. and T.* (1910), 26 T. L. R., 607.

(*m*) See p. 593, *post*, and title EXECUTION, Vol. XIV., pp. 115 *et seq.*

be obtained (*n*) for arrears, because they are only enforceable as an equitable debt (*o*), and because the order of the Divorce Division is not a final and conclusive judgment upon which an action for debt can be maintained (*p*). Payment of arrears can be enforced otherwise (*q*), but a bankruptcy notice cannot be founded thereon (*r*).

Before an order for the payment of a fixed sum, or even after an order for alimony *pendente lite* has been made (*s*), the court will not grant an injunction restraining a husband from so dealing with his property as to defeat alimony *pendente lite* (*t*).

SUB-SECT. 2.—*Disputes as to Property.*

Inquiry.

1058. To decide a dispute between the parties to a matrimonial suit as to the ownership of property (*a*), a summons may be taken out before a judge of the Divorce Division, who, if necessary, will refer the matter to one of the registrars to inquire and report (*b*). The procedure is similar to that in other divisions of the High Court (*c*).

Injunction.

If one of the parties has good grounds for fearing that the other will dispose of such property pending the litigation, an injunction to restrain may be obtained (*d*).

SUB-SECT. 3.—*Children: Custody, Maintenance and Access.*

Interim orders.

1059. Once a suit has been commenced, the children of the marriage should not be removed from the person in whose custody they are *de facto*, or out of the jurisdiction, except by leave of the court (*e*), and in any suit for judicial separation, or for nullity or dissolution of marriage (*f*), or for restitution of conjugal rights (*g*),

(*n*) Under R. S. C., Ord. 14, r. 1; or otherwise in the King's Bench Division.

(*o*) *Bailey* v. *Bailey* (1884), 13 Q. B. D. 855, C. A.; compare *Ivimey* v. *Ivimey*, [1908] 2 K. B. 260, C. A.; and see *Berkeley* v. *Elderkin* (1853), 1 E. & B. 805; *Hutchinson* v. *Gillespie* (1856), 11 Exch. 798.

(*p*) *Robins* v. *Robins*, [1907] 2 K. B. 13.

(*q*) *I.e.*, under the Debtors Act, 1869 (32 & 33 Vict. c. 62) s. 5 (by means of a judgment summons). See *Linton* v. *Linton* (1885), 15 Q. B. D. 239, C. A.; and further, as to enforcement, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 339 *et seq.*

(*r*) *Re Henderson, Ex parte Henderson* (1888), 20 Q. B. D. 509, C. A. See, however, *Re Hallman, Ex parte Ellis and Collier*, [1909] 2 K. B. 430 (costs); title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 25, 26; and p. 568, *post*.

(*s*) *Carter* v. *Carter*, [1896] P. 35 (judicial separation); and see *Hyde* v. *Hyde* (1865), 4 Sw. & Tr. 80.

(*t*) *Newton* v. *Newton* (1885), 11 P. D. 11; and see p. 591, *post*.

(*a*) A recent example of this is *Joseph* v. *Joseph*, [1909] P. 217 (dispute as to ownership of the dowry given on a Jewish marriage).

(*b*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17; *Wood* v. *Wood and White* (1889), 14 P. D. 157.

(*c*) See p. 460, *ante*.

(*d*) *Phillips* v. *Phillips* (1888), 13 P. D. 220 (judicial separation); and see p. 590, *post*. As to the general grounds upon which an injunction may be obtained, see title INJUNCTION.

(*e*) See *Harris* v. *Harris* (1890), 63 L. T. 262, where an *interim* injunction was granted *ex parte* to restrain a husband from taking a child out of the jurisdiction till an application for custody *pendente lite* could be made.

(*f*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 35.

(*g*) Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 6; disposing of *Chambers* v. *Chambers* (1870), 39 L. J. (P. & M.) 56.

SECT. 5. **Proceedings pending Suit.**

the court may, from time to time, before making its final decree, make *interim* orders with respect to the custody, maintenance (*h*) and education of such children, and may direct proceedings to be taken for placing them under the protection of the Chancery Division (*i*). Applications (*k*) for these purposes are made on summons to the judge in chambers (*l*). Applications for access (*m*) are made to a registrar, subject to appeal to the judge (*n*). They should be made before a finding of "guilty of adultery" against a wife, even if the King's Proctor show cause against the husband's decree (*o*).

How the jurisdiction is exercised.

1060. The children referred to are for some purposes those under the age of twenty-one (*p*), but this limitation does not necessarily extend to questions of custody. The court has power to make an order as to custody *inter partes*, but, apparently, not as against the child. If a child of sixteen is minded to leave his father's house, he cannot be reclaimed by *habeas corpus* or otherwise (*q*). The paramount consideration of the court in exercising its discretion is not the punishment of a guilty spouse, but the children's welfare, against which a father's common law right to their custody (*r*), if it conflicts with the rules of equity (*s*), does not prevail (*t*). For similar reasons both parents may sometimes be passed over (*a*), and consequently a third party may intervene in the suit for the purpose of asking for custody (*b*). In arriving at a decision, the state of the

(*h*) The only child of the marriage with the wife: no order for its maintenance pending suit (*Cranwell* v. *Cranwell* (1868), 19 L. T. 611).

(*i*) It seems that such proceedings will not be directed where the child's property is small, in the absence of other governing circumstances (*Stark* v. *Stark and Hitchins*, [1910] P. 190, C. A.).

(*k*) Supported by affidavit; see p. 535, *post*.

(*l*) This is the practice in spite of Divorce Rule 104, which directs a motion; compare *Anthony* v. *Anthony* (1860), 30 L. J. (P. M. & A.) 208.

(*m*) See *Thompson* v. *Thompson and Sturmfells* (1861), 2 Sw. & Tr. 402 (granted); *Codrington* v. *Codrington and Anderson* (1864), 3 Sw. & Tr. 496 (if wife's application not *bonâ fide*, refused); *Goderich* v. *Goderich and Lara, Forder and Kelsey* (1869), 19 L. T. 611 (application of wife found guilty of adultery not refused till time for rehearing had expired); *Philip* v. *Philip* (1872), 41 L. J. (P. & M.) 89 (where wife had been lunatic; refused in interest of child).

(*n*) Divorce Rule 212.

(*o*) *Shewell* v. *Shewell and Fox* (1869), 20 L. T. 404; and as to children generally, see title INFANTS AND CHILDREN.

(*p*) *Thomasset* v. *Thomasset*, [1894] P. 295, C. A., overruling *Blandford* v. *Blandford*, [1892] P. 148; *Mallinson* v. *Mallinson* (1866), L. R. 1 P. & D. 93, 221; *Ryder* v. *Ryder* (1861), 2 Sw. & Tr. 225.

(*q*) *Stark* v. *Stark and Hitchins*, *supra* (distinguishing *Thomasset* v. *Thomasset*, *supra*; whilst discharging an order for custody of a girl (16) granted to innocent father, and leaving the parties to their common law rights).

(*r*) See *R.* v. *Greenhill* (1836), 4 Ad. & El. 624; and as to such rights, see title INFANTS AND CHILDREN.

(*s*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (10).

(*t*) *Spratt* v. *Spratt* (1858), 1 Sw. & Tr. 215; *Cartlidge* v. *Cartlidge* (1862), 2 Sw. & Tr. 567; *Chetwynd* v. *Chetwynd* (1865), L. R. 1 P. & D. 39.

(*a*) *Curtis* v. *Curtis* (1858), 1 Sw. & Tr. 75; *Spratt* v. *Spratt*, *supra*; *Ling* v. *Ling and Prior* (1866), 13 L. T. 683.

(*b*) *Chetwynd* v. *Chetwynd* (1865), 4 Sw. & Tr. 151, where it was ordered to be by petition.

mother's health is sometimes taken into consideration (*c*), but the interest of the child comes first (*d*).

SUB-SECT. 4.—*Security for Costs.*

(i.) *In General.*

Petitioner to co-respondent.

1061. A co-respondent can only obtain security for costs from the petitioner if the latter is claiming damages, although the former must be made a party in any event (*e*), unless the petitioner (even a wife having separate estate (*f*)) is out of the jurisdiction (*g*), in which case security may be ordered. So also, if a respondent be insane and the official solicitor be appointed guardian *ad litem*, the petitioner (even if a wife) may be ordered to provide for the latter's costs (*h*). Any person, other than the King's Proctor, showing cause against a decree of divorce, may be ordered to give such security (*i*), but the fact of being an undischarged bankrupt is not in itself a ground for making an order for security, nor, as a rule (*k*), need it be given when moving the Court of Appeal for a new trial (*l*).

Wife to husband.

(ii.) *Wife's Costs*

Costs up to setting down;

1062. When a suit is about to be set down for hearing, or earlier by leave, the wife, if she has not sufficient separate estate, may file her bill of costs for taxation (*m*); and the registrar, having ascertained, by consent or otherwise, what sum ought to be paid for her costs up to setting down (*n*), and (*o*) what is sufficient security to be given, or sum to be paid into the registry, by the husband (*p*) to cover her costs of and incidental to the hearing of the suit, issues an order on him, or, if he be a lunatic, on his committee (*q*), to pay or secure them within a fixed time; but if the husband disputes his liability by reason of his wife having separate estate or otherwise,

and of hearing.

(*c*) *Barnes* v. *Barnes and Beaumont* (1867), L. R. 1 P. & D. 463; *Duggan* v. *Duggan* (1859), 29 L. J. (P. M. & A.) 159.

(*d*) *Philip* v. *Philip* (1872), 41 L. J. (P. & M.) 89.

(*e*) *Redfern* v. *Redfern and Herbert* (1890), 63 L. T. 780.

(*f*) *M.* v. *De B.* (1875), 44 L. J. (P. & M.) 41.

(*g*) Compare *Re Norman* (1849), 11 Beav. 401; *Blackett* v. *Blackett*, [1902] P. 170, C. A., overruling *Smith* v. *Smith and Palk* (1882), 7 P. D. 227, as the practice was not settled in the Divorce Division.

(*h*) *Jackson* v. *Jackson*, [1908] P. 308; and see *Giles* v. *Giles*, [1900] P. 17.

(*i*) See *Howarth* v. *Howarth* (1884), 9 P. D. 218, C. A.

(*k*) Since the Judicature Act, 1890 (53 & 54 Vict. c. 44).

(*l*) *Rickaby* v. *Rickaby*, [1901] P. 134, C. A., following *Heckscher* v. *Crosley*, [1891] 1 Q. B. 224, C. A.

(*m*) Compare p. 580, *post*.

(*n*) Which have sometimes to be lodged in the registry to await developments (*Rogers* v. *Rogers* (1865), 4 Sw. & Tr. 82 (wife, petitioner, notorious evil liver)); see p. 528, *post*.

(*o*) The words "by consent . . . and" are not part of the rule, but indicate the practice.

(*p*) But not her husband's father, if he petition for a nullity of his son's marriage and cite her and her husband (*Wells* v. *Cottam* (1864), 3 Sw. & Tr. 364).

(*q*) *Portsmouth* (*Earl*) v. *Portsmouth* (*Countess*) (1826), 3 Add. 63; compare *Woodgate* (*Committee of Taylor*) v. *Taylor* (1861), 30 L. J. (P. M. & A.) 197, n.

SECT. 5. Proceedings pending Suit.

such order may be suspended till he has time to appeal (*r*). If the wife's defence be a simple denial, she may be called upon by her husband to furnish an affidavit by herself and her solicitors, showing that she has a good defence on the merits. In any case, the registrar may, if he thinks fit, order security for the taxed costs, as well as the costs of the hearing (*s*).

Such orders are in the nature of a protection to the wife's solicitor, and through him to her (*t*); but he must be prompt in making himself secure (*a*).

Payment or bond.

1063. When security is ordered, unless the husband elects to pay the amount into the registry (*b*) and gives notice to the wife's solicitor, a bond is required from him, with two sureties (*c*), who may be required to justify and, if necessary, to be examined as to means before the registrar (*d*). When the bond is approved, it is filed (*e*) with the registrar's minute to that effect. If the wife considers the amount ordered to be too small, she may apply on summons to the judge in chambers to direct the registrar to make a further provision (*f*). If the hearing of the case lasts longer than has been anticipated, application may be made (*g*) for further security. This, if granted, enables the wife to recover from her husband, on a usual order (*h*), such extra costs as the registrar may allow.

As to subsequent suits.

1064. A wife whose husband has obtained a decree of judicial separation against her on the ground of adultery, is entitled to defend herself at his expense, should he afterwards bring a suit for dissolution of marriage (*i*); and where a wife who has obtained a separation order sues for dissolution of marriage, she can obtain security for her costs (*k*); but a husband is not required to give security for his wife's costs, where the King's Proctor is showing cause against a decree *nisi* which she has obtained (*l*), nor is it

(*r*) Divorce Rule 158. The registrar sometimes calls for counsel's advice on evidence.

(*s*) Memorandum issued by JEUNE, P., 21st January, 1902.

(*t*) See p. 548, *post*.

(*a*) *Gough* v. *Gough and Baynton* (1864), 33 L. J. (P. M. & A.) 136 (suit decided against wife before proceedings for security completed; costs before the order for taxation, and of hearing, refused); *Keats* v. *Keats and Montezuma* (1859), 1 Sw. & Tr. 334; *Rolt* v. *Rolt* (1864), 3 Sw. & Tr. 604; *Whitmore* v. *Whitmore* (1866), L. R. 1 P. & D. 96; *Nairne* v. *Nairne* (1901), 18 T. L. R. 16 (when a solicitor has ceased to act for the wife, it is too late for him to apply, but compare *Jinks* v. *Jinks* (1911), 27 T. L. R. 326). See also *Cheale* v. *Cheale* (1828), 1 Hag. Ecc. 374.

(*b*) Payment is made at the Bank of England, Law Courts Branch, and the lodgment completed at the office of the Assistant Paymaster-General, Royal Courts of Justice, Room 45, under the Supreme Court Funds Rules, 1905, which have superseded Divorce Rules 169—171; see title COURTS, Vol. IX., p. 69.

(*c*) The penalty is double the amount payable to the wife's solicitor.

(*d*) From whose decision there is an appeal to the judge in chambers.

(*e*) Divorce Rule 199.

(*f*) *Madan* v. *Madan and De Thoren* (1868), 18 L. T. 337.

(*g*) Usually at the beginning of the second day.

(*h*) See p. 547, *post*.

(*i*) *Holt* v. *Holt and Fleeming* (1858), 28 L. J. (P. & M.) 12.

(*k*) *Sheppard* v. *Sheppard*, [1905] P. 185; and compare p. 549, *post*.

(*l*) *Gladstone* v. *Gladstone* (1875), L. R. 3 P. & D. 260; *Butler* v. *Butler* (1890), 15 P. D. 32, 126, C. A.

settled whether the wife of a pauper can obtain security from him, with a stay till payment (*m*) or security.

Security for costs of a commission.

1065. When a commission or letters of request are allowed to issue (or, it is submitted, an examiner is appointed to take evidence), whether at the instance of a husband or a wife, the former must, if necessary, pay or secure such sum within such time as the registrar considers sufficient to meet her expenses thereof, and the order may be made then and there without a fresh summons (*n*); but it is otherwise where alimony is the subject of the inquiry (*o*) or where the order is obtained by a wife before the citation has been served (*p*). If, after a wife has been found guilty of adultery, an inquiry be directed as to her property, so that a settlement (*q*) of it may be ordered as soon as a final decree is pronounced, the husband must give security for the costs of the inquiry in case no decree is made (*r*).

Enforcing the order.

1066. The order to pay or secure, which should be served personally, acts, until complied with, as a stay (*s*), if the wife so elects. The remedy for non-payment of costs is the same as in other cases in the Divorce Division (*t*); but the penalty for a husband not securing her costs, if the husband is able so to do (*a*), is attachment (*b*), which, however, will be refused if the court be satisfied that the husband has no means; and in any event the writ of attachment is generally ordered to lie in the registry (*c*) for a time (*d*). Sometimes the husband will be ordered to attend for cross-examination as to means (*e*).

Injunction.

The court may grant an injunction restraining a husband from receiving a legacy till he has complied with an order to pay or secure his wife's costs (*f*).

(*m*) *Richardson* v. *Richardson*, [1895] P. 276, *per* JEUNE, P., at p. 280.

(*n*) Divorce Rules 198, 137; compare *Hood* v. *Hood* (1858), 2 Sw. & Tr. 112, n.; *Baily* v. *Baily and Della Rocca* (1860), 2 Sw. & Tr. 112 (cases before the present rules were made). As to commissions and letters of request, see p. 535, *post*.

(*o*) *Wilson* v. *Wilson and Howell* (1871), 26 L. T. 107.

(*p*) *Vallentine* v. *Vallentine*, [1901] P. 283.

(*q*) Under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 45.

(*r*) *Midwinter* v. *Midwinter*, [1892] P. 28, C. A.

(*s*) *Clarke* v. *Clarke*, [1891] P. 278; and see p. 538, *post*. In which case it can only be heard ten days after restoration to list and notice thereof.

(*t*) See p. 583, *post*; except by garnishee proceedings (see p. 589, *post*).

(*a*) *Lynch* v. *Lynch* (1885), 10 P. D. 183.

(*b*) *Bates* v. *Bates* (1888), 14 P. D. 17, C. A.; *Shine* v. *Shine*, [1893] P. 289 (husband undischarged bankrupt, but with a free salary of £30 per week; failure to secure £40); and see p. 585, *post*.

(*c*) *Holland* v. *Holland* (1865), 34 L. J. (P. M. & A.) 65; and compare *Ward* v. *Ward* (1859), 1 Sw. & Tr. 484, where a *fi. fa.* was the appropriate remedy.

(*d*) *Hepworth* v. *Hepworth* (1861), 2 Sw. & Tr. 414.

(*e*) *Sullivan* v. *Sullivan, Leahay, Madden, and Slaney* (1875), 33 L. T. 706.

(*f*) *Gillet* v. *Gillet* (1889), 14 P. D. 158, following *Sidney* v. *Sidney* (1867), 17 L. T. 9; *Bullus* v. *Bullus* (1910), 102 L. T. 399; but compare *Hawes* v. *Hawes* (1886), 57 L. T. 374 (application to continue an *interim* injunction refused); and see p. 585, *post*.

SECT. 6. Preparations for Trial.

SECT. 6.—*Preparations for Trial.*

SUB-SECT. 1.—*Discovery.*

(i.) *Discovery of Documents. Interrogatories.*

Discovery.

1067. A summons for discovery (*g*) and inspection (*h*) of documents, or for leave to administer interrogatories (*i*), may, as a rule, be issued as soon as an answer has been filed, but if there are charges of adultery, neither a respondent, co-respondent, or party who might intervene (*k*), nor a petitioner, even if there be a counter-charge, is, at this stage, liable to be asked, or bound to answer, any question tending to prove his or her guilt (*l*). Where, however, an issue is tried subsequent to, and arising out of, a decree of dissolution, this protection is not afforded (*m*).

King's Proctor.

Minors.

The King's Proctor is exempt from giving discovery, though he often gives facilities in the nature of discovery (*n*), but an infant respondent is not exempt, and the necessary affidavit in such a case must be sworn by the infant and not by the guardian (*o*).

The proper time to object to interrogatories, on the ground that

(*g*) See p. 466, *ante*. It is not the practice for the application to be supported by affidavit, nor is any deposit required. As to the application for discovery generally, see title DISCOVERY, INSPECTION AND INTERROGATORIES, Vol. XI., pp. 58 *et seq.*

(*h*) *Redfern* v. *Redfern*, [1891] P. 139, C. A. The Divorce Court had power to grant inspection (*Shaw* v. *Shaw* (1862), 2 Sw. & Tr. 642; *Pollard* v. *Pollard and Hemming* (1864), 3 Sw. & Tr. 613 (under the Common Law Procedure Acts); *Winscom* v. *Winscom and Plowden* (1864), 3 Sw. & Tr. 380, at p. 383, n.); and see *Noverre* v. *Noverre* (1846), 4 Notes of Cases, 652; *Boxley and Freck* v. *Stubbington* (1758), 2 Lee, 501. As to production of documents for inspection, see title DISCOVERY, INSPECTION AND INTERROGATORIES, Vol. XI., pp. 67 *et seq.* For cases on the question of possession of documents, see *ibid.*, p. 85; *Reed* v. *Langlois* (1849), 1 Mac. & G. 627; *Kearsley* v. *Philips* (1883), 10 Q. B. D. 36; *D.* v. *D.* (1911), 55 Sol. Jo. 331.

(*i*) *Euston* v. *Smith* (1884), 9 P. D. 57; *Harvey* v. *Lovekin* (1884), 10 P. D. 122, C. A. The Ecclesiastical Courts had power to administer interrogatories; see Hare on Discovery of Evidence, 2nd ed., pp. 88, 89 (citing *Dunn* v. *Coates* (1738), 1 Atk. 288); *Anon.* (1752), 2 Ves. Sen. 452. The draft interrogatories must be produced to the registrar; the answers are on oath; compare *Hooton* v. *Dalby*, [1907] 2 K. B. 18, C. A.; see also *Redfern* v. *Redfern*, *supra*, at p. 144; Chancery Amendment Act, 1852 (15 & 16 Vict. c. 86), ss. 12, 14, 19; Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 50, 51 (still effective as to divorce practice); and compare R. S. C., Ord. 31. As to application for leave to administer interrogatories generally, see title DISCOVERY, INSPECTION AND INTERROGATORIES, Vol. XI., pp. 92 *et seq.*

(*k*) See p. 507, *ante*.

(*l*) Evidence Act, 1869 (32 & 33 Vict. c. 68), s. 3; see also *King* v. *King* (1850), 2 Rob. Eccl. 153; *Swift* v. *Swift* (1832), 4 Hag. Ecc. 139, 154. If both cruelty and adultery be alleged, interrogatories as to the communication of a venereal disease, as an act of cruelty, will not be allowed (*E.* v. *E.* (1907), 24 T. L. R. 78). In *Schoolcraft* v. *Schoolcraft and Ruhmoor* (1891), 65 L. T. 794, although the wife seems, for some reason, to have denied adultery on oath in her answer, she was not thereby held to have forfeited this protection.

(*m*) *Evans* v. *Evans*, [1904] P. 378; which, however, does not seem to follow the *dicta* of BOWEN, L.J., in *Redfern* v. *Redfern*, *supra*.

(*n*) See *D.* v. *D.* (1909), 25 T. L. R. 411.

(*o*) *Redfern* v. *Redfern*, *supra*.

they must necessarily criminate (*p*), is when swearing the answer, but this does not apply to questions as to adultery (*q*).

Notices to produce and admit.

1068. Notices to produce or to admit documents, including bankers' books, must be served, where necessary (*r*), as in other divisions of the High Court (*a*), and the court will sometimes direct documents to be brought into the registry for its inspection, so that it may decide whether an applicant ought to see them (*b*).

(ii.) *Inspection of the Person.*

Order.

1069. When a suit for nullity of marriage by reason of impotence is in a position to be set down, application should be made on summons to the registrar for an order for the appointment of medical inspectors (*c*) and for the hearing of the case *in camerâ* (*d*). Personal or substituted (*e*) service of the summons is necessary only if the respondent has not entered an appearance.

Appointment.

The registrar appoints the two inspectors (*f*), but the petitioner's solicitor pays their fees and arranges an appointment when they are sworn and the parties identified (*g*) separately. The registrar (*h*) makes a minute of the proceedings.

Examination and report.

After the examination, which is carried out at any convenient place, the inspectors make a report in writing, which is handed (*i*) to the registrar and filed, either side being able to obtain a copy.

Refusal of inspection.

The refusal of a respondent to submit to inspection does not prevent the progress of a suit (*k*), but in such case the registrar, before certifying that the papers are in order, requires to be satisfied

(*p*) Although no indictment lies at common law for adultery (*Galizard* v. *Rigault* (1702), 2 Salk. 552), and there is no statute making it punishable, it exposes the guilty party to ecclesiastical punishment in theory at any rate; compare *Hebbert* v. *Purchas* (1871), L. R. 3 P. C. 605.

(*q*) *Harvey* v. *Lovekin* (1884), 10 P. D. 122, C. A., approving *Allhusen* v. *Labouchere* (1878), 3 Q. B. D. 654, C. A.

(*r*) *Case* v. *Case* (1860), 2 Sw. & Tr. 65. The form of these is as in other Divisions.

(*a*) See titles BANKERS AND BANKING, Vol. I., pp. 643 *et seq.*; PRACTICE AND PROCEDURE.

(*b*) *Pollard* v. *Pollard and Hemming* (1864), 3 Sw. & Tr. 613 (application by a co-respondent, against whom damages claimed, to inspect letters from the respondent to the petitioner).

(*c*) Under the ecclesiastical practice (Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22).

(*d*) See p. 464, *ante*.

(*e*) See p. 509, *ante*; but in this case the order is made by the judge in chambers.

(*f*) Originally each side had a right to nominate one (*W.* v. *H.*, *falsely called W.* (1861), 30 L. J. (P. M. & A.) 73; *S.*, *falsely called E.*, v. *E.* (1862), 31 L. J. (P. M. & A.) 164, 165, n.; *B.*, *falsely called C.*, v. *C.* (1863), 32 L. J. (P. M. & A.) 135; and see note (*h*), p. 471, *ante*).

(*g*) *B.* v. *B.*, [1901] P. 39; and see *H.*, *otherwise G.*, v. *G.* (1900), 69 L. J. (P.) 120.

(*h*) Or district registrar, if the parties are in the country.

(*i*) Or posted from the country to him.

(*k*) *W.* v. *S.*, [1905] P. 231; *S.* v. *B.*, *falsely called S.* (1905), 21 T. L. R. 219. At one time the respondent's absence from the country seems to have had this effect (*T.* v. *M.*, *falsely called T.* (1865), L. R. 1 P. & D. 31; *B.* v. *L.* (1869), L. R. 1 P. & D. 639); but see *Sparrow* v. *Harrison* (1841), 3 Curt. 16.

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of service of the order (*l*). It seems that service must be again proved at the hearing, particularly in an undefended case.

SUB-SECT. 2.—*Arrangements for Hearing.*

(i.) *Setting down Causes. Juries. Questions.*

Who can set down.

1070. A case can only be set down for trial by the petitioner or, if he fail to do so within one month from the conclusion (*m*) of the pleadings, by either or any one of the respondents (*n*), on a certificate from the registrar that the papers are in order (*o*); and, when set down, notice thereof must be given to each party on the record (*p*). A copy of such notice is then filed and the case comes on in its turn, unless the judge otherwise orders (*q*).

Registrar's certificate.

Directions inferred.

1071. No summons for directions is necessary, but when the pleadings are concluded (*r*), by issue being joined, or by a proceeding in default (*s*), the suit may be proceeded with as though a direction had been given for its hearing by oral evidence before a judge alone, or, if damages are claimed, with a common jury (*t*). Where no damages are claimed, the petitioner may at once set the suit down for hearing orally before a judge alone, unless, where questions of fact are raised, any party has successfully applied by summons for a trial by jury (*a*).

Juries.

1072. Any party to a petition for dissolution of marriage may insist on having contested (*b*) matters of fact tried by a jury (*c*), and damages must in all cases be ascertained by the verdict of a

(*l*) Under a circular issued by the President (Sir GORELL BARNES); compare *H., otherwise G.*, v. *G.* (1900), 69 L. J. (P.) 120.

(*m*) Divorce Rule 205.

(*n*) *Ibid.*, 46.

(*o*) *Ibid.*, 206. The registrar will cause any irregularity to be corrected, or refer the matter to the judge, and any party objecting to the registrar's decision may apply to the judge on summons to rescind or vary it.

(*p*) Divorce Rules 44, 45.

(*q*) *Ibid.*, 47.

(*r*) Compare *Broadwood* v. *Broadwood and St. Albans* (1864), 34 L. J. (P. M. & A.) 10; *Gough* v. *Gough and Baynton* (1863), 32 L. J. (P. M. & A.) 128 (where petitioner allowed to set down before his particulars were filed).

(*s*) Divorce Rules 20, 17, 18; and see p. 511, *ante*. An affidavit of search for appearance is necessary, even though service has been dispensed with (*Cooke* v. *Cooke and Lucy* (1859), 28 L. J. (P. & M.) 56). The affidavit must state not only a co-respondent's name, but that he is the co-respondent (*Temple* v. *Temple and Laing* (1861), 31 L. J. (P. M. & A.) 34); nor is it sufficient to refer to the indorsement (*Rich* v. *Rich* (1863), 32 L. J. (P. M. & A.) 77), or to a citation (*Dick* v. *Dick* (1863), 32 L. J. (P. M. & A.) 94, n.).

(*t*) Divorce Rule 205; and see *infra*.

(*a*) *Ibid.* It seems that an application for a common or special jury must be made by petitioner within fourteen days from the filing of the last pleading, failing which a respondent or co-respondent may apply; see Divorce Rule 40.

(*b*) But not in undefended cases where damages are not claimed, see *Thompson* v. *Rourke*, [1892] P. 244, C. A.

(*c*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 28; see also *ibid.*, ss. 37, 38; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 104—115; Juries Act, 1870 (33 & 34 Vict. c. 77), ss. 16—18, 24; and see p. 529, *post*. As to juries generally, and the practice relating thereto, see title JURIES.

jury, even if the suit be undefended (*d*); but, for the trial of facts in other suits or of demurrers (*e*) in the Divorce Division, the court may refuse or grant, on conditions (*f*), an order for a common, or special, jury, reserving questions of costs (*g*), or, apparently, it may order a jury though neither party desire it (*h*); and, if a wife obtain a special jury, the costs will not necessarily be allowed against her husband (*i*).

Questions for the jury.

1073. Questions for the jury, including an issue as to cruelty (*k*), are briefly stated in writing by the petitioner's solicitor and settled by the registrar (*l*); or, should a petitioner fail to deposit them for settlement (*m*), a respondent or co-respondent may do so (*n*). The party who has deposited the questions must deliver a copy of them, as settled, to opponents, who may apply to the judge (*o*) to alter or amend them, his decision being final; and after eight days from such delivery or amendment the questions may be filed and the suit set down (*p*).

Setting down for trial.

Special verdicts etc.

Bills of exceptions, special verdicts, special cases and demurrers are provided for (*q*); but these do not now appear to be of general practical utility.

(ii.) *Trial of Issues. Consolidation of Suits.*

Issues: (a) In courts other than the Divorce Division;

1074. The court may direct issues to be tried, in any court of common law, either before a judge of assize in any county, or at the sittings for the trial of causes in London or Middlesex (*r*);

(*d*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 33.

(*e*) Divorce Rule 67. Such trials of fact are set down like causes; see *Baker* v. *Baker* (1880), 5 P. D. 142; compare R. S. C., Ord. 25; *Griffith* v. *Griffith* (1864), 3 Sw. & Tr. 355.

(*f*) *Taylor* v. *Taylor* (1863), 32 L. J. (P. M. & A.) 126.

(*g*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 36; see *Marchmont* v. *Marchmont* (1858), 1 Sw. & Tr. 228 (judicial separation); *C.* v. *C.* (1862), 32 L. J. (P. M. & A.) 12; *Ricketts* v. *Ricketts* (1866), 35 L. J. (P. M. & A.) 92 (restitution and nullity); *Thompson* v. *Rourke*, [1892] P. 244, C. A. (jactitation); *Löwenfeld* v. *Löwenfeld*, [1903] P. 177, C. A. (act on petition); *Ryves and Ryves* v. *A.-G.* (1865), L. R. 1 P. & D. 23; *Re Bouverie's Petition* (1862), 2 Sw. & Tr. 548; *Sackville-West* v. *A.-G.*, [1910] P. 143 (legitimacy declaration).

(*h*) *Ratcliffe* v. *Ratcliffe* (1858), 27 L. J. (P. & M.) 60.

(*i*) *Scott* v. *Scott* (1862), 32 L. J. (P. M. & A.) 40.

(*k*) Notwithstanding *Kretzschmar* v. *Kretzschmar and Reinecker* (1859), 28 L. J. (P. & M.), 128.

(*l*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 38; Divorce Rule 41.

(*m*) Within fourteen days from the conclusion of the pleadings; see note (*r*), p. 528, *ante*.

(*n*) Divorce Rule 42.

(*o*) Within eight days, or on the first summons day thereafter (*ibid.*, 43).

(*p*) *Ibid.*, 44; and see p. 528, *ante*.

(*q*) By the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 39; and Divorce Rule 67; compare Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 46, 47, 48, 179, 184; Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 32; Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 25.

(*r*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 40. The object of this was to save expense; see *Hogg* v. *Hogg* (1860), 32 L. J. (P. M. & A.) 209, and *Snowball* v. *Snowball* (1871), L. R. 2 P. & D. 263 (judicial separation); *Richardes* v. *Richardes and Jones* (1861), 30 L. J. (P. M. & A.) 48 (dissolution); but the procedure seems to have fallen into disuse.

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and where it is necessary for facts to be ascertained before the court can arrive at a decision on a subsidiary point, it is the practice for it to direct a separate issue to be tried in the Divorce Division (*s*).

(b) in Divorce Division. Separating issues.

In proper cases, an order may be obtained from a judge on a summons directing that the respective cases against a respondent and co-respondent or co-respondents be tried separately (*a*). This process is sometimes resorted to by a co-respondent in a case where a respondent has made statements against him. Such an order may be made conditionally on a co-respondent paying any extra costs thereby occasioned (*b*).

Consolidation.

Where there are cross-suits (*c*) on the file, it is (*d*) the practice for registrars, on the application of one party, to give notice to the others that the two suits will be tried together (*e*), unless there be some valid objection, but the order made is not a consolidation order in the sense understood before the Judicature Act, 1890 (*f*).

(iii.) *Cause Lists. Transfers. Striking Out.*

Four cause lists.

1075. There are four separate lists, in one of which a suit, act on petition, or issue must be set down, this depending on whether it is to be tried by a judge sitting alone as (1) undefended, or (2) defended, or with (3) a common, or (4) a special jury. These cause lists, from which the *rota* of business is taken, are in charge of the clerk of the rules (*g*).

(*s*) As in *Evans* v. *Evans*, [1904] P. 274 (question of legitimacy arising out of a petition for variation of settlements); *Mordaunt* v. *Mordaunt* (1870), L. R. 2 P. & D. 103, 109 (question as to lunacy of respondent, which arose out of a summons for time to answer).

(*a*) *Miller* v. *Miller and Fowler* (1905), *Times*, 8th, 9th, 10th March, in which the issue as to the co-respondent's adultery was decided in his favour, and he was dismissed with costs. Afterwards, in *Miller* v. *Miller* (1907), *Times*, 23rd July, the respondent was found guilty on her own confession with the same co-respondent, and a decree *nisi* was pronounced; and see *Stone* v. *Stone and Appleton* (1864), 3 Sw. & Tr. 608.

(*b*) As in *B.* v. *B.*, *W. and P.* (1898) (unreported), order by Gorell Barnes, J., in chambers, on 7th May, 1898, where the wife had not appeared, that the case against the co-respondent W. should be tried by a jury); and in *Cox v. Cox* (1871), L. R. 2 P. & D. 201, where the respondent and the second co-respondent had put in answers, and the case against them was ordered to be tried first on the second co-respondent's undertaking.

(*c*) See p. 515, *ante*.

(*d*) For the former practice, see *Osborne* v. *Osborne*, *Osborne* v. *Osborne and Martelli* (1863), 3 Sw. & Tr. 327 (same issues; wife's suit stayed); *Burroughs* v. *Burroughs* (1862), 2 Sw. & Tr. 544 (wife's suit for restitution tried before husband's for dissolution; but judgment reserved till verdict of jury in husband's suit).

(*e*) *Rippingall* v. *Rippingall and Delacour*, *Rippingall* v. *Rippingall* (1876), 24 W. R. 967.

(*f*) 53 & 54 Vict. c. 44, s. 5; see *Forbes-Smith* v. *Forbes-Smith*, [1901] P. 258, 266, C. A.; compare *Re Swire*, *Mellor* v. *Swire* (1882), 21 Ch. D. 647, C. A.; *Re McRae*, *Forster* v. *Davis*; *Norden* v. *McRae* (1883), 25 Ch. D. 16, C. A.

(*g*) This official sits in the Royal Courts of Justice, Room 646. The official shorthand writer, who records all evidence *verbatim*, acts as unpaid assistant to him. Before the beginning of each term a card is published indicating the dates on which it is intended that these four lists and other business of the court shall be dealt with by the judge who is occupied with divorce business, and also by the

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1076. When a suit or other proceeding has been stayed for security for costs (*h*), or has been placed in a fifth list, called the reserved list, for this or other reason (*i*), as soon as the stay is removed notice should be given to the clerk of the rules, so that the case may be replaced in one of the four lists for trial, but, unless there are special circumstances, no case will be heard until ten days after its restoration to such list (*k*). Early in each Michaelmas sittings, all cases which have been in the reserved list for twelve months are, after notice to the parties or their solicitors, called over in court and struck out in the absence of successful application to the contrary (*l*).

The reserved list.

To obtain the transfer of a case from one list to another, or its postponement, application must be made to the judge (*m*), either by consent or on notice to the other side. Notice of readiness to proceed with a part-heard cause is given to the clerk of the rules.

Transfers.

SUB-SECT. 3.—*Evidence.*

(i.) *In General. Privilege.*

1077. The rules of evidence in force in the superior courts and in the Court for Divorce and Matrimonial Causes existing (*n*) in October, 1875, subject to subsequent statutory alteration, prevail in the Divorce Division. This Division is, therefore, as regards oral evidence, in the same position as the other Divisions of the High Court (*o*), and this applies also to questions of privilege (*p*). It seems that in undefended cases copies of letters to a respondent, whereof no notice to produce has been served, may be admitted in evidence (*q*).

Rules of evidence.

1078. On a party taking the necessary *præcipe* to the registry (*r*), the court issues, under seal, writs of *subpœna ad testificandum* or *subpœna duces tecum*, containing any number of names (*s*), which can be served in any part of Great Britain or Ireland (*t*), with the

Subpœna.

Admiralty judge, when at liberty. No notice of impending trial is given, and parties must ascertain the date for themselves.

(*h*) See p. 525, *ante*.

(*i*) Such as a commission; see p. 535, *post*.

(*k*) Compare Divorce Rule 48.

(*l*) Supported by affidavit if necessary.

(*m*) Or to the registrar, if the case be not yet printed in the judge's list.

(*n*) Compare p. 468, *ante*, and see the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 48 (repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), 50).

(*o*) See Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 20, and p. 533, *post*. As to evidence generally, see title EVIDENCE, Vol. XIII., pp. 415 *et seq.*

(*p*) But a petitioner in a suit for divorce may be asked, it seems, in cross-examination whether she did not at first instruct her solicitor to seek restitution (*Maccann* v. *Maccann* (1862), 3 Sw. & Tr. 142); see pp. 473, 479, *ante*.

(*q*) *Case* v. *Case* (1860), 2 Sw. & Tr. 65; compare *Neeld* v. *Neeld* (1831), 4 Hag. Ecc. 263, 267; *Croft* v. *Croft* (1830), 3 Hag. Ecc. 310, 317; *Crewe* v. *Crewe* (1800), 3 Hag. Ecc. 123, 125; *Codrington* v. *Codrington and Anderson* (1865), 4 Sw. & Tr. 63.

(*r*) Divorce Rule 109; but not now on parchment.

(*s*) Usually three or less; and see, generally, title EVIDENCE, Vol. XIII., pp. 577 *et seq.*

(*t*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 49; Attendance of Witnesses Act, 1854 (17 & 18 Vict. c. 34), s. 1; Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 16.

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same effect as those issued out of the superior courts before the Judicature Acts (*a*). The attendance in court of a party or witness in prison is obtained on affidavit by an order from the judge without summons (*b*).

It is not necessary to serve more than one *subpœna* on any witness (*c*).

Protection of persons accused.

1079. The parties to any proceeding instituted in consequence (*d*) of adultery, and the husbands and wives of such parties, are competent to give evidence therein; but no witness, whether a party or not, is liable to be asked (*e*), or is bound to answer, any question tending to show that he or she has been guilty of such (*f*) adultery, unless the witness shall have denied, in the same proceeding, his or her alleged adultery (*g*), and such denial lays him or her open to be cross-examined as to other acts of adultery (*h*). It seems also that this protection can be enjoyed by a spouse who brings a suit for nullity on the ground of impotence and is met by a cross-suit for dissolution on the ground of adultery (*i*); but apparently it does not apply to an issue arising out of, and tried subsequently to, a decree of dissolution (*k*).

Conduct of case.

1080. Where there are contested counter-charges of adultery against a petitioner, it is the usual practice, so as to gain the advantage described, not to obtain a denial of them in chief; but, if a sufficient case is afterwards made out, to recall him or her with witnesses to disprove it, to be examined and cross-examined (*l*);

(*a*) See note (*t*), p. 531, *ante*.

(*b*) See *Bland* v. *Bland* (1875), L. R. 3 P. & D. 233.

(*c*) Divorce Rule 180, which abolished fresh *subpœnas* for each sittings.

(*d*) It seems that restitution suits are not so instituted; see *Blackborne* v. *Blackborne* (1868), 37 L. J. (P. & M.) 73.

(*e*) These words are not surplusage; the judge will prevent questions being put to a witness, who might have to refuse to answer them one by one (*Hebblethwaite* v. *Hebblethwaite* (1869), L. R. 2 P. & D. 29). It is the practice to inquire of accused persons who are not parties whether they desire to give evidence; compare *Fisher* v. *Fisher* (1860), 30 L. J. (P. M. & A.) 24.

(*f*) It seems that this word must be read somewhere into the section, if the obvious intention of the legislature is to be carried out. The persons to be protected are the parties to the suit and those who might become parties (see p. 507, *ante*); and see *Hall v. Hall* (1909), 25 T. L. R. 524: *M.* v. *D.* (1885), 10 P. D. 175.

(*g*) Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3; and see *Ruck* v. *Ruck and Croft*, [1911] P. 90 (questions tending to show adultery put to test wife's evidence on the issues of conduct conducing and connivance).

(*h*) *Brown* v. *Brown* (1874), L. R. 3 P. & D. 198, which laid this down as to acts charged in the pleadings; but *Cowley* v. *Cowley* (1897), *Times*, 20th, 21st, 29th January, 2nd, 3rd February, went further, the respondent being asked about, and admitting, acts not charged, but afterwards added by amendment; and compare *Codrington* v. *Codrington and Anderson* (1865), 4 Sw. & Tr. 63; though *Babbage* v. *Babbage and Manning* (1870), L. R. 2 P. & D. 222, seems an authority to the contrary. In *Mawford* v. *Mawford* (1866), 15 L. T. 217, a wife was granted a decree, although she declined to say if she was then pregnant by a groom.

(*i*) *S.* v. *S.*, [1907] P. 224; but see, *contra*, *M.* v. *D.* (1885), 10 P. D. 175.

(*k*) See note (*m*), p. 526, *ante*.

(*l*) *Jackman* v. *Jackman* (1889), 14 P. D. 62; but if the allegation is denied in chief and the petitioner is cross-examined thereon, the calling of witnesses in support of the denial cannot be postponed to the evidence in support of the charge.

and it is sometimes convenient to adopt a similar course as to counter-charges of cruelty (*m*); but only evidence in rebuttal may be given by the petitioner when recalled.

Cross-examination of parties.

1081. Neither husband nor wife can be compelled to disclose a communication made to him or her by her or him during marriage (*n*), and a party who examines a witness is not entitled to prove a former contradictory statement made by such witness (*o*), nor, where a respondent or a co-respondent gives evidence hostile to the other, unless cross-examination of one by the other be permitted, should such evidence be admitted as against the other (*p*). The answers of a party cross-examined as to credit, on matters not in issue, are conclusive (*q*), and a wife, who has made a confession which is not believed nor acted on by her husband (*r*), cannot be cross-examined on behalf of the man against whom she made it, if he is not a party to the suit (*s*).

(ii.) *Vivâ Voce Evidence.*

Oral examination.

1082. All witnesses (*t*) are usually, if possible, sworn and examined orally in open court (*a*); and the evidence of a petitioner must be produced at the hearing; but where, in an undefended case, he can speak to nothing but the marriage, persons who were present may, in his unavoidable absence, be permitted to prove it (*b*). In petitions for nullity, except on the ground of impotence, the marriage must be strictly proved (*c*). In addition to the evidence of the petitioner, the production of a regular certificate of a marriage is usual, but not essential (*d*).

Proof of marriage.

Evidence of identity.

1083. Identity (*e*), which is a question of fact when proof thereof is necessary, must be strictly, although it may be circumstantially (*f*)

(*m*) The late Mr. Inderwick, K.C., did so in *Williams* v. *Williams and Gazzard* (1897); see *Times*, 30th October, 1st, 3rd, 4th November.

(*n*) Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), s. 3; and see *Cowley* v. *Cowley* (1897), *Times*, 20th, 21st, 29th January, 2nd, 3rd February.

(*o*) *Ryberg* v. *Ryberg and Smith* (1863), 32 L. J. (P. M. & A.) 112; and see Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 23; and title EVIDENCE, Vol. XIII., p. 573.

(*p*) *Allen* v. *Allen*, [1894] P. 248, C. A., doubting *Glennie* v. *Glennie and Bowles* (1863), 3 Sw. & Tr. 109, 110, n.

(*q*) *Baker* v. *Baker* (1863), 3 Sw. & Tr. 213.

(*r*) As in *Edwards* v. *Edwards*, [1897] P. 316.

(*s*) *Edwards* v. *Edwards and Wilson* (1899), *Times*, 17th, 20th June.

(*t*) As to police witnesses in divorce proceedings, see *Stephenson* v. *Stephenson and Jackson* (1897), *Times*, 28th October.

(*a*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 46.

(*b*) *Nicholson* v. *Nicholson and Fairley* (1892), 68 L. T. 28.

(*c*) *Nokes* v. *Milward*, (1824), 2 Add. 386; and compare *G.* v. *G.*, *falsely called K.* (1908), 25 T. L. R. 328, C. A.

(*d*) See *Woods* v. *Woods* (1840), 2 Curt. 516. See further, as to proof of marriages, pp. 311 *et seq.*, *ante*.

(*e*) Particularly of a respondent. As to identity of a co-respondent, against whom neither damages nor costs are claimed, see *Duff* v. *Duff and Lindsay*, [1888] W. N. 74.

(*f*) *Rooker* v. *Rooker and Newton* (1863), 3 Sw. & Tr. 526. See also *Frith* v. *Frith*, [1896] P. 74; *Dawson* v. *Dawson and Reilly* (1907), 23 T. L. R. 716 (photographs are seldom accepted in evidence unless supported by the handwriting of the original of the portrait); and see title EVIDENCE, Vol. XIII., p. 565.

SECT. 6. Preparations for Trial.

proved (*g*), and it is usual for the petitioner (*h*), or some one who knows him or her and the respondent as man and wife, to go with the proposed witness to make sure that the person as to whom the evidence is to be given is the respondent.

The court does not compel a respondent to attend for identification (*i*), except possibly in a case of nullity on the ground of bigamy (*k*). The fact that an appearance has been entered to a citation does not establish the identity of the person served (*l*); though the affidavit of service is generally accepted as evidence of the fact by the court, where no question of identity (*m*) is raised. In an undefended suit for nullity on the ground of impotence, however, the identity of the persons medically examined, although it has already been ascertained at the registry, should also be proved in court (*n*).

(iii.) *Affidavits, Affirmations, and Declarations.*

Affidavit evidence.

1084. Parties may (*o*) verify their respective cases wholly or in part (*p*) by affidavit (*q*); but unless the order (*r*) so to prove a case

(*g*) Especially where bigamy is alleged (*Searle* v. *Price* (1816), 2 Hag. Con. 187), and in undefended cases; though, where the King's Proctor charges a petitioner with adultery, the court is inclined to assume his identity unless it is refuted (*Hulse* v. *Hulse* (1871), L. R. 2 P. & D. 357); see also *Cobbe* v. *Garston* (1841), Milw. 529.

(*h*) The refusal to accept his evidence (as in *Harris* v. *Harris and Milton* (1870), L. R. 2 P. & D. 77) is not now common.

(*i*) *Hooke* v. *Hooke* (1858), 28 L. J. (P. & M.) 29; and compare *Pollack* v. *Pollack, and Deane, and Macnamara* (1862), 2 Sw. & Tr. 648; see, however, *Lloyd* v. *Lloyd* (1866), L. R. 1 P. & D. 222; *Sykes* v. *Sykes and Smith* (1868), 38 L. J. (P. & M.) 12.

(*k*) *Enticknap* v. *Rice* (*falsely called Enticknap*) (1865), 4 Sw. & Tr. 136.

(*l*) *Deane* v. *Deane* (1858), 1 Sw. & Tr. 90.

(*m*) *Goldsmith* v. *Goldsmith, Dalrymple, Nicolls and Wooley* (1862), 31 L. J. (P. M. & A.) 163, *contra*, is not now followed.

(*n*) *H., otherwise G.*, v. *G.* (1900), 69 L. J. (P.) 120; and compare p. 527, *ante*.

(*o*) *Adams* v. *Adams and Guest* (1873), 29 L. T. 699, and *Ling* v. *Ling and Croker* (1858), 1 Sw. & Tr. 180 (dissolution); *Burslem* v. *Burslem* (1892), 67 L. T. 719; *Bailey* v. *Bailey and Hodgson* (1909), *Times*, 14th January.

(*p*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 46; though the deponent is subject to be cross-examined thereon and thereafter to be re-examined orally in open court (compare R. S. C., Ord. 38, r. 1). Leave is now practically never given except where there is no defence, or on an act on petition, as to which see p. 311, *ante*. As to the filing of affidavits and as to cross-examination, see Divorce Rules 51, 55, and as to filing of affidavits in undefended cases, *ibid.*, 188.

(*q*) As in *March* v. *March* (1858), 28 L. J. (P. & M.) 30; and *Macartney* v. *Macartney* (1866), L. R. 1 P. & D. 259 (both cases of bigamy with adultery; on the ground of expense); *B.* (*falsely called C.*) v. *C.* (1863), 32 L. J. (P. M. & A.) 135 (wife's evidence of husband's impotence); *Ford* v. *Ford* (1867), 36 L. J. (P. & M.) 86 (wife's evidence in her restitution suit); *Burslem* v. *Burslem, supra* (respondent husband in America; evidence of bigamy and adultery; to save expense of commission); *Ex parte Hobson* (1894), 70 L. T. 816 (petitioner, an engine driver at Kimberley, South Africa, allowed to prove marriage and cohabitation); *M'Kechnie* v. *M'Kechnie* (1859), 1 Sw. & Tr. 550 (proof of a marriage in Scotland by the minister and petitioner's father and brother, who were present); *Cooper-King* v. *Cooper-King*, [1900] P. 65 (evidence, by former Governor of Hong Kong, of validity of a marriage there); *Roberts* v. *Brennan*, [1902] P. 143 (affidavit of A.-G. of Isle of Man). As to swearing of affidavits in Germany, see *In the Goods of Fawcus* (1884), 9 P. D. 241.

(*r*) Obtained on summons; see p. 467, *ante*.

be drawn up, it seems that the proceedings would be irregular (*s*). The affidavit which is filed in verification of a petition (*t*) will not be admitted as evidence at the hearing, nor one filed in a Chancery suit (*a*).

Rules as to affidavits.

Every affidavit must be correctly entitled in the cause (*b*), drawn in the first person, and properly stamped (*c*). The Divorce Rules also contain provisions as to the description and address of the deponent (*d*) or deponents (*e*); as to interlineations, alterations and erasures (*f*); as to blind or illiterate deponents (*g*); as to swearing before a party or his solicitor or the latter's partner, clerk, or agent (*h*); and as to filing out of time (*i*).

The practice as to what a deponent may state of his own knowledge or otherwise follows that in the other Divisions of the High Court (*k*).

Rules generally applicable.

The foregoing provisions also apply to affidavits (*l*) other than those for use at trial (*m*), and also, where applicable, to affirmations (*n*) and declarations (*o*).

(iv.) *Commissions. Letters of Request.*

Witness abroad.

1085. Where a witness is out of the jurisdiction (*p*), or for other reasons (*q*), the court may order a commission to issue, with a stay until it is returned, for his or her examination on oath upon

(*s*) *Webb* v. *Webb* (1862), 32 L. J. (P. M. & A.) 63.

(*t*) See p. 497, *ante*.

(*a*) *Deane* v. *Deane* (1858), 1 Sw. & Tr. 90, and *Studdy* v. *Studdy* (1859), 28 L. J. (P. & M.) 105.

(*b*) *Sutherland* (*falsely called Cromie*) v. *Cromie* (1863), 3 Sw. & Tr. 210 (an affidavit, headed only "Sutherland *v.* Cromie," rejected); compare R. S. C., Ord. 38, r. 2; and see note (*h*), p. 497, *ante*.

(*c*) Divorce Rules 138, 144; compare R. S. C., Ord. 38, rr. 7, 15, and title EVIDENCE, Vol. XIII., p. 625.

(*d*) Divorce Rule 138; compare R. S. C., Ord. 38, r. 8, and title EVIDENCE, Vol. XIII., p. 625.

(*e*) Divorce Rule 139; compare R. S. C., Ord. 38, r. 9, and title EVIDENCE, Vol. XIII., p. 625.

(*f*) Divorce Rule 140; compare R. S. C., Ord. 38, r. 12, and title EVIDENCE, Vol. XIII., p. 626.

(*g*) Divorce Rule 141; compare R. S. C., Ord. 38, r. 13, and title EVIDENCE, Vol. XIII., p. 627.

(*h*) Divorce Rule 142; compare *ibid.*, 143; R. S. C., Ord. 38, rr. 16, 17, and title EVIDENCE, Vol. XIII., p. 628.

(*i*) Divorce Rule 145; compare R. S. C., Ord. 38, r. 18, and title EVIDENCE, Vol. XIII., p. 629.

(*k*) Compare R. S. C., Ord. 38, r. 3, and title EVIDENCE, Vol. XIII., p. 625.

(*l*) In spite of an agreement before a registrar to have no evidence except by affidavit, the court may permit such evidence to be supplemented by oral evidence (*B.* v. *B.* (1907), 51 Sol. Jo. 430).

(*m*) See p. 466, *ante*, and the practice generally.

(*n*) Compare the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3.

(*o*) Divorce Rule 146; and see title EVIDENCE, Vol. XIII., pp. 590 *et seq.*

(*p*) See p. 468, *ante*, but an application (before 1858) of a wife, found guilty of adultery, for a commission to India etc. to prove condonation was rejected (*Campbell* v. *Campbell* (1857), 3 Jur. (N. S.) 845). As to evidence out of court generally, see title EVIDENCE, Vol. XIII., pp. 609 *et seq.*

(*q*) *E.g.*, likely to disappear (*Cooke* v. *Cooke and Quaile* (1859), 2 Sw. & Tr. 50).

SECT. 6. Preparations for Trial.

Application.

interrogatories (*r*) or otherwise (*s*). The application is made by summons, unless the case is undefended (*t*), and is supported by an affidavit by the solicitor stating that the witness is necessary and material. The application may be made after issue has been joined (*a*), or as soon as the time for appearance (*b*) has expired, and in proper cases even before the citation has been served (*c*). Undue delay in applying may defeat the application (*d*). The commission, which is addressed to some one agreed on by the parties or nominated (*e*) by the court, is drawn up by the applicant, and a copy delivered two clear days before the commission issues under seal to each party entitled to cross-examine. Any such party may apply to alter or amend it (*f*), or may apply by summons to join in a commission and examine witnesses (*g*), in which case the commission does not issue till the registrar so directs (*h*).

Joining in commission.

Procedure.

1086. The procedure is similar to that under the Rules of the Supreme Court (*i*). The evidence is usually taken in narrative form, and, by consent, a shorthand writer may be employed, but he should not be appointed commissioner (*k*). The depositions are handed personally or sent by post to the senior registrar at Somerset House.

Using the evidence.

1087. Where an order has been made, on undisputed grounds, to take the evidence of a witness resident abroad, the court may assume, when the evidence is tendered, that the witness is still abroad (*l*), but, if the order was founded on illness or temporary absence, strict proof of the inability to secure the witness's attendance must be given (*m*). The misdirection of a commission need not prevent the evidence obtained being used (*n*).

(*r*) This method is not now resorted to.

(*s*) Under the Evidence on Commission Act, 1831 (1 Will. 4, c. 22); see the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 47, repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), and title EVIDENCE, Vol. XIII., pp. 609 *et seq.*

(*t*) Divorce Rule 132, but often by summons, even if the case is undefended, and if a case is in progress, to the judge in court.

(*a*) *Shaw* v. *Shaw* (1862), 31 L. J. (P. M. & A.) 95; *Stone* v. *Stone and Appleton* (1865), 13 W. R. 414 (usually one name at least is given).

(*b*) *Fitzgerald* v. *Fitzgerald* (1863), 3 Sw. & Tr. 397; *Shaw* v. *Shaw* (1862), 2 Sw. & Tr. 642; *Stone* v. *Stone and Appleton* (1862), 31 L. J. (P. M. & A.) 136.

(*c*) *Brown* v. *Brown* (1864), 33 L. J. (P. M. & A.) 203; *Gribbon* v. *Gribbon* (1907), 24 T. L. R. 160.

(*d*) *Stone* v. *Stone and Appleton*, *supra*; or want of sufficient notice (*Fitzgerald* v. *Fitzgerald*, *supra*).

(*e*) Divorce Rule 133. In an undefended case the applicant does not nominate (*Cooke* v. *Cooke and Quaile* (1859), 2 Sw. & Tr. 50; *Lodge* v. *Lodge and Smythe* (1863), 32 L. J. (P. M. & A.) 93).

(*f*) Divorce Rule 134.

(*g*) *Ibid.*, 135.

(*h*) *Ibid.*, 136; for an old case of cross-suits, see *Osborne* v. *Osborne*, *Osborne* v. *Osborne and Martelli* (1863), 3 Sw. & Tr. 327. As to security for the costs of a commission, see p. 525, *ante*.

(*i*) Compare R. S. C., Ord. 37, founded largely on the Evidence on Commission Act, 1831 (1 Will. 4, c. 22); and see title EVIDENCE, Vol. XIII., p. 609.

(*k*) *Bicknell* v. *Bicknell*, [1908] W. N. 97, C. A.

(*l*) *Pollack* v. *Pollack, Deane, and Macnamara* (1861), 30 L. J. (P. M. & A.) 183.

(*m*) *Mills* v. *Mills* (1861), 30 L. J. (P. M. & A.) 183.

(*n*) *Wilson* v. *Wilson* (1883), 9 P. D. 8, C. A.

1088. If it be undesirable to issue a commission (*o*), letters of request (*p*) signed by the President may be issued seeking the assistance of a foreign court, through the Foreign Office, which requires security for its expenses. Such a course is, however, attended with grave delay, expense and inconvenience (*q*). Letters of request.

(v.) *Examination of Witnesses within the Jurisdiction.*

1089. If a witness who is within the jurisdiction is ill or otherwise unable to attend, the court may order an examination on oath, upon interrogatories, or otherwise, before an officer of the court or other person. The application is made in manner similar to that for a commission (*r*), and the examination is usually *vivâ voce*, and before some one agreed on by the parties or nominated by the court (*s*). Those entitled to cross-examine must usually have four clear days' notice of the time and place appointed (*t*). Witnesses in England. Notice.

SECT. 7.—*Disposing of Cause Lists.*

SUB-SECT. 1.—*Without Hearing or Trial.*

(i.) *By Abatement on Death of Parties.*

1090. The death of the petitioner or the respondent (*a*) before decree absolute causes a suit to abate altogether (*b*), and if a petitioner die after such decree, his executor cannot be made a party to continue a petition for variation of settlements, where there are no children, as against the respondent (*c*). If a co-respondent dies before the hearing, the petitioner must move to strike out his name (*d*). If he dies before decree absolute, and before Death of parties.

(*o*) Compare p. 509, *ante* (Germany, Spain and Switzerland are countries in point).

(*p*) See Divorce Rules 132—137; compare R. S. C., Ord. 37, r. 6A; see the Evidence on Commission Act, 1831 (1 Will. 4, c. 22), as to mandamus to Indian and colonial judges, and generally, title EVIDENCE, Vol. XIII., p. 611.

(*q*) See *Hitchins* v. *Hitchins* (1866), 35 L. J. (P. & M.) 62, where evidence so taken was allowed to be read, although a French judge, neither agent objecting, had only put such questions as he thought fit.

(*r*) Divorce Rule 129; and see p. 536, *ante*.

(*s*) Divorce Rule 130.

(*t*) *Ibid.*, 131.

(*a*) But not in the case of the death of a respondent where there is a claim for damages (*M.* v. *M. and A.* (1910), 26 T. L. R. 305).

(*b*) *Brocas* v. *Brocas* (1861), 2 Sw. & Tr. 383 (death of husband before hearing; evidence produced to registrar); *Schenck* v. *Schenck* (1908), 24 T. L. R. 739 (executor of wife who died before hearing, after obtaining orders for alimony *pendente lite* and costs, cannot become a petitioner); *Grant* v. *Grant and Bowles and Pattison* (1862), 2 Sw. & Tr. 522 (guardian of children cannot intervene to make decree absolute, so as to vary settlements); *Stanhope* v. *Stanhope* (1886), 11 P. D. 103, C. A. (petitioner's executor cannot intervene to make decree absolute, so as to defeat respondent's rights under a will); *Bevan* v. *M'Mahon and Bevan* (*falsely called M'Mahon*) (1859), 2 Sw. & Tr. 58 (father's suit for nullity of daughter's marriage; on his death his widow and executrix could not continue); and see, generally, title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 228 *et seq.*

(*c*) *Thomson* v. *Thomson*, [1896] P. 263; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 229. Unless the fact of death be strictly proved, the decree will be made absolute (*Dering* v. *Dering* (1868), L. R. 1 P. & D. 531).

(*d*) *Walpole* v. *Walpole and Chamberlain*, [1901] P. 86; *Sutton* v. *Sutton and Peacock* (1863), 32 L. J. (P. M. & A.) 156.

SECT. 7. Disposing of Cause Lists.

the time named to bring in the damages awarded, no order can be made on his executor (who cannot be made a party) in the Divorce Division; nor can the order made on the deceased be altered (*e*), unless he died after agreeing to pay the costs by instalments (*f*).

Costs.

Where a respondent husband dies before the hearing, the court may give the widow her costs up to the amount in court, and his executor may attend the taxation (*g*). Where a petitioner dies after decree absolute, his executor can enforce an order for costs (*h*).

(ii.) *By Stay of Proceedings.*

Return to cohabitation.

1091. At any time after the commencement of proceedings for restitution of conjugal rights, the respondent, if willing to return, may apply by summons to the registrar for an order to stay the proceedings; and, on proof of return (*i*), the petition may be dismissed, though, where the wife is petitioner, only after payment of her taxed costs (*k*).

Irregularity.

1092. If the name of the co-respondent be omitted from the printed list, or if a previous petition against the wife which has been struck out remains on the file, the suit will be stayed till these matters are adjusted (*l*). So, too, where a husband disobeys an order to pay alimony or costs *pendente lite* to his wife, she may apply to have the petition dismissed (*m*), or to have the suit stayed (*n*): a husband's suit may be stayed if alimony (ordered in his wife's cross-suit) be in arrear (*o*); or after a disagreement of the jury until the wife's costs of the first and second trial have been paid or secured (*p*), and, *a fortiori*, if, after a husband's suit has been dismissed, he brings a fresh one in which the charges overlap (*q*).

When stay refused.

1093. The court, however, may refuse a stay in the following cases:—

Where the wife or husband, not having paid the costs of one suit, brings another for a different cause of action (*r*);

(*e*) *Brydges* v. *Brydges and Wood*, [1909] P. 187, C. A. It does not seem to have been submitted in this case that, although R. S. C., Ord. 42, r. 26, does not apply, Consolidated Order XXIX., r. 2, its predecessor, might do so; compare also R. S. C., Ord. 17, r. 4, with the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 135—142, and with Consolidated Order XXXII., made under the Chancery Amendment Act, 1852 (15 & 16 Vict. c. 86), s. 52.

(*f*) *Waddell* v. *Waddell*, [1892] P. 226.

(*g*) *Cunningham* v. *Cunningham* (1897), 77 L. T. 405.

(*h*) *Hawks* v. *Hawks* (1876), 1 P. D. 137; Attorneys' and Solicitors' Act, 1870 (33 & 34 Vict. c. 28), s. 19.

(*i*) Divorce Rule 176; compare *Crothers* v. *Crothers* (1868), L. R. 1 P. & D. 568.

(*k*) *Cooper* v. *Cooper* (1864), 3 Sw. & Tr. 392; *Dixon* v. *Dixon* (1871), L. R. 2 P. & D. 253; Divorce Rule 193 (1875).

(*l*) *Onslow* v. *Onslow, Jones and Campbell* (1889), 60 L. T. 680.

(*m*) *Curtis* v. *Curtis* (1868), 38 L. J. (P. & M.) 9; but not if the delay has occurred through the wife's *laches* (*Bridgman* v. *Bridgman and Puckrin* (1869), 20 L. T. 87).

(*n*) *Curtis* v. *Curtis, supra*; *P.* v. *P. and T.* (1910), 26 T. L. R. 607; but postponement is not granted *ex parte* (*Hepworth* v. *Hepworth* (1861), 2 Sw. & Tr. 414).

(*o*) *P.* v. *P. and T.*, *supra*.

(*p*) *Kemp-Welch* v. *Kemp-Welch and Crymes*, [1910] P. 233, C. A.; *Joseph* v. *Joseph and Burnhill* (1897), 76 L. T. 236.

(*q*) *Sanders* v. *Sanders*, [1911] W. N. 46, C. A., overruling *Yeatman* v. *Yeatman and Rummell* (1869), 39 L. J. (P. & M.) 37.

(*r*) *Abdy* v. *Abdy* (1896), 12 T. L. R. 524.

Pending the wife's appeal as to her answer being taken off the file (*s*);
By reason of a husband not paying extra costs (*t*);
Where there is a substantial question of estoppel by deed (*u*);
In a wife's suit for restitution of conjugal rights or for judicial separation, where her husband's petition for dissolution is pending abroad (though, in this case, not for want of jurisdiction) (*v*).

(iii.) *By Dismissal for Want of Prosecution.*

Dismissing suit.

1094. Where a suit is not duly prosecuted, the petitioner should be called upon to show cause why it should not be dismissed; but it will not be dismissed as against the co-respondent only (*x*).

A petition may be dismissed (*y*) in the following cases:—
If a petitioner gives notice of abandoning his petition, and takes no further steps (*a*);
If, when a case is called on for hearing, no one appears to support the petition (*b*);
Where the allegations in a petition for dissolution of marriage are only sufficient to support a prayer for judicial separation, and the petitioner refuses (*c*) to amend.

But a petitioner cannot have a petition dismissed without notice to the respondent (*d*); though, if the procedure be formal and in order (*e*), a wife will not successfully resist her husband's application for dismissal, on his paying all her costs, even if she has filed a petition for alimony *pendente lite* (*f*).

The application to dismiss is by summons (*g*), and when an order has been made for dismissal of a petition on payment of costs, the cause remains in the list until the registrar, on proof that the costs have been paid, orders its removal (*h*).

(*s*) *Wilson* v. *Wilson* (1871), L. R. 2 P. & D. 292.
(*t*) *Keane* v. *Keane* (1873), L. R. 3 P. & D. 52.
(*u*) *Marshall* v. *Marshall* (1879), 5 P. D. 19. In this case not even a temporary stay is granted.
(*v*) *Thornton* v. *Thornton* (1886), 11 P. D. 176, C. A.; *Von Eckhardstein* v. *Von Eckhardstein* (1907), 23 T. L. R. 539, 593, C. A.; and compare p. 591, *post*.
(*x*) *Gold* v. *Gold* (1908), 52 Sol. Jo. 715; *Hancock* v. *Hancock and Smith* (1867), L. R. 1 P. & D. 334.
(*y*) *Desmarest* v. *Desmarest* (1861), 31 L. J. (P. M. & A.) 34; *Potts* v. *Potts and Bateman* (1862), 32 L. J. (P. M. & A.) 32; if the court is satisfied that the petition will not be proceeded with (*Round* v. *Round, Ginn* v. *Ginn* (1869), 20 L. T. 87).
(*a*) *Symons* v. *Symons and Pike* (1862), 2 Sw. & Tr. 435.
(*b*) See p. 541, *post*.
(*c*) *Rowley* v. *Rowley* (1865), 4 Sw. & Tr. 137.
(*d*) *Lutwyche* v. *Lutwyche and Cox* (1859), 28 L. J. (P. & M.) 56; *Ryder* v. *Ryder* (1861), 30 L. J. (P. M. & A.) 164; *Troward* v. *Troward* (1884), 32 W. R. 864 (reconciliation after decree *nisi*; decree rescinded on wife's motion); compare *Lewis* v. *Lewis* (1861), 2 Sw. & Tr. 394 (a similar case, where the court refused to dismiss, but by consent granted a stay).
(*e*) *Stuart* v. *Stuart* (1862), 3 Sw. & Tr. 219.
(*f*) *Twisleton* v. *Twisleton* (1872), L. R. 2 P. & D. 339; but see *Southern* v. *Southern* (1890), 62 L. T. 668; and compare *P.* v. *P. and T.* (1910), 26 T. L. R. 607.
(*g*) *Slater* v. *Slater and Bolderson* (1900), 69 L. J. (P.) 48.
(*h*) Divorce Rule 193; and see *Warwick* v. *Warwick* (1901), 85 L. T. 173.

SECT. 7. Disposing of Cause Lists.

Withdrawing petition.

1095. In a technical sense, a petition cannot be withdrawn (*i*), for, once on the file, it must remain there (*k*); but the word is often used to imply dismissal or the stay of all proceedings. If the parties to a suit have become reconciled and have agreed that the petition shall be withdrawn, the fact that the necessary steps have not been taken will not prevent the court from carrying out their intention, should one of them seek to revive the suit after a long interval (*l*).

(iv.) *By Compromise.*

Compromise, when enforced.

1096. The court will recognise a settlement of differences (*m*), and an agreement of compromise entered into is valid (*n*), and may (*o*) be made an order of court (*p*), or may be enforced in the Chancery Division (*q*). But if, in consideration of an agreement to secure money to a petitioning husband, a suit be allowed to be dismissed, the agreement, being against public policy, will not be enforced (*r*). Nor will an agreement by a husband to pay his wife's taxed costs on her withdrawing her counter-charges be upheld, if he has himself committed such adultery as the court cannot excuse (*s*).

The costs of a compromise or of a deed of separation are not included in costs of suit, unless this is expressly agreed (*t*). An agreement by deed, after a separation order has been made, that a wife is to return to cohabitation, and that, if in future she obtain another separation order, her husband is to pay her a sum of money, in consideration of which she is not to enforce any further sum ordered, is not against public policy, and an action will lie to recover the sum of money agreed (*u*).

(*i*) *Ryder* v. *Ryder* (1861), 30 L. J. (P. M. & A.) 164.

(*k*) See *Brocas* v. *Brocas* (1861), 2 Sw. & Tr. 383.

(*l*) *Scharrer* v. *Scharrer* (1909), *Times*, 7th July, C. A.

(*m*) *Brown* v. *Brown* (1874), L. R. 3 P. & D. 202; *Hooper* v. *Hooper* (1863), 3 Sw. & Tr. 251 (the full court, in a suit for judicial separation, held that the petitioner could not repudiate except on the ground of fraud etc.). In *Rowley* v. *Rowley* (1864), 3 Sw. & Tr. 338; (1866) L. R. 1 Sc. & Div. 63, the House of Lords recognised a compromise; and in *Stanes* v. *Stanes* (1877), 3 P. D. 42, HANNEN, P., remarked that compromises were binding on suitors in divorce, there being no distinction between restitution and separation suits. See, further, as to contracts between spouses being void on the ground of public policy, pp. 439 *et seq.*, *ante*.

(*n*) *Sterbini* v. *Sterbini* (1870), 39 L. J. (P. & M.) 82 (agreement to withdraw from suit for dissolution, for good consideration, in the absence of fraud or duress). As to compromise of suits generally, see title PRACTICE AND PROCEDURE.

(*o*) Provided this be part of the terms of compromise (*Howard* v. *Howard* (1897), 77 L. T. 140, a suit for judicial separation); but not otherwise (*Graves* v. *Graves* (1893), 69 L. T. 420).

(*p*) *De Ricci* v. *De Ricci*, [1891] P. 378, where the court sent a deed back to the registrar, who had, under the terms, prepared it, for revision.

(*q*) *Hart* v. *Hart* (1881), 18 Ch. D. 670.

(*r*) *Gibbs* v. *Hume* (1861), 10 W. R. 38.

(*s*) *Weekes* v. *Weekes*, *Weekes* v. *Weekes and Marshall* (1905), 21 T. L. R. 227.

(*t*) *Lancaster* v. *Lancaster*, [1896] P. 75, 118, C. A.

(*u*) *Harrison* v. *Harrison*, [1910] 1 K. B. 35.

(v) *By Striking out*

SECT. 7. Disposing of Cause Lists.

Striking out.

1097. If no one appears on either side to support or oppose a petition when it is called on, it is struck out of the list and, if there be a jury, the judge will discharge the jurors (*a*). This, however, is only equivalent to adjourning it *sine die*, and it may be reinstated on personal explanation by counsel or by affidavit. It is occasionally reinstated only on condition that the solicitor or the party in fault pays the costs thrown away (*b*). A case has been struck out because the minutes were not filed with the papers (*c*).

SUB-SECT. 2.—*By Hearing or Trial.*

(i.) *Before the Court, Alone or with a Jury.*

Methods of trial.

1098. Suits are heard (*d*) by a judge alone, or tried with a jury (*e*), usually in open court, but sometimes *in camerâ* (*f*).

Onus probandi.

1099. The burden of proof governs the right to begin; but where there are cross-petitions or cross-prayers, the earlier in date has the preference, unless the allegations in the petition be not traversed, in which case a respondent, who has made counter-charges, proceeds to prove them (*g*).

Nullity.

Where there are to be tried claims for judicial separation amended to nullity, and for nullity, by the wife and husband respectively, the burden of proof is on the wife (*h*); but where the respective claims are for dissolution and for nullity of marriage, the question of nullity is tried first (*i*).

Dissolution.

Restitution.

In a suit for restitution of conjugal rights, if the separation be admitted, the respondent begins by proving justification (*k*).

Jactitation.

In a suit for jactitation of marriage, also, the respondent begins (*l*).

(*a*) *Haydon* v. *Haydon and Cooke* (1860), 30 L. J. (P. M. & A.) 112.

(*b*) Compare *Holden* v. *Holden and Pearson* (1910), 102 L. T. 398 (where a rehearing was ordered).

(*c*) *Murphy* v. *Murphy* (1862), 31 L. J. (P. M. & A.) 162; but see note (*p*), p. 528, *ante*; and p. 539, *ante*.

(*d*) Not until ten days after setting down and notice, except by consent (Divorce Rule 48).

(*e*) Subject to the same rights and obligations as in trials by a jury in the King's Bench Division, and by consent of all parties, a jury may be dismissed (*Bancroft* v. *Bancroft and Rumney* (1864), 3 Sw. & Tr. 610), but the sheriff is entitled to his fees, although the jury is discharged before the hearing (*Blackburn* v. *Blackburn* (1907), 51 Sol. Jo. 345). See the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 38; Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 20. As to juries generally, see title JURIES.

(*f*) See p. 464, *ante*.

(*g*) *Bacon* v. *Bacon and Bacon* (1859), 29 L. J. (P. M. & A.) 61.

(*h*) *L.* v. *L., otherwise M.* (1909), 25 T. L. R. 43.

(*i*) See *M.* v. *D.* (1885), 10 P. D. 175; *S.* v. *S.*, [1907] P. 224; *Serrell* v. *Serrell and Bamford* (1862), 2 Sw. & Tr. 422, no longer holds good.

(*k*) *Cherry* v. *Cherry* (1858), 1 Sw. & Tr. 319; *Smith* v. *Smith*, [1900] P. 66. This course was accepted as correct in *Russell* v. *Russell* (1895), 4th April (unreported), by Sir H. James, Q.C., and Mr. Murphy, Q.C.; but see *Burroughs* v. *Burroughs* (1862), 2 Sw. & Tr. 544.

(*l*) *Ascroft* v. *Trevor, otherwise Foley* (1906), *Times*, 13th—23rd March (where the respondent sought restitution).

SECT. 7. Disposing of Cause Lists.

(ii.) *Procedure. Adjournment. Dismissal of Parties.*

Order of speeches.

1100. The order of speeches, as between respondents, is a matter of arrangement between counsel; but it is usual for the co-respondent (if more than one, then in the order on the record) to follow the respondent in opening, and for the parties to sum up in the inverse order (*m*). It is convenient for a party in person to call evidence at once, reserving any comment for summing up (*n*).

Further evidence.

The court may, at any time during the hearing, adjourn it, or require further evidence (*o*); or it may, at the close of the petitioner's evidence, dismiss from the suit any person, other than the husband or wife, against whom adultery is alleged, if the evidence against him or her is insufficient (*p*). When a suit has been adjourned for the purpose of enlarging the allegations in the petition, it seems that the whole of the evidence must be heard on the second occasion (*q*).

(iii.) *Assessment of Damages.*

By jury.

1101. A claim for damages is heard and tried on the same principles, in the same manner, and subject to the same, or like, rules and regulations with some exceptions (*r*), as actions for criminal conversation (*s*) were tried and decided in the courts of common law before 1858, and in the same way as a petition for dissolution of marriage or judicial separation. Even if there is no defence, the amount of damages must in every case be ascertained by the verdict of a jury (*t*).

Co-respondent's knowledge.

1102. Proof of adultery does not necessarily entitle a petitioner to damages (*a*), but the fact that the co-respondent did not know that the respondent was a married woman does not absolutely disentitle the husband to claim (*b*); though, if the husband relies on such

(*m*) *Robinson* v. *Robinson and Lane* (1859), 1 Sw. & Tr. 362; see also *Glennie* v. *Glennie and Bowles* (1862), 32 L. J. (P. M. & A.) 17. Where counsel for a co-respondent has called no evidence, he is entitled to address the jury after the petitioner's counsel (*Jeffree* v. *Jeffree and Nuttall* (1910), 54 Sol. Jo. 655). The retainer rules have been held by the Bar Council to apply to proceedings in the Divorce Division (see the report of the General Council of the Bar, 1910, p. 13). See also *Re Harrisson*, [1908] 1 Ch. 282, which arose out of a probate suit.

(*n*) *Curtis* v. *Curtis* (1858), 27 L. J. (P. & M.) 73.

(*o*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 44; see *Ward* v. *Ward* (1858), 1 Sw. & Tr. 185 (as to desertion).

(*p*) Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 11; see *Robinson* v. *Robinson and Lane* (1859), 1 Sw. & Tr. 362.

(*q*) *Walker* v. *Walker* (1862), 31 L. J. (P. M. & A.) 117.

(*r*) For instance (according to *Weedon* v. *Timbrell* (1793), 5 Term Rep. 357, and *Winter* v. *Henn* (1831), 4 C. & P. 494), no damages were obtainable if husband and wife had been living apart; compare *Gardner* v. *Gardner and Bamfield* (1901), 17 T. L. R. 331.

(*s*) See *Comyn* v. *Comyn and Humphreys* (1860), 32 L. J. (P. M. & A.) 210; *Lord* v. *Lord*, [1900] P. 297. These actions are now abolished.

(*t*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 33.

(*a*) *Gibson* v. *Gibson and West* (1906), 22 T. L. R. 361; but see *Pegler* v. *Pegler and Russell* (1901), 85 L. T. 649; *Spedding* v. *Spedding and Smith* (1862), 31 L. J. (P. M. & A.) 96, note (1).

(*b*) *Watson* v. *Watson and Watts* (1905), 21 T. L. R. 320.

knowledge, he must prove it, for this question bears on the amount of damages (*c*).

Means of co-respondent.

The jury ought not to consider the means of the co-respondent, except in so far as they were of assistance to him in seducing the wife. The measure of damages is what the petitioner has lost in his wife (*d*); it is immaterial whether the co-respondent can pay that loss or not (*e*). It is not for the jury to punish; and where a husband and wife are living apart under a deed (*f*) the damages may be reduced to a minimum, unless the co-respondent's conduct brought about the separation (*g*); and the extent to which this is the case must be considered (*h*).

Conduct of wife.

If the wife was not virtuous (*i*) before marriage, or if the married life has been unhappy, the tendency is to diminish the damages; but where she has taken good care of the house and children, or assisted in the husband's business, to increase them (*k*).

Conduct of husband.

1103. Where a husband, by reason of his own conduct, is not entitled to a decree of dissolution or otherwise, no damages should be awarded (*l*), as, otherwise, he might continue to live with his wife and enjoy the damages (*m*), and, once a husband has condoned his wife's adultery with a particular man, he cannot obtain damages from him, no matter what the wife's conduct, independently of that man, may be (*n*); but where a husband is blameless, a co-respondent, if found guilty, may be cast in damages, although the respondent be found not guilty, having been forced (*o*).

SECT. 8.—*Finding and Decree.*

SUB-SECT. 1.—*Judgments and Verdicts.*

Judgment.

1104. When the judge has summed up, he delivers his judgment, or, if there be a jury, the questions upon which the jury must give their verdict are put to them. If they cannot agree, they must be

Verdict.

(*c*) *Lord* v. *Lord*, [1900] P. 297; differing from *Darbishire* v. *Darbishire and Baird* (1890), 62 L. T. 664; and from *Newby* v. *Newby and White* (1897), 77 L. T. 142. *Calcraft* v. *Harborough* (*Earl*) (1831), 4 C. & P. 499, is still of authority.

(*d*) In *Stone* v. *Stone and Appleton* (1864), 3 Sw. & Tr. 608, although the co-respondent did not appear, the respondent was acquitted, and the jury assessed the damages at a farthing.

(*e*) *Cowing* v. *Cowing and Wollen* (1863), 33 L. J. (P. M. & A.) 149; *Bikker* v. *Bikker and Whitewood* (1892), 67 L. T. 721.

(*f*) See pp. 439 *et seq.*, *ante*.

(*g*) *Izard* v. *Izard* (1889), 14 P. D. 45.

(*h*) *Evans* v. *Evans*, [1899] P. 195.

(*i*) *Darbishire* v. *Darbishire and Baird*, *supra*.

(*k*) *Keyse* v. *Keyse* (1886), 11 P. D. 100.

(*l*) *Cox* v. *Cox and Warde*, [1906] P. 267 (petition for damages only); *Story* v. *Story and O'Connor* (1887), 12 P. D. 196, where the husband's adultery had been condoned.

(*m*) *Hyman* v. *Hyman*, [1904] P. 403 (cohabitation resumed); *Ravenscroft* v. *Ravenscroft* (1872), L. R. 2 P. & D. 376.

(*n*) *Bernstein* v. *Bernstein*, [1892] P. 375; *Bernstein* v. *Bernstein*, [1893] P. 292, C. A.; overruling *Pomero* v. *Pomero* (1884), 10 P. D. 174.

(*o*) *Long* v. *Long and Johnson* (1890), 15 P. D. 218 (the court intervened in the interest of the respondent).

SECT. 8. Finding and Decree.

discharged (*p*), unless their disagreement be on an immaterial point (*q*), and in such case the suit is then treated as part heard, and replaced in the same jury list.

If the case occupies more than a day, it is very usual for the parties to agree to give extra remuneration to the jury (*r*).

SUB-SECT. 2.—*Decrees.*

Decree *nisi* for dissolution and nullity.

1105. If a petitioner in a suit for dissolution of marriage or for nullity succeeds, and there is not found to exist any absolute or other bar to relief, the court must (*s*) pronounce a decree *nisi*, subject, however, to terms in certain cases; but if there is found to exist a discretionary bar, the petition may be dismissed.

Final decrees.

1106. In other suits decrees are final and are granted or refused on very similar principles. The following points should be noticed:—

In a suit for jactitation of marriage the decree enjoins perpetual silence on the subject;

In a suit for restitution of conjugal rights the order is to return (*t*), and to file a certificate of compliance in the registry;

On a decree of judicial separation being pronounced, it is not necessary to enter into a bond conditioned against marrying again (*a*).

Details.

1107. The decree includes, where necessary, orders for custody of the children, damages, and costs; and a certificate for a special jury, if ordered at the instance of the party in whose favour an order for costs is made, should be asked for at the time (*b*). The registrar enters the finding and decree in the Court Book and signs it (*c*). When the decree is drawn up, it need not be served personally, unless it be feared that some part of it may be disobeyed.

Rectification.

1108. A mistake in a decree, such as an error as to the place of marriage (*d*); or an order which dismisses a petition on the ground of the husband's connivance, but does not contain a direct statement that the wife has committed adultery, may be amended by the court (*e*).

The law as it exists when the suit commences governs the rights of the parties, unless fresh legislation expressly provides otherwise (*f*).

(*p*) *Hurley* v. *Hurley*, [1891] P. 367. *Quære* whether the verdict of a majority can, even by consent, be accepted.

(*q*) *Godrich* v. *Godrich* (1872), L. R. 2 P. & D. 392; and see *Narracott* v. *Narracott and Hesketh* (1864), 3 Sw. & Tr. 408.

(*r*) For a special jury case where this was not done, owing to lack of means, see *Kemp-Welch* v. *Kemp-Welch and Crymes* (1909), *Times*, 4th December.

(*s*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31.

(*t*) Usually within fourteen days.

(*a*) Divorce Rule 126.

(*b*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 34; see *Skipper and Skipper* v. *Bodkin* (1860), 2 Sw. & Tr. 1. As to special juries see generally, title JURIES.

(*c*) Divorce Rule 49.

(*d*) *Skeats* v. *Skeats and White* (1865), 35 L. J. (P. & M.) 47.

(*e*) *Gipps* v. *Gipps and Hume* (1863), 32 L. J. (P. M. & A.) 179.

(*f*) *Ansdell* v. *Ansdell* (1880), 5 P. D. 138.

Finding and Decree.

1109. Although controversial matters as to custody, alimony etc. are not discussed at the hearing (*g*) of suits for judicial separation (*h*), or for nullity or dissolution of marriage, the court, usually in chambers makes provision in its decree for the custody of the children (*i*), after hearing the parties, when necessary. The respondent is not heard unless, at least, an appearance has been entered (*k*). The order directs that the children shall not, except by leave (*l*), be removed from the jurisdiction; and in an order for restitution of conjugal rights, the custody of the children may be given to the petitioning wife until the decree be obeyed (*m*).

Order for custody in decree.

1110. Where a decree of judicial separation, or of dissolution of marriage *nisi* or absolute, is pronounced, the court may declare a guilty husband or wife unfit to have the custody of the children; and thereafter he or she is not entitled as of right to their custody or guardianship on the death of the other parent (*n*). It seems that, on that event, any application necessary must be made in the Chancery Division (*o*).

Declaration of unfitness.

1111. Custody of children is usually, except for grave cause (*p*), given to the innocent (*q*) party, though there is no fixed rule (*r*). Access is usually allowed to an offending father (*s*), though not, except by consent (*t*), to a mother (*a*) who has been guilty of adultery (*b*). There is, however, no definite rule that in no circumstances can a woman who has committed adultery be allowed

When guilty party may obtain custody or access.

(*g*) *Wallace* v. *Wallace* (1862), 32 L. J. (P. M. & A.) 34.

(*h*) Even if the domicil be not English (*Armytage* v. *Armytage*, [1898] P. 178); but see *Seymour* v. *Seymour* (1859), 1 Sw. & Tr. 332.

(*i*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 35. The order is usually made in chambers.

(*k*) Divorce Rule 50.

(*l*) Obtained on summons before the judge.

(*m*) *Paine* v. *Paine* (1902), 50 W. R. 382.

(*n*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 7. Such a declaration was made in *Skinner* v. *Skinner* (1888), 13 P. D. 90; *Handford* v. *Handford* (1890), 63 L. T. 256; *Webley* v. *Webley* (1891), 64 L. T. 839; *C.* v. *C.* (1905), 22 T. L. R. 26; but refused in *Woolnoth* v. *Woolnoth* (1902), 18 T. L. R. 453; and see *Bagnall* v. *Bagnall and Hobbs* (1910), 26 T. L. R. 659.

(*o*) *Davis* v. *Davis* (1889), 14 P. D. 162.

(*p*) *March* v. *March and Palumbo* (1867), L. R. 1 P. & D. 437. See *Witt* v. *Witt*, [1891] P. 163, where it appeared that the innocent mother was not a fit person; custody given to father.

(*q*) *Marsh* v. *Marsh* (1858), 1 Sw. & Tr. 312.

(*r*) See *Symington* v. *Symington* (1875), L. R. 2 Sc. & Div. 415 (sons given to the father, and daughters to innocent mother); and also *Martin* v. *Martin* (1860), 29 L. J. (P. M. & A.) 106 (judicial separation; husband guilty of almost insane cruelty to wife, allowed custody of some of the children, with mutual access). Compare *Stark* v. *Stark and Hitchins*, [1910] P. 190, C. A.; and see p. 577, *post*.

(*s*) *Hyde* v. *Hyde* (1859), 29 L. J. (P. & M.) 150; *Boynton* v. *Boynton* (1861), 2 Sw. & Tr. 275.

(*t*) *Cubley* v. *Cubley and Smith* (1861), 30 L. J. (P. M. & A.) 161 (child aged two; *interim* order by consent).

(*a*) See *Clout* v. *Clout and Hollebone* (1861), 2 Sw. & Tr. 391; *Bent* v. *Bent and Footman* (1861), 2 Sw. & Tr. 392; compare *Bacon* v. *Bacon* (1866), L. R. 1 P. & D. 167 (judicial separation, on ground of wife's cruelty; access granted).

(*b*) *Taylor* v. *Taylor and Wolters* (1870), 39 L. J. (P. & M.) 23; as explained by LINDLEY, L.J., in *Handley* v. *Handley*, [1891] P. 124, C. A.

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access: the court has a wide discretion (*c*), and in a case where the child was conceived before marriage limited access was allowed to the wife (*d*). On a dissolution of marriage the court may disregard a covenant as to custody in a separation deed (*e*), and, where a marriage is annulled on the ground of the man's insanity at the time of celebration, the custody may be given to the mother (*f*).

Order for damages in decree.

1112. Unless a co-respondent has pleaded, it seems that he cannot be heard (*g*) as to damages. The common form of order against him in a decree is that he do, within a fixed time, bring the amount awarded into court. But as this does not make him a debtor to the petitioner either at law or in equity, in order to facilitate recovery (*h*), payment to the petitioner himself is sometimes directed, on his undertaking to bring what he recovers into the registry; or the original order may be varied to that effect, so that payment may be enforced by the issue of an appropriate writ (*i*). Should there be danger of a co-respondent making away with his property before the time limited expires, he may be restrained by injunction from so doing (*k*). If the co-respondent is keeping out of the way, substituted service of the order may be obtained (*l*).

Bankruptcy. Committal.

1113. If the petitioner be put as above mentioned in a position to act personally (or even perhaps if he be not), he can prove in bankruptcy (*m*); but he has not a good petitioning creditor's debt (*n*); and though he may succeed in getting an order against the co-respondent by means of a judgment summons under the Debtors Act, 1869 (*o*), he cannot obtain a receiving order in lieu thereof. An order of discharge of a co-respondent, who has become a bankrupt, does not release him from a judgment against him in a matrimonial suit, except to such extent as the court may order (*p*).

(*c*) *Handley* v. *Handley*, [1891] P. 124, C. A.; and see *Stark* v. *Stark and Hitchins*, [1910] P. 190, C. A.

(*d*) *M.* v. *M.* (1906), 22 T. L. R. 325.

(*e*) *Jump* v. *Jump* (1883), 8 P. D. 159.

(*f*) *Jackson* v. *Jackson*, [1908] P. 308.

(*g*) Compare Divorce Rule 50; see also p. 510, *ante*.

(*h*) *Pritchard* v. *Pritchard* (1870), L. R. 2 P. & D. 53 (where co-respondent, about to take his property out of jurisdiction, was ordered to pay petitioner within two days); *Patterson* v. *Patterson* (1870), L. R. 2 P. & D. 189 (to enable petitioner to prove in bankruptcy against co-respondent).

(*i*) *Pritchard* v. *Pritchard*, *supra*. As to enforcement of orders generally, see pp. 584 *et seq.*, *post*.

(*k*) *Brydges* v. *Brydges and Wood*, [1909] P. 187, C. A.; and as to injunction, see p. 590, *post*.

(*l*) *Pritchard* v. *Pritchard*, *supra*.

(*m*) *Re O'Gorman, Ex parte Bale*, [1899] 2 Q. B. 62 (co-respondent bankrupt; order to pay to petitioner; judgment summons under the Debtors Act, 1869, (32 & 33 Vict. c. 62), s. 5, refused because the damages were provable; necessity for order to pay to petitioner doubted); *Wood* v. *Wood* (1868), L. R. 1 P. & D. 467; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 26, 36.

(*n*) *Re Muirhead, Ex parte Muirhead* (1876), 2 Ch. D. 22, C. A. (he is merely in the position of a receiver; *Patterson* v. *Patterson*, *supra*, doubted).

(*o*) 32 & 33 Vict. c. 62, s. 5; *Re Fryer, Ex parte Fryer* (1886), 17 Q. B. D. 718, C. A.; and compare note (*m*), *supra*.

(*p*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 10.

SUB-SECT. 4.—*Orders for Costs.*

(i.) *In General.*

Who may be heard.

1114. Before pronouncing a decree, the judge will hear the parties (even if they have simply entered an appearance and not pleaded) as to costs, which are in the discretion of the court (*q*), each case depending on its own facts (*r*).

The order, which forms part of the decree, is for costs of and incidental to the suit (*s*), and includes, *inter alia*, those of applications for variation of settlements (*a*), provided the applicants have been successful (*b*), and for the apportionment of damages (*c*).

Pauper suitors.

A successful pauper is not entitled to any costs or fees, other than out-of-pocket expenses (*d*); but an order for full costs against a pauper, for what it is worth, may be given to a successful opponent (*e*), and where a husband abandons his defence to a charge of adultery, and the woman implicated therein applies to be and is allowed to defend, and succeeds, she may obtain costs against the respondent, and also against the petitioner (*f*).

(ii.) *Between Husband and Wife.*

Costs against wife if she has separate estate.

1115. If a suit be decided against a wife who has separate estate, including even an allowance under a separation deed (*g*), she may be condemned in costs (*h*). But the application for such an order must be made at the hearing, or, so that she may have notice, on an adjournment for that purpose (*i*) when, if not restrained from

(*q*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 51 (repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19)); Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5. Although there is no statute or rule cutting down this discretion, it is the practice to regard costs, after the verdict of a jury, as following the event, apparently by analogy to R. S. C., Ord. 65, r. 1.

(*r*) See further, on the subject of costs, as to applications as to time etc., p. 513, *ante*; as to security for costs, p. 523, *ante*; as to disposing of cause lists without hearing or trial, p. 537, *ante*; as to functions of the King's Proctor and of members of the public, p. 552, *post*; as to appeal, pp. 552, 557, *post*; as to incidental proceedings after decree, p. 563, *post*; as to variation of settlements, p. 571, *post*; as to taxation of costs, p. 580, *post*; as to recovery of costs, p. 583, *post*.

(*s*) Compare *Smithe* v. *Smithe* (1868), L. R. 1 P. & D. 587, 592.

(*a*) See p. 571, *post*; *Gill* v. *Gill and Hogg* (1863), 3 Sw. & Tr. 359.

(*b*) *Stone* v. *Stone and Brownrigg* (1864), 3 Sw. & Tr. 372.

(*c*) *Irwin* v. *Irwin and Layard* (1890), 59 L. J. (P.) 53.

(*d*) *Richardson* v. *Richardson*, [1895] P. 276; *Carson* v. *Pickersgill & Sons* (1885), 14 Q. B. D. 859, C. A., which seems to cut down *Afford* v. *Afford* (1861), 2 Sw. & Tr. 387 ("there is no reason why the wife should not have her costs").

(*e*) *Richardson* v. *Richardson*, *supra*.

(*f*) *Wade* v. *Wade*, [1903] P. 16. As to costs in suits for a declaration of legitimacy, see title BASTARDY, Vol. II., p. 434.

(*g*) *Clark* v. *Clark and Saldji*, [1906] P. 331.

(*h*) *Hyde* v. *Hyde and Fellgate* (1888), 59 L. T. 523; *Millward* v. *Millward and Andrews* (1887), 57 L. T. 569; *Holmes* v. *Holmes* (1755), 2 Lee, 90; unless her husband is responsible for her misconduct (*Milne* v. *Milne* (1871), L. R. 2 P. & D. 202); and see *Morris* v. *Freeman* (1878), 3 P. D. 65); though, apparently, not if her separate estate be very small (*Aires* v. *Aires* (1892), 65 L. T. 859).

(*i*) *Field* v. *Field and Denton* (1887), 13 P. D. 23.

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anticipation or, even if restrained, in case she instituted (*k*) the proceedings, an order may be obtained against her. It is, however, too late to ask for costs against any party after a decree has been made absolute (*l*). Where the parties have been only partially successful, they may have to pay their own costs (*m*), and where a guardian or next friend represents a wife who is a minor, he may, if he acts without due caution, render himself personally liable (*n*).

Successful wife's costs not limited by security.

1116. Where the petition of a wife, who has obtained no security for costs, is dismissed, no order for costs is usually made against her husband (*o*); but in ordinary cases the costs of a wife who succeeds, whether as a petitioner (*p*) or as a respondent (*q*), are in no way limited to the amount secured, and they follow the decree almost as a matter of course (*r*). In cross-suits, where both husband and wife fail, she may have full costs, except, perhaps, in so far as her defence was a joint one with the co-respondent (*s*). On the other hand, a woman who has wilfully married her deceased husband's brother, although she is entitled to a decree of nullity, will probably not be allowed costs (*t*). Where a wife obtains a decree of nullity of marriage, on the ground of the respondent's lunacy at the time of its celebration, her costs may be allowed, although she may have to provide his costs in the first instance (*a*).

Order if wife unsuccessful.

1117. When a wife, who is not proved to have sufficient separate estate, has obtained an order for security against her husband, but fails in her suit (*b*), she may, as a rule (*c*), obtain an order for costs against him not exceeding (*d*) the amount secured; but the application and the order ought to be made at the

(*k*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2; and see *Gordon* v. *Gordon*, [1904] P. 163, C. A. (taking out a summons to vary a decree *nisi* is not instituting); see further, p. 374, *ante*.

(*l*) *Wait* v. *Wait* (1871), L. R. 2 P. & D. 228.

(*m*) *Duplany* v. *Duplany*, [1892] P. 53, 57.

(*n*) *Brown* v. *Brown* (1850), 2 Rob. Eccl. 302; on the question of indemnification by the minor, compare *Re Fish, Bennett* v. *Bennett*, [1893] 2 Ch. 413, 423; and *Steeden* v. *Walden*, [1910] 2 Ch. 393.

(*o*) *Thompson* v. *Thompson* (1886), 57 L. T. 374.

(*p*) *Kaye* v. *Kaye* (1858), 4 Sw. & Tr. 239.

(*q*) *Watson* v. *Watson and Wilkinson* (1862), 31 L. J. (P. M. & A.) 102, n.; *Bridges* v. *Bridges and Barnett* (1867), 16 L. T. 34 (where both husband and wife had committed adultery); *Chaldecott* v. *Chaldecott and Cartwright* (1873), 29 L. T. 699.

(*r*) *Peacock* v. *Peacock* (1858), 27 L. J. (P. & M.) 71 (judicial separation); *Starkey* v. *Starkey and Irwinn* (1861), 30 L. J. (P. M. & A.) 118; *Cooke* v. *Cooke and Allen* (1864), 3 Sw. & Tr. 603; and for the general principle, see *Ellaytt* v. *Ellaytt, Taylor and Halse* (1864), 3 Sw. & Tr. 503.

(*s*) *Burroughs* v. *Burroughs, Burroughs* v. *Burroughs and Silcock* (1862), 31 L. J. (P. M. & A.) 124.

(*t*) *Aughtie* v. *Aughtie* (1810), 1 Phillim. 201; *Andrews* v. *Ross* (1888), 14 P. D. 15; compare *D'Etchegoyen* v. *D'Etchegoyen* (1908), 25 T. L. R. 85 (marriage with divorced husband's brother).

(*a*) For form of order, see *Jackson* v. *Jackson*, [1908] P. 308, 311; *Goatly* v. *Jones*, [1907] W. N. 161.

(*b*) Even by reason of collusion (*Todd* v. *Todd* (1866), 13 L. T. 759).

(*c*) *Sopwith* v. *Sopwith* (1860), 2 Sw. & Tr. 105, and *Glennie* v. *Glennie and Bowles* (1863), 3 Sw. & Tr. 109, 110, n., show the old practice.

(*d*) But see *Robertson* v. *Robertson* (1881), 6 P. D. 119, C. A.; *Otway* v. *Otway* (1887), 13 P. D. 12, 141, C. A.

hearing (*e*), although in special circumstances (*f*) the application may be considered later. If the wife contends that she ought to be allowed more costs than have been secured, special application should be made at the hearing, and then, when her costs have been taxed, she will be in a position to obtain the decision of the judge (*g*) on a summons (*h*).

Conduct of solicitor.

1118. If the wife's solicitor has not acted *bonâ fide* for her protection, the court may refuse to make an order for her costs (*i*), though this will only happen where the solicitor should have had no doubt as to the course to adopt (*k*). Although there is no rigid rule, if a solicitor knowingly promotes a case which clearly has no foundation, or takes unnecessary steps, or produces absurd evidence, the whole or part of his costs may be disallowed (*l*). The wife's solicitor ought to scrutinise charges which she proposes to make in a petition even more strongly than matters which she puts forward in defence (*m*), and it is his duty to bring forward any defence set up, unless clearly unfounded (*n*); but he is not bound, as soon as he finds she cannot deny the charges made, to abandon her, for to do so might cause her to seek the assistance of a less scrupulous adviser; and there is an honourable way of defending the worst of cases (*o*).

Wife's costs in successive suits.

1119. If a wife brings a suit on one ground and fails, and she then brings a second suit seeking different relief and succeeds, her

(*e*) Divorce Rule 159.

(*f*) *Conradi* v. *Conradi and Flashman* (1866), L. R. 1 P. & D. 163; *Somerville* v. *Somerville and Webb* (1867), 36 L. J. (P. & M.) 87.

(*g*) *Smith* v. *Smith* (1882), 7 P. D. 84, which considers and explains *Robertson* v. *Robertson, supra*; but compare *Smith* v. *Smith*, [1882] W. N. 91. C. A.

(*h*) See *Ash* v. *Ash*, [1893] P. 222.

(*i*) See p. 429, *ante*. As to the position of a sum of money paid in, in lieu of security, see *Evans* v. *Evans and Robinson* (1859), 1 Sw. & Tr. 328; *T., falsely called D.*, v. *D.* (1866), L. R. 1 P. & D. 127 (suit for nullity); *Wells* v. *Wells and Cottam* (1864), 3 Sw. & Tr. 593 (needless defence); *Kershaw* v. *Kershaw and Berry* (1907), 23 T. L. R. 296 (unreasonable defence); *Beer* v. *Beer* (1906), 22 T. L. R. 367 (unreasonable suit for restitution); *Marks* v. *Marks and Walton* (1905), 21 T. L. R. 209 (unreasonable counter-charges); *Townson* v. *Townson and Bucknall* (1898), 67 L. J. (P.) 68 (wife's confession; said to be known to her solicitor; he was ordered to satisfy court within fourteen days that he believed defence; otherwise security to be paid out); *Walker* v. *Walker and Lawson* (1897), 76 L. T. 234 (no defence; counter-charges uncorroborated); *Heal* v. *Heal* (1867), L. R. 1 P. & D. 300 (judicial separation; wife, who had more property than husband, induced by others to institute proceedings); *Clark* v. *Clark, Perrin and Cummins* (1865), 4 Sw. & Tr. 111 (fictitious defence; wife only allowed costs of simple traverse; husband to deduct costs of meeting charges). Compare *Morgan* v. *Morgan and Porter* (1869), 38 L. J. (P. & M.) 41 (only one counter-charge proved). As to relationship of solicitor and client generally, see title SOLICITORS.

(*k*) *Flower* v. *Flower* (1873), L. R. 3 P. & D. 132.

(*l*) *Robertson* v. *Robertson* (1881), 6 P. D. 119, C. A.; *Jones* v. *Jones* (1872), L. R. 2 P. & D. 333, 339 (for such practice would be oppressive and a great wrong to the husband).

(*m*) *Huntly-Gordon* v. *Huntly-Gordon* (1908), 24 T. L. R. 806 (where the wife was allowed costs of cross-charges, which failed).

(*n*) *Wells* v. *Wells* (1858), 1 Sw. & Tr. 308.

(*o*) *Smith* v. *Smith* (1882), 7 P. D. 84.

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husband will probably only be condemned in one set of costs (*p*). But should she successfully defend a second trial, where a jury disagree on the first, she may have her costs of both (*q*), including her full costs of the first (*r*), and so also as to the second, if it is improbable that the case will be retried. Should she be found guilty on a first trial and not guilty on a second, she may have all her costs, including those of her motion for a new trial (*s*). Where a petitioner and co-respondent are both convicted of adultery, which has not been contested by the petitioner, the wife may have her full costs, if the co-respondent obtain a new trial (*a*); and, where a wife is acquitted, and her husband applies for a new trial, it may be made a condition precedent to its being granted that he should pay her costs of the first trial (*b*).

(iii.) *Between Petitioner and Co-respondent.*

Guilty co-respondent to pay costs except under certain conditions.

1120. A co-respondent, against whom adultery is established (though, it seems, not otherwise), may be ordered to pay the whole or any part of the costs of the proceedings (*c*); but it is not the practice to make such an order (*d*), unless it be proved that he knew, before the adultery (*e*) was committed, that the respondent was married (*f*); and he may escape liability for costs if the wife's conduct has been profligate, to the husband's knowledge, before the adultery (*g*). A co-respondent, who acted on a *bonâ fide* belief that the petitioner's marriage was void, may escape condemnation in costs (*h*); and a co-respondent found guilty may escape by being condemned only in the costs of the charges made against himself,

(*p*) *Ditchfield* v. *Ditchfield* (1869), L. R. 1 P. & D. 729; compare *Butler* v. *Butler* (1890), 15 P. D. 32, 126, C. A.

(*q*) *Waudby* v. *Waudby and Bowland* (1901), 17 T. L. R. 490, affirmed (1901), 17 T. L. R. 620, C. A. (no security having been given); *Waudby* v. *Waudby*, [1902] P. 85.

(*r*) *Hurley* v. *Hurley*, [1891] P. 367; *Delaforce* v. *Delaforce and Driscoll*, [1892] W. N. 68.

(*s*) *Nicholson* v. *Nicholson and Ratcliffe* (1864), 33 L. J. (P. M. & A.) 114.

(*a*) *Barnes* v. *Barnes* (1868), L. R. 1 P. & D. 572.

(*b*) *Morphett* v. *Morphett* (1869), L. R. 1 P. & D. 702; *Taylor* v. *Taylor and Darg* (1899), 81 L. T. 494, where a new trial, not a re-hearing, was ordered by the Divisional Court, on the husband's application, the wife being allowed her costs, and he being ordered to give further security to cover her costs of the application and the new trial; *Kemp-Welch* v. *Kemp-Welch and Crymes*, [1910] P. 233, C. A., where further proceedings by a husband on a re-trial were stayed until the whole of the wife's taxed costs were paid or secured and security given for the wife's further costs of the re-trial; see also *Sanders* v. *Sanders*, [1911] P. 101, C. A.

(*c*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 34.

(*d*) *Teagle* v. *Teagle and Nottingham* (1858), 1 Sw. & Tr. 188; *Priske* v. *Priske and Goldby* (1860), 4 Sw. & Tr. 238.

(*e*) *Robinson* v. *Robinson and Wilson* (1898), 78 L. T. 391; and see *Bilby* v. *Bilby*, [1902] P. 8; *Newby* v. *Newby and White* (1897), 77 L. T. 142; *Learmouth* v. *Learmouth and Austin* (1889), 59 L. J. (P.) 14 (he is not bound to desert her when he finds out).

(*f*) *Badcock* v. *Badcock and Chamberlain* (1858), 1 Sw. & Tr. 189; compare *Lord* v. *Lord*, [1900] P. 297 (damages); but this does not enable him to make counter-charges with impunity as to costs (*Howe* v. *Howe* (1867), 15 W. R. 498).

(*g*) *Boyd* v. *Boyd and Collins* (1859), 1 Sw. & Tr. 562; *Nelson* v. *Nelson* (1868), L. R. 1 P. & D. 510.

(*h*) *Ousey* v. *Ousey* (1874), L. R. 3 P. & D. 223.

although the respondent has made unsuccessful, though not unreasonable, charges against the petitioner, and particularly if she is also found to have committed adultery with some one else (*i*). A husband who, being himself guilty of adultery (*k*), or knowing his wife to be profligate (*l*), makes a claim for damages successfully resisted by a co-respondent, may be deprived of costs.

Once adultery has been condoned, fresh adultery only by the co-respondent will revive a right, even as to costs, against him (*m*).

Costs against petitioner.

1121. If a petitioner, after a jury have disagreed, does not persevere with his case, he may be cast in the co-respondent's costs (*n*), without awaiting the result of action by the King's Proctor as to a cross-suit brought by the wife (*o*), though not perhaps where the case against the co-respondent was strong (*p*); but if the case be tried again, although the witnesses called by the co-respondent exonerate him, he may have to pay his own costs of the first trial, if he then produced no evidence (*q*), and the petitioner may in like circumstances have to pay the costs of a first trial even if he succeed on the second (*r*); but this is not always the case, even if he has himself been guilty of adultery which has been condoned (*s*).

Effect of condoned adultery.

1122. Although adultery with cruelty, condonation and connivance, or with conduct conducing (*t*), be found against a petitioner, a guilty co-respondent may be refused his costs (*a*), and may be ordered to pay those of a petitioner, whose petition is dismissed on account of his condoned (*b*) adultery (*c*). If, however, the petitioner's own conduct ought to have prevented him from coming to the court at all, he may have to pay the co-respondent's costs (*d*), or each may be ordered to pay for the issue on which he has failed (*e*), and a co-respondent may have to pay his own costs, although found not guilty, if, by his conduct, he has brought the suit on himself (*f*).

Effect of co-respondent's conduct.

(*i*) *Codrington* v. *Codrington and Anderson* (1865), 4 Sw. & Tr. 63.
(*k*) *Watson* v. *Watson and Wilkinson* (1862), 31 L. J. (P. M. & A.) 102, n.
(*l*) *Manton* v. *Manton and Stevens* (1865), 4 Sw. & Tr. 159.
(*m*) *Norris* v. *Norris, Lawson and Mason* (1861), 4 Sw. & Tr. 237.
(*n*) *Whitmore* v. *Whitmore and Brettell* (1865), L. R. 1 P. & D. 25.
(*o*) *Whitmore* v. *Whitmore and Brettell* (1865), 13 L. T. 610.
(*p*) *Bancroft* v. *Bancroft and Rumney* (1865), 34 L. J. (P. M. & A.) 144.
(*q*) *Wight* v. *Wight* (1867), L. R. 1 P. & D. 368; *West* v. *West* (1870), L. R. 2 P. & D. 196.
(*r*) *Wood* v. *Wood* (1868), L. R. 1 P. & D. 467.
(*s*) *Waudby* v. *Waudby*, [1902] P. 85.
(*t*) *Seddon* v. *Seddon and Doyle* (1862), 2 Sw. & Tr. 640; *Hick* v. *Hick and Kitchen* (1864), 34 L. J. (P. M. & A.) 11.
(*a*) *Ellaytt* v. *Ellaytt, Taylor and Halse* (1864), 3 Sw. & Tr. 503 (where, although the jury found connivance, they assessed damages at £50); *Williams* v. *Williams and Gazzard* (1897), *Times*, 4th November; see also *Goode* v. *Goode and Hamson* (1861), 30 L. J. (P. M. & A.) 105; *Starkey* v. *Starkey and Irwinn* (1861), 30 L. J. (P. M. & A.) 118.
(*b*) *Story* v. *Story and O'Connor* (1887), 12 P. D. 196.
(*c*) *Bremner* v. *Bremner and Brett* (1864), 3 Sw. & Tr. 378; *Ravenscroft* v. *Ravenscroft* (1872), L. R. 2 P. & D. 376.
(*d*) *Adams* v. *Adams and Colter* (1867), L. R. 1 P. & D. 333
(*e*) *Conradi* v. *Conradi and Flashman* (1866), L. R. 1 P. & D. 163.
(*f*) *Robinson* v. *Robinson and Gamble* (1860), 32 L. J. P. M. & A.) 210;

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Co-respondent's liability for respondent's costs.

1123. The costs which a husband has had to provide for a guilty wife are recoverable under an order for costs against the co-respondent (*g*), but the order does not include the costs of an unsuccessful showing of cause against the decree by the King's Proctor (*h*), unless the co-respondent be made a party thereto (*i*), for a co-respondent cannot be condemned in the costs of a suit to which he is not a party (*k*). Where, however, the King's Proctor successfully shows cause, the co-respondent may, in a proper case, still have to pay the costs of the suit ordered against him (*l*).

SUB-SECT. 5.—*Certificates under the Clergy Discipline Act*, 1892.

Misconduct of a clergyman.

1124. Where a clergyman is found guilty of adultery, or has a decree of judicial separation pronounced against him, the court must cause a certificate thereof to be sent to the Bishop of London, to be preserved in the registry of his diocese, or of any other to which he may direct it to be sent (*m*).

SECT. 9.—*Functions of the King's Proctor and of Members of the Public.*

SUB-SECT. 1.—*Argument by the King's Proctor.*

At the instance of the court.

1125. On a petition for dissolution of marriage (*n*) the court, including the Court of Appeal (*o*), may send the papers to the King's Proctor, who will, on the direction of the Attorney-General, instruct counsel fully to argue any point indicated by the court (*p*).

SUB-SECT. 2.—*Intervention by the King's Proctor.*

Intervention may be at any time.

1126. At any time during the progress of a petition for dissolution or nullity (*q*) of marriage, and before the decree *nisi* is made

Winscom v. *Winscom and Plowden* (1864), 3 Sw. & Tr. 380; *Carstairs* v. *Carstairs and Dickenson* (1864), 3 Sw. & Tr. 538

(*g*) See *Townson* v. *Townson and Bucknall* (1898), 78 L. T. 54, where the husband was only ordered to pay the wife's solicitors what he recovered from the co-respondent.

(*h*) *Blackhall* v. *Blackhall and Clarke* (1888), 13 P. D. 94.

(*i*) *Taplen* v. *Taplen*, [1891] P. 283.

(*k*) *Forbes-Smith* v. *Forbes-Smith*, [1901] P. 258, C. A.

(*l*) *Hyman* v. *Hyman*, [1904] P. 403; but see *Youell* v. *Youell, Terrass, and Burleigh* (1875), 33 L. T. 578.

(*m*) Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), ss. 1 (1) (c), (d), 5 (4); and for the effect of this, see title ECCLESIASTICAL LAW, Vol. XI., pp. 524 *et seq.*

(*n*) It seems that this does not apply to nullity, as the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 5, is not mentioned in the Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31).

(*o*) *Harriman* v. *Harriman*, [1909] P. 123, C. A.; *Le Sueur* v. *Le Sueur* (1877), 2 P. D. 79, C. A.

(*p*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 5, perpetuated by stat. (1862) 25 & 26 Vict. c. 81. See *Stevens* v. *Stevens and Field* (1889), 61 L. T. 844, where BUTT, J., pronounced a decree *nisi*. *Quære*, whether the King's Proctor is entitled to call evidence in these circumstances. In *Jackson* v. *Jackson*, [1910] P. 230, the King's Proctor moved for directions, and it was held that as the court could not compel the Attorney-General to issue his *fiat*, the case must remain in the reserved list till that list was called over or dealt with in the ordinary course; see p. 531, *ante*.

(*q*) Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31), s. 1.

absolute, the King's Proctor, upon the information of any person (*r*), or on suspicion that any of the parties are or have been in collusion to obtain relief, may, under the direction of the Attorney-General, by leave of the court (*s*) obtained on motion (*t*), intervene (*a*) in the suit by entering an appearance within fourteen days after leave, and by filing his plea and delivering a copy of it on the same day to the petitioner or the petitioner's solicitor (*b*). The plea must allege such case of collusion, but, it seems, not a case of adultery (*c*), and the King's Proctor may retain counsel and subpœna witnesses to prove it (*d*). All subsequent pleadings and proceedings are similar to those in an original petition (*e*), including the obtaining, as of right, of particulars (*f*) of the charge. If the King's Proctor intervene during the adjournment of an undefended case, the hearing may be completed, provided that the trial of his allegations come on immediately afterwards (*g*). Once the King's Proctor has intervened, the petitioner cannot prevent the case being heard (*h*).

Procedure.

1127. The court may order the King's Proctor's costs arising from such intervention to be paid by any of the parties, including a wife if she have separate property; and in case his reasonable costs are not thereby fully satisfied, he is entitled to the balance as part of the expense of his office. The court may make other orders as to his costs, or as to those of any party to the suit, occasioned by such intervention, which costs may be recovered in like manner as in other cases; provided that the Treasury may order any costs which the King's Proctor shall, by such order of the court, pay to any of the parties, to be deemed part of the expense of his office (*i*). The court has an absolute discretion in dealing with the costs of all parties, and such discretion is

Costs.

(*r*) Including a respondent or co-respondent (*St. Paul* v. *St. Paul* (1869), L. R. 1 P. & D. 739); but see *Pattenden* v. *Pattenden and Herzfield* (1868), 19 L. T. 612.

(*s*) Such intervention is now very uncommon, but for a recent case in point see *Carter* v. *Carter* (1909), *Times*, 4th May; *Carter* v. *Carter*, [1910] P. 4; *Higgins* v. *King's Proctor*, *King's Proctor* v. *Carter*, [1910] P. 151, C. A.

(*t*) To a judge (Divorce Rules 23, 24); but for this purpose there is no need to file an affidavit. It is otherwise on a motion to postpone, when proper notice must be given (*Anon.* (1861), 2 Sw. & Tr. 249).

(*a*) Though vexatious re-opening of a case by the King's Proctor is not provided against by statute, the control of the Attorney-General and of the court is a sufficient check (*Conradi* v. *Conradi* (1868), L. R. 1 P. & D. 391, 514).

(*b*) Divorce Rule 68.

(*c*) *Hudson* v. *Hudson* (1875), 1 P. D. 65, which differs from *Drummond* v. *Drummond* (1861), 2 Sw. & Tr. 269; both were previous to Divorce Rule 202 (1877). As to other defences, see *Sottomayer* v. *De Barros* (1879), 5 P. D. 94, *per* HANNEN, P., at p. 97, following *Boardman* v. *Boardman* (1866), L. R. 1 P. & D. 233; see also *Jackson* v. *Jackson*, [1910] P. 230.

(*d*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7.

(*e*) Divorce Rule 69; but as to discovery, see p. 526, *ante*.

(*f*) *Jessop* v. *Jessop* (1861), 2 Sw. & Tr. 301.

(*g*) *Gethin* v. *Gethin* (1861), 2 Sw. & Tr. 406.

(*h*) *Joyce* v. *Joyce* (1864), 33 L. J. (P. M. & A.) 200.

(*i*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), ss. 5, 7; and see p. 556, *post*.

SECT. 9. Functions of the King's Proctor etc.

to be exercised in each case, on consideration of the facts of that case (*k*).

SUB-SECT. 3.—*Showing Cause against a Decree.*

(i.) *In General.*

Showing cause.

1128. After decree *nisi* and before decree absolute of dissolution or nullity (*l*) of marriage has been pronounced, the King's Proctor (*m*), if the Attorney-General deems it expedient, or any member of the public (*n*) may show cause (*o*) why the decree should not be made absolute, by reason of the same having been obtained by collusion (*p*), or by reason of material facts (*q*) having been withheld from the court (*r*). It is sufficient to plead that the decree was obtained contrary to justice, owing to material facts not being before the court (*s*). If a fact which has been withheld turns out on investigation not to be material, a decree absolute will be pronounced (*t*); and, if it be material, though not withheld intentionally, the decree may be rescinded (*a*). A solicitor, whose character is assailed by his client in connection with such a charge, is not prevented by any question of privilege from clearing himself; nor can a petitioner in such circumstances rely upon privilege so as to have material facts (*b*) kept from the court (*c*).

Condonation.

Condonation of adultery, afterwards revived by adultery, unless it is concealed, in which case it might be collusive, is no ground for rescission of a decree; but, even if it were collusive and a decree were refused, in some cases a fresh petition might be successfully presented (*d*).

(*k*) *Higgins* v. *King's Proctor*, *King's Proctor* v. *Carter*, [1910] P. 151, C. A.; and see *Carter* v. *Carter*, [1910] P. 4.

(*l*) Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31), s. 1; and see *T.* v. *T.*, *otherwise T.* (1908), 24 T. L. R. 580 (decree in undefended nullity suit re cinded on proof of consummation).

(*m*) *Bowen* v. *Bowen and Evans* (1864), 3 Sw. & Tr. 530; *Masters* v. *Masters* (1864), 34 L. J. (P. M. & A.) 7; *Gladstone* v. *Gladstone* (1875), L. R. 3 P. & D. 260.

(*n*) This does not include a co-respondent who has not defended (*Harries* v. *Harries and Gregory* (1901), 18 T. L. R. 219); and see *Latham* v. *Latham and Gethin* (1861), 2 Sw. & Tr. 299; *Stoate* v. *Stoate* (1861), 2 Sw. & Tr. 384 (a respondent who has failed cannot show cause; the proper course is to appeal).

(*o*) In strictness, the procedure described at p. 552, *ante*, is intervention, that now described is showing cause, but the latter is often called intervention. See the Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31), title; Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 2; Divorce Rule 202.

(*p*) Whether occurring before or after decree *nisi* (*Rogers* v. *Rogers*, [1894] P. 161; *Hulse* v. *Hulse* (1871), L. R. 2 P. & D. 259, 357).

(*q*) *Dering* v. *Dering* (1868), L. R. 1 P. & D. 531.

(*r*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7, following on *Y.* v. *Y.* (1860), 1 Sw. & Tr. 598, where a private person attempted to allege adultery by the petitioner.

(*s*) *Crawford* v. *Crawford* (1886), 11 P. D. 150.

(*t*) *Alexandre* v. *Alexandre* (1870), L. R. 2 P. & D. 164; *Hunter* v. *Hunter*, [1905] P. 217; but see *Roche* v. *Roche*, [1905] P. 142; and see p. 496, *ante*.

(*a*) *Howarth* v. *Howarth* (1884), 9 P. D. 218, C. A.; compare *Philipps* v. *Philipps* (1878), 4 Q. B. D. 127, 133, C. A.; *Davy* v. *Garrett* (1878), 7 Ch. D. 473, 488, C. A.

(*b*) As to material facts, see *Rogers* v. *Rogers*, [1894] P. 161, 169; *Pretty* v. *Pretty*, [1911] P. 83.

(*c*) *Lambart* v. *Lambart* (1907), 51 Sol. Jo. 345.

(*d*) *Rogers* v. *Rogers*, *supra*; but see *Alexandre* v. *Alexandre*, *supra*.

(ii.) *By the King's Proctor.*

SECT. 9. Functions of the King's Proctor etc.

1129. When the King's Proctor desires to show cause, he enters an appearance, and within fourteen days thereof files his plea, setting out his case, and delivers it to the petitioner. Subsequent proceedings are in general as in an original petition (*e*). The King's Proctor is not exempt from giving particulars (*f*), and if he is allowed to amend erroneous allegations of dates, it may be at his own expense (*g*).

Procedure.

1130. The court may permit any accused person to be made a party to the suit (*h*), and the evidence is given *vivâ voce*, not by affidavit (*i*).

Evidence.

If the petitioner does not attend at the trial (*k*), a decree may be rescinded without evidence being adduced by the King's Proctor (*l*); and, if there be no opposition, this may be done on motion (*m*), as where, after decree *nisi*, a reconciliation (*n*) has been effected and cohabitation resumed; but it is doubtful if one of the parties can successfully apply to the court for this purpose (*o*). After the King's Proctor has filed a plea showing cause against a decree, the petitioner is not entitled to prevent the case from being heard (*p*); and, should he consent to its being dismissed, the King's Proctor is still entitled to prove his case (*q*). Where, however, a decree of nullity on the ground of impotence is alleged by the King's Proctor to have been obtained by collusion, and the petitioner moves to have the decree rescinded, the petition may, by consent of the King's Proctor, be dismissed (*r*); but not if he opposes (*s*).

1131. The costs are dealt with similarly to those of an intervention (*t*). The court may order a party who has intervened

Costs.

(*e*) Divorce Rules 202, 69; but, it seems, if the King's Proctor and other persons are showing cause, he only will be allowed to address a jury; though the others may cross-examine witnesses (*Dering* v. *Dering* (1868), L. R. 1 P. & D. 531; and generally as to the subsequent proceedings, see p. 541, *ante*.

(*f*) *Jessop* v. *Jessop* (1861), 2 Sw. & Tr. 301 (the character of the collusion charged should be given by way of particulars); *Barnes* v. *Barnes* (1867), L. R. 1 P. & D. 505; *Hulse* v. *Hulse* (1871), L. R. 2 P. & D. 259, 357; *Gladstone* v. *Gladstone* (1875), L. R. 3 P. & D. 260; *Crawford* v. *Crawford* (1886), 11 P. D. 150; *Pierce* v. *Pierce* (1892), 66 L. T. 861, where the particulars contained charges against a man, who was not a co-respondent, and were struck out.

(*g*) *Tomkins* v. *Tomkins* (1872), 20 W. R. 497.

(*h*) Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 3, which disposes of *Grieve* v. *Grieve*, [1893] P. 288; and *Carew* v. *Carew*, [1894] P. 31.

(*i*) *Studholme* v. *Studholme and Cullum* (1876), 25 W. R. 165.

(*k*) *Pollack* v. *Pollack, Deane, and M'Namara* (1863), 34 L. J. (P. M. & A.) 49.

(*l*) *Sheldon* v. *Sheldon* (1865), 4 Sw. & Tr. 75; *Crowden* v. *Crowden* (1906), 23 T. L. R. 143.

(*m*) Supported by an affidavit of search; see note (*t*), p. 528, *ante*.

(*n*) *Flower* v. *Flower*, [1893] P. 290; or, on a suit being abandoned, it seems that it may be placed in the reserved list till the King's Proctor's costs are paid and then dismissed on application (*Collins* v. *Collins and Smith* (1881), 44 L. T. 31).

(*o*) *Lewis* v. *Lewis* (1861), 2 Sw. & Tr. 394; *Boulton* v. *Boulton and Page* (1861), 2 Sw. & Tr. 405.

(*p*) *Gray* v. *Gray* (1861), 2 Sw. & Tr. 263, 266.

(*q*) *Clapham* v. *Clapham and Guest* (1868), 17 L. T. 584 (before decree *nisi*).

(*r*) *A.* v. *A.*, [1901] P. 284.

(*s*) Compare *Joyce* v. *Joyce* (1864), 33 L. J. (P. M. & A.) 200 (because the King's Proctor is entitled to his costs if he succeeds).

(*t*) Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 2, which disposes

SECT. 9. Functions of the King's Proctor etc.

to defend a charge made by the King's Proctor to pay the latter's costs (*a*), and a petitioner who, having concealed nothing, succeeds in upholding a decree, may be given costs against the King's Proctor (*b*). If a petitioner in spite of having committed adultery succeeds in upholding a decree (*c*), or if in an undefended case a decree of nullity be rescinded on the ground that the marriage had been consummated (*d*), or if there is no moral fault, both sides (*e*) may be left to pay their own costs; so, too, if the King's Proctor only succeeds on a minor plea, after the petitioner has been put to great expense (*f*).

King's Proctor may waive or insist on costs.

If a wife's decree be rescinded owing to her adultery, where her husband's behaviour, though very bad, has not directly conduced to it, the King's Proctor sometimes waives his claim to costs (*g*); but if, after the King's Proctor has shown cause by his plea, a petitioner moves to rescind the decree and dismiss the petition, the King's Proctor may insist that his costs be first provided for (*h*); and he may have an order, for what it is worth, for full costs against a pauper suitor whose decree is rescinded (*i*). It also appears that, on an unsuccessful showing of cause, the co-respondent will not be condemned in the costs thereof (*k*). An order for costs in favour of the King's Proctor is enforceable by the holder of that office for the time being (*l*).

(iii.) *By Members of the Public.*

Procedure.

1132. Where a member of the public (*m*) shows cause, the procedure is different from that followed in the case of the King's Proctor. The former must first enter an appearance in the cause, and, within four days, file affidavits, setting forth the facts on which he relies, and deliver copies thereof to the petitioner. Affidavits by the petitioner may be filed in answer, and affidavits by

of the difficulty which occurred in *Lautour* v. *Her Majesty's Proctor* (1864), 10 H. L. Cas. 685.

(*a*) *Davison* v. *Davison*, [1909] P. 308; *Thompson* v. *Thompson* (1908), *Times*, 25th November, where the decree was rescinded, and a solicitor who had deceived the court was ordered to pay costs.

(*b*) *Higgins* v. *Higgins*, [1910] P. 1; reversed *sub nom. Higgins* v. *King's Proctor*, *King's Proctor* v. *Carter*, [1910] P. 151, C. A. (disapproving of *Howard* v. *Howard and Drew* (1903), *Times*, 4th February, and approving *Westcott* v. *Westcott*, [1908] P. 250); and see *Howe* v. *Howe and Howe*, [1910] W. N. 30.

(*c*) *Symons* v. *Symons*, [1897] P. 167; *Burdon* v. *Burdon*, [1901] P. 52, 59.

(*d*) *T.* v. *T.*, *otherwise T.* (1908), 24 T. L. R. 580.

(*e*) *Rogers* v. *Rogers*, [1894] P. 161, where after cohabitation had been resumed, since decree *nisi*, the husband again committed adultery; yet the decree in favour of the wife was rescinded.

(*f*) As in *Barnes* v. *Barnes* (1867), L. R. 1 P. & D. 505.

(*g*) *Shaw* v. *Shaw* (1904), 20 T. L. R. 795.

(*h*) *A.* v. *A.*, [1901] P. 284.

(*i*) *White* v. *White*, [1898] P. 124; *Guy* v. *Guy and Foster* (1900), 17 T. L. R. 4; and as to such an order, see also p. 547, *ante*.

(*k*) *Blackhall* v. *Blackhall and Clarke* (1888), 13 P. D. 94; *sed quære*, since the co-respondent can become a party under the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 3.

(*l*) *Re Rayner*, *Ex parte Rayner* (1877), 37 L. T. 38.

(*m*) *Woodhead* v. *Woodhead and Jones* (1907), 23 T. L. R. 334, is an instance of a successful intervention, but the court does not lean towards this process; see *Lautour* v. *Her Majesty's Proctor*, *supra*; *Forster* v. *Forster and Berridge* (1863), 3 Sw. & Tr. 151; *Hulse* v. *Hulse* (1871), L. R. 2 P. & D. 259, 357;

SECT. 9. Functions of the King's Proctor etc.

the intervener in reply, each delivering copies to the other, within eight days after the receipt of adverse affidavits (*n*); but no affidavit in rejoinder can be filed without leave (*o*). The questions so raised are argued as and when directed on a motion made for that purpose to the judge; and, if he directs that any questions of fact shall be tried by a jury, the matter is proceeded with in the same way as the trial of any other issue (*p*).

Motion for directions

The question of costs is governed by the same considerations as in other cases (*q*). A member of the public is in a similar position to the King's Proctor (*r*), and, if unsuccessful, is condemned in costs (*s*), sometimes as between solicitor and client (*t*).

Costs.

SECT. 10.—*Appeals from and in the Divorce Division.*

SUB-SECT. 1.—*Appeals.*

(i.) *From Decrees Nisi and Absolute.*

Appeal from Decrees *nisi*.

1133. An appeal to the Court of Appeal (*a*) lies from the grant or refusal of a decree *nisi* for dissolution or nullity of marriage (*b*) as of right (*c*), including, it appears, any decision on a preliminary proceeding which goes to the root of the question whether or not a dissolution or nullity of marriage may be decreed (*d*). The appeal lies within three months (*e*) from the date of such grant,

Stoate v. *Stoate* (1861), 2 Sw. & Tr. 384; *Clements* v. *Clements and Thomas* (1864), 3 Sw. & Tr. 394.

(*n*) Divorce Rules 70—74.

(*o*) Of the judge, or, in his absence, of the registrar (Divorce Rule 75).

(*p*) Divorce Rule 76; and see p. 529, *ante*.

(*q*) Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 2, which got rid of the difficulty in *Dering* v. *Dering* (1868), L. R. 1 P. & D. 531, and in *Vivian* v. *Vivian* (1870), L. R. 2 P. & D. 100; and see pp. 547 *et seq.*, *ante*.

(*r*) *Woodhead* v. *Woodhead and Jones* (1907), 23 T. L. R. 334; *Howe* v. *Howe and Howe*, [1910] W. N. 30.

(*s*) *Forster* v. *Forster and Berridge* (1863), 3 Sw. & Tr. 151.

(*t*) *Edwards* v. *Edwards and Wilson* (1899), *Times*, 17th, 20th June.

(*a*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 12. Interlocutory appeals may be heard by two judges, though three often sit. The Court of Appeal is to decide in case of doubt what judgments are final. See also title COURTS, Vol. IX., p. 62.

(*b*) The Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 19, directs these appeals to be made to the Court of Appeal, instead of to the House of Lords. The Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 3, gives a right of appeal from the Court of Appeal to the House of Lords; see *Cleaver* v. *Cleaver* (1884), 9 App. Cas. 631, *per* Lord SELBORNE, L.C., at pp. 633 *et seq.* The Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9, does not restrict appeals from the decrees under discussion, except by providing that, if there shall be an appeal from the Court of Appeal to the House of Lords, it shall be brought within one month after the decision appealed against, if the House of Lords be then sitting, or within fourteen days after the House next sits.

(*c*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1, which forbids appeals without leave from interlocutory judgments in general, but, by sub-s. (iv.), excepts decrees *nisi* in matrimonial causes. Judgment includes decree (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100).

(*d*) *Pagani* v. *Pagani* (1866), L. R. 1 P. & D. 223; see also *Sidney* v. *Sidney* (1866), L. R. 1 P. & D. 78; reversed by the House of Lords (1867), 36 L. J. (P. & M.) 73, H. L., *per* Lord CRANWORTH, at p. 74.

(*e*) R. S. C., Ord. 58, r. 15 (there being no divorce rule governing this). See *Giles* v. *Giles*, [1900] P. 17. It is also submitted that, by analogy with the case of a new trial, these appeals are governed by the practice of the Court of

SECT. 10. Appeals from and in the Divorce Division.

refusal, or decision (*f*). There is an appeal from any decision of the Court of Appeal to the House of Lords (*g*).

There is no appeal from a decree absolute in such cases in favour of any party, who, having had an opportunity of appealing from the decree *nisi*, on which it is founded, has failed to do so (*h*).

(ii.) *From other Final Decrees and Orders.*

Appeals from Final Decrees.

1134. From the grant or refusal of a decree of restitution of conjugal rights or of judicial separation, or in a suit for jactitation of marriage, all of which are final decrees, an appeal lies, as of right, to the Court of Appeal, within three months after the pronouncing of such decree (*i*). The decision of the Court of Appeal is final, except where leave is obtained to appeal to the House of Lords on a point of law (*j*).

When leave required.

1135. An order made by consent of the parties, or as to costs only, is subject to appeal, but only by leave (*k*), and an order which might otherwise be interlocutory (*l*), but which forms part of a final judgment, is subject to appeal without leave (*m*).

Contempt.

If a stranger to a divorce suit publish comments thereon, likely

Appeal, and by the R. S. C.; see *Wilkins* v. *Wilkins*, [1896] P. 108, C. A., *per* LINDLEY, L.J., at p. 111; and note (*b*), p. 557, *ante*.

(*f*) With fourteen days' notice; R. S. C., Ord. 58, r. 3; and see note (*b*), p. 557, *ante*.

(*g*) From a decree *nisi* and, it seems, from other decisions referred to in the text, within one month of pronouncement if the House of Lords is then sitting, or fourteen days after it sits.

(*h*) Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 10; and see *Cleaver* v. *Cleaver* (1884), 9 App. Cas. 631, 634.

(*i*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 55; Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9 (which substituted the Court of Appeal for the full court, and provided that this provision, so far as is consistent with its tenor, shall be construed as one with the Matrimonial Causes Act, 1857). It therefore seems that Divorce Rules 77, 78, 79 (appeals to the full court) are still in force, in so far as they are not inconsistent with the practice of the Court of Appeal. These provide that notice is to be given to opponents, and a copy delivered when the appeal is filed, and that within ten days (except by leave) a case in support of the appeal is to be filed and delivered, and that opponents, within ten days (except by leave) of delivery, may file a case in opposition, and, if they do, must then deliver copies to the appellant, and that after ten days after the time allowed for filing the latter the appeal may be heard, thus making a thirty days' notice of appeal, but there is no recent decision on this point, and a fourteen days' notice would probably be sufficient.

(*j*) Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9. Leave was given in *Russell* v. *Russell*, [1895] P. 315, C. A. (a question of cruelty).

(*k*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49; but see the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 20, which practically re-enacts the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 51. See also *Smith* v. *Smith* (1882), 7 P. D. 84, 93; [1882] W. N. 91, C. A.; *Russell* v. *Russell*, [1892] P. 152, C. A.; *Carter* v. *Carter*, [1910] P. 4, *per* BARGRAVE DEANE, J., at p. 13; *Higgins* v. *King's Proctor*, *King's Proctor* v. *Carter*, [1910] P. 151, C. A.; *Butler* v. *Butler* (1890), 15 P. D. 32, 126, C. A.; *Campbell* v. *Campbell*, [1887] W. N. 83, C. A.; *Robertson* v. *Robertson* (1881), 6 P. D. 119, C. A.

(*l*) The practical test is, perhaps, whether a principle is involved or not.

(*m*) *Forbes-Smith* v. *Forbes-Smith*, [1901] P. 258, C. A. (order against co-respondent to pay costs of a wife's cross-suit, forming part of final judgment held not interlocutory).

to prevent its fair trial, an order of attachment against him for contempt is in "a criminal cause or matter" (*n*), and no appeal lies (*o*). A party who is in contempt may nevertheless be heard on appeal as to certain, though not all, matters of defence; but not as to a voluntary application (*p*).

Legitimacy declaration, etc.

From the grant or refusal of a declaration under the Legitimacy Declaration Act, 1858 (*q*), or the Greek Marriages Act, 1884 (*r*), it seems that the right of appeal is the same (*s*) as in the case of a decree *nisi*.

(iii.) *From Interlocutory Orders.*

Appeal from registrar judge in chambers.

1136. Any person heard on a summons before a registrar, who objects to the order, may, subject to any direction as to costs, apply to the judge in chambers to rescind or vary the order (*t*).

When reheard in court.

Any person, heard on a summons before the judge in chambers, whether original or by way of appeal from a registrar, who is dissatisfied with the decision, should ask the judge whether he desires first to hear the matter argued in open court, with a view to an appeal from the decision come to there, if adverse, and, if the judge does not, for a certificate to that effect, to enable the appellant to go to the Court of Appeal direct (*a*). If the judge refuse to give a certificate, or to adjourn the summons into court, a motion, by way of rehearing (*b*), must be made to him in court to discharge the order; otherwise, no appeal can be brought from the order, unless by special leave of the judge or the Court of Appeal (*c*). If it be desired to appeal from an interlocutory (*d*) order made in court, leave must generally be obtained (*e*).

When leave required.

There is no appeal, on a question of fact, from the Court of Appeal to the House of Lords; but on a point of law leave may be granted (*f*).

(*n*) Within the meaning of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47; and see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 285.

(*o*) *O'Shea* v. *O'Shea and Parnell* (1890), 15 P. D. 59, C. A.; see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 322; and compare *Seldon* v. *Wilde*, [1911] 1 K. B. 701, C. A.

(*p*) *Gordon* v. *Gordon*, [1904] P. 163, C. A.

(*q*) 21 & 22 Vict. c. 93, s. 4; and see Divorce Rule 174.

(*r*) 47 & 48 Vict. c. 20, s. 1; and compare Divorce Rule 213.

(*s*) Compare the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 7; repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

(*t*) Divorce Rule 184. No time is mentioned, but the practice seems to be that the application should be made within five days (R. S. C., July, 1905), see *Beecham* v. *Beecham* (1903), *Times*, 14th March; and see *In the Goods of Patrick (John)* (1889), 14 P. D. 42, C. A.; and R. S. C., Ord. 54, r. 21.

(*a*) Within, it seems, three months; but, to be quite safe, within fourteen days (under R. S. C., Ord. 58, r. 15) with four days' notice (under R. S. C., Ord. 58, r. 3).

(*b*) *Re Giles, Real and Personal Advance Co.* v. *Michell* (1890), 43 Ch. D. 391, 395; *Boake* v. *Stevenson*, [1895] 1 Ch. 358.

(*c*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 50; *Rigg* v. *Hughes* (1884), 9 P. D. 68, C. A.; and see *Holloway* v. *Cheston* (1881), 19 Ch. D. 516; *Boake* v. *Stevenson, supra*; *Re Pearce*, [1899] W. N. 114, C. A.; *Re Rouse, Rouse* v. *Trible* (1888), 59 L. T. 887.

(*d*) See p. 465, *ante*.

(*e*) But not in cases as to custody of children, attachment, receivers, or injunctions (Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1).

(*f*) Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9. Leave was refused in

SECT. 10. SUB-SECT. 2.—*Motions for New Trials.*

Appeals from and in the Divorce Division.

Motion for new trial.

1137. A new trial, where a suit has been tried by a judge and jury, as distinguished from a rehearing, where a suit has been tried by a judge without a jury, is obtained by motion to the Court of Appeal (*g*). The notice of motion is a fourteen days' notice, and must be served within ten days after the trial or judgment on further consideration (*h*). Time in vacation is not reckoned in the computation of the period for serving the notice of motion (*i*), and there is power to enlarge or abridge this period on terms (*j*). It appears that, where a new trial is applied for on the motion of one respondent, it may be ordered in respect of all respondents (*k*).

Grant or refusal.

It seems that new trials are granted or refused on the same principles as in cases from other divisions of the High Court (*l*). Where the jury can only agree as to some of the issues, they should be discharged unless the disagreement be immaterial (*m*) and the case set down again (*n*), but a partial verdict as to issues not interdependent on one another may be accepted (*o*).

The question of an appeal to the House of Lords is governed by the same considerations as those in the case of appeals from final decrees and orders (*p*).

Lowe v. *Lowe*, [1899] P. 204, C. A. (application to intervene); and granted in *Cowley* v. *Cowley*, [1900] P. 305, C. A. (use of title derived from divorced husband).

(*g*) Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 1; R. S. C., Ord. 39, rr. 1, 1A; see *Wilkins* . *Wilkins*, [1896] P. 108, C. A., *per* LINDLEY, L.J., at p. 111, which seems to dispose of the *dictum* of LOPES, L.J. (as to R. S. C., Ord. 39, r. 6), in *Allen* v. *Allen*, [1894] P. 248, C. A., at p. 255; see also *Taplin* v. *Taplin and Holland* (1888), 13 P. D. 100.

(*h*) R. S. C., Ord. 39, r. 4.

(*i*) *Ibid.*, Ord. 39, rr. 1A, 4.

(*j*) *Ibid.*, Ord. 64, r. 7; see *Wilkins* v. *Wilkins*, *supra*.

(*k*) *Walker* v. *Walker*, *Nicoll and Craig* (1861), 31 L. J. (P. M. & A.) 26; *Stone* v. *Stone and Appleton* (1864), 34 L. J. (P. M. & A.) 33; *Worsley* v. *Worsley and Worsley* (1904), 20 T. L. R. 171. The last case was the outcome of the conviction of witnesses for perjury (see note (*e*), p. 593, *post*); compare *R.* v. *Hern* (*R. A.*) *and Winnifrith* (*A. B.*) (1897), *Times*, 18th January (respondent and co-respondent sentenced to six and eighteen months' hard labour for perjury, and for conspiring to obtain a new trial).

(*l*) New trials were granted in the following cases:—*Fluister* v. *Fluister*, [1897] P. 22, C. A. (undefended case; surprise; costs thrown away paid); *Wilkins* v. *Wilkins*, *supra* (nullity; reappearance of first husband, declared dead in a previous suit for judicial separation); *Butchart* v. *Butchart*, [1901] A. C. 266 (weight of evidence); *Jago* v. *Jago and Graham* (1862), 3 Sw. & Tr. 103 (mistake of witness); but refused in *Miller* v. *Miller and Hicks* (1862), 2 Sw. & Tr. 427 (fresh evidence); *Gethin* v. *Gethin* (1862), 2 Sw. & Tr. 560 (witnesses pretending they had only told a part of the truth); *Scott* v. *Scott* (1863), 3 Sw. & Tr. 319 (witness discovered who could corroborate party); *Ellaytt* v. *Ellaytt, Taylor, and Halse* (1864), 3 Sw. & Tr. 503 (somewhat inconsistent verdict). As to new trial generally, see title PRACTICE AND PROCEDURE.

(*m*) *Narracott* v. *Narracott and Hesketh* (1864), 3 Sw. & Tr. 408.

(*n*) *Godrich* v. *Godrich* (1872), L. R. 2 P. & D. 392.

(*o*) A recent example of this was *Kemp-Welch* v. *Kemp-Welch and Crymes*, [1910] P. 233, C. A.

(*p*) *Butchart* v. *Butchart*, *supra*; though in *Highton* v. *Treherne* (1878), 48 L. J. (Q. B.) 167, C. A., and *Wilks, Trustee etc.* v. *Judge*, [1880] W. N. 98, C. A., the court had decided that decisions as to new trials are interlocutory orders; and see pp. 557, 558, *ante*.

SUB-SECT. 3.—*Applications for Rehearing.*

SECT. 10. **Appeals from and in the Divorce Division.**

1138. If, when a suit has been heard before a judge sitting without a jury, it is desired that there should be a rehearing (*q*), application must be made to a divisional court (*r*) by notice of motion, filed in the registry, stating the grounds of the application, and whether all or part of the finding or decree is complained of. Such notice must be filed and served within eight days (not counting vacations) after the hearing, and the motion must be made eight days after service, or on the first sitting of the divisional court after such eight days (*s*). The notice of motion may be amended by leave (*t*).

Application to divisional court.

An appeal lies to the Court of Appeal (*u*), and, as in the case of final decrees and orders, to the House of Lords (*v*).

Appeal.

SUB-SECT. 4.—*Costs.*

1139. If a wife obtains a decree, and her husband appeals, she is entitled to defend herself, and he must provide her costs of the appeal (*a*). The fact that she has committed adultery does not necessarily affect the matter; but if she, being herself found guilty, actively brings the matter before the court, he need not make such provision (*b*). If she brings a frivolous or hopeless motion for a new trial, it will be dismissed with costs; but her husband will not be allowed to take these from the security he gave for her costs in the first instance, unless her solicitor has done something to justify this (*c*).

Security for wife's costs of appeal.

The question of costs in the Court of Appeal is governed by its practice, and by the Rules of the Supreme Court (*d*), and, in the House of Lords, although there is no power, pending an appeal, to grant alimony to a wife, an order may be made on the husband to pay a round sum to his wife to enable her to carry on her case (*e*).

Costs in Court of Appeal, and House of Lords.

(*q*) Applications were granted in *Keane* v. *Keane* (1871), 41 L. J. (P. & M.) 41, where wife had appeared, though she had not pleaded, and the case was heard out of turn; *Lee* v. *Lee* (1872), L. R. 2 P. & D. 409 (surprise); *Taylor* v. *Taylor and Darg* (1899), 81 L. T. 494, where, on documentary and other new evidence, a new trial with a common jury was ordered; see also *Durant* v. *Durant* (1824), 2 Add. 267 (fresh evidence); *Hill* v. *Hill* (1861), 2 Sw. & Tr. 407 (reason for not opposing).

(*r*) *Smith* v. *Smith*, [1897] P. 293, C. A.; *Watson* v. *Watson* (1903), 89 L. T. 78. As to the constitution of the divisional court, see p. 463, *ante*.

(*s*) Divorce Rule 62.

(*t*) *Ibid.*, 62A.

(*u*) *Heckscher* v. *Crosley*, [1891] 1 Q. B. 224, C. A., *per* Lord ESHER, M.R., at p. 225. The Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 2, which made the time fourteen days, has been repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), and it seems that the time for appeal is, by analogy, the same as for an application for a new trial; see also *Boulting* v. *Boulting* (1864), 33 L. J. (P. M. & A.) 81.

(*v*) *Butchart* v. *Butchart*, [1901] A. C. 266; and see p. 558, *ante*.

(*a*) As to the husband's liability for his wife's costs generally, see p. 547, *ante*.

(*b*) *Otway* v. *Otway* (1888), 13 P. D. 141, C. A.

(*c*) *Hall* v. *Hall*, [1891] P. 302, C. A.

(*d*) See *Wilkins* v. *Wilkins*, [1896] P. 108, 111, C. A.; and title PRACTICE AND PROCEDURE.

(*e*) *Robinson* v. *Robinson* (1859), not reported (on petition refused); *Keats* v.

SECT. 10. Appeals from and in the Divorce Division.

In a pauper appeal to the House of Lords, a solicitor's out-of-pocket expenses and a reasonable amount for his office expenses are allowable under an order for costs, but not the fees of the House nor counsel's fees (*f*).

SUB-SECT. 5.—*Reversal of Decrees of Judicial Separation.*

Procedure.

1140. Any party against whom a decree of judicial separation has been pronounced may, at any time thereafter, having first duly entered an appearance in the suit (*g*), present a petition to the court, setting out the grounds relied on (*h*) to show that it was obtained in his or her absence, and, where desertion was the ground of such decree, that there was reasonable ground for the alleged desertion. The court may, on being satisfied of the truth of the allegations, reverse the decree accordingly; but such reversal does not prejudice nor affect the rights or remedies which any other person would have had, in case such reversal had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof (*i*).

Effect of reversal.

A sealed copy of the petition must be personally served, and an answer thereto may be filed (in which case a copy of it must be delivered to the petitioner or the petitioner's solicitor) within fourteen days (*k*). Other proceedings are as in a suit for judicial separation (*l*), and the question of appeal from an order for reversal is governed in the same manner.

SUB-SECT. 6.—*Discharge of Protection Orders.*

Procedure in High Court.

1141. When a wife has obtained a protection order, her husband, and any creditor or person claiming under him, may apply to the Divorce Division (*m*), although it did not make the order for protection, or to the magistrate or justices by whom such order was made, for the discharge thereof (*n*). Such discharge does not

Keats (1859), not reported (petition of appellant (wife) for payment of alimony *pendente lite* refused.) In an unreported case, *Campbell* v. *Campbell*, the House of Lords ordered the sum of £150 to be paid to the wife to enable her to carry on the appeal, and a similar result happened in the case of *Yelverton* v. *Longworth or Yelverton* (1864), not reported.

(*f*) *Johnson* v. *Lindsay & Co.*, [1892] A. C. 110.

(*g*) Divorce Rule 64.

(*h*) *Ibid.*, 63; and see *Phillips* v. *Phillips* (1866), L. R. 1 P. & D. 169; compare *Grossi* v. *Grossi* (1873), L. R. 3 P. & D. 118, where a decree of judicial separation, granted *per incuriam* to a wife guilty of adultery, was rescinded.

(*i*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 23. As to the effect of such a decree upon property acquired by the wife during separation, see pp. 346, 370, 379, *ante*.

(*k*) Divorce Rule 65.

(*l*) *Ibid.*, 66; and as to such suits, see p. 500, *ante*.

(*m*) See Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 9; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34.

(*n*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21. The discharge may be obtained even if the wife be dead (*Mudge* v. *Adams* (1881), 6 P. D. 54; *Mahoney* v. *M'Carthy*, [1892] P. 21). For the practice where the order is made by a police or other magistrate, see p. 600, *post*.

adversely affect persons who had *bonâ fide* made payments under the order (*o*).

The application in the Divorce Division is made on motion (*p*) supported by affidavit. Notice of such motion, and copies of any affidavit or other document proposed to be read or used in support thereof, must be personally served (*q*) on the wife eight clear days before the motion is heard (*r*), and any question of appeal from the discharge of such an order is governed by the same considerations as an appeal from a decree of judicial separation (*s*).

Notice of motion.

SECT. 11.—*Incidental Proceedings after Decree.*

SUB-SECT. 1.—*Orders to support Wife, Husband, or Children.*

(i.) *Permanent Alimony.*

Application for allotment.

1142. A wife who has obtained a final decree of judicial separation in her favour, or even if such decree be against her (*t*), and has previously thereto filed her petition for alimony *pendente lite*, on such decree being affirmed on appeal, or after the expiration of the time for appealing against the decree, if no appeal be then pending, may apply for an allotment (*u*) of permanent alimony; She must, eight days at least before making such application (*a*), give notice thereof to her husband or his solicitor (*b*). The application is referred to one of the registrars, as in the case of alimony *pendente lite* (*c*). So, too, if no alimony has been allotted to her *pendente lite*, a wife may file a petition for permanent alimony, which is disposed of on the same principles (*d*) as are laid down for an application for alimony *pendente lite*.

Commencement.

1143. As a rule, permanent alimony begins from the final decree of the judge or of the Court of Appeal, as the case may be (*e*).

Wife in prison.

Where a wife is undergoing a sentence of penal servitude, her application may be ordered to stand over till shortly before her

(*o*) Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 10; and see p. 562, *ante*. As to the effect of a protection order upon property acquired by the wife after the desertion, see pp. 346, 370, 379, *ante*.

(*p*) See p. 465, *ante*.

(*q*) See p. 508, *ante*.

(*r*) Divorce Rule 125.

(*s*) See p. 562, *ante*.

(*t*) *Prichard* v. *Prichard* (1864), 3 Sw. & Tr. 523; *Forth* v. *Forth* (1867), 16 L. T. 574; *Goodden* v. *Goodden*, [1891] P. 395; affirmed, [1892] P. 1, C. A. (overruling *White* v. *White* (1859), 1 Sw. & Tr. 591; and *Dart* v. *Dart* (1863), 3 Sw. & Tr. 208 (cases of wife's cruelty)).

(*u*) To be made on the basis of the figures previously ascertained (*Bonsor* v. *Bonsor*, [1897] P. 77). Where there has been a contest as to alimony *pendente lite*, the question must not be re-opened unless the circumstances have meanwhile changed (*Franks* v. *Franks* (1861), 31 L. J. (P. M. & A.) 25; *Greenwood* v. *Greenwood* (1862), 32 L. J. (P. M. & A.) 136).

(*a*) *Fisk* v. *Fisk* (1862), 31 L. J. (P. M. & A.) 60, is an authority for saying that, if the wife propose to show a change of income since alimony *pendente lite* was allotted, a fresh petition should be filed.

(*b*) Divorce Rule 91.

(*c*) *Ibid.*, 191; and as to alimony *pendente lite*, see p. 516, *ante*.

(*d*) Divorce Rule 190; and see p. 516, *ante*.

(*e*) Divorce Rule 93.

SECT. 11. Incidental Proceedings after Decree.

release (*f*); and, where a wife enters into a deed covenanting not to ask for further alimony, and her husband afterwards is found guilty of adultery, she may be held to be estopped from obtaining more (*g*), unless the court finds that the position of the parties provided for by the deed is altered by its order (*h*).

Effect of covenants.

The parties cannot covenant so as to affect the powers of the court as to the maintenance etc. of their children (*i*).

Election of remedy.

1144. Where a wife has obtained a decree of restitution of conjugal rights which is disobeyed by her husband, she must make her election whether she will ask for the financial relief obtainable on his refusal to return to her or for a judicial separation, under which she can only obtain permanent alimony, which is not secured (*j*).

Proportion allotted.

There is no fixed rule (*k*) as to what proportion of the joint incomes of the husband and wife should be allowed to the innocent wife. It has usually been one-third, sometimes less (*l*), and occasionally as much as one-half (*m*). Except for this difference of proportion, the allotment is made in practically the same way as in the case of alimony *pendente lite* (*n*).

Enforcing payment.

A husband cannot be ordered to give security for payment of alimony (*o*). Payment is enforced in a similar manner to that of alimony *pendente lite*, and applications for injunctions are similarly dealt with (*p*).

Not assignable.

Alimony is not assignable (*q*).

(ii.) *Maintenance.*

After dissolution or nullity.

1145. On a decree for dissolution or nullity (*r*) of marriage, the court may order the husband to secure to the wife (*s*), to its satisfaction, such gross sum of money, or such annual sum, for any term not exceeding her life, as it shall deem reasonable, having regard

(*f*) *Leslie* v. *Leslie*, [1908] P. 99.

(*g*) *Ross* v. *Ross*, [1908] 2 I. R. 339.

(*h*) *Bishop* v. *Bishop*, *Judkins* v. *Judkins*, [1897] P. 138, 149, C. A., explaining *Gandy* v. *Gandy* (1882), 7 P. D. 77, 168, C. A.

(*i*) *Bishop* v. *Bishop*, *Judkins* v. *Judkins*, *supra*; and as to these powers, see p. 521, *ante*, and p. 578, *post*.

(*j*) *Leslie* v. *Leslie*, *supra*; *Theobald* v. *Theobald* (1890), 15 P. D. 26, 28; and see p. 569, *post*.

(*k*) *Otway* v. *Otway* (1813), 2 Phillim. 109; *L.* v. *L.* (1911), 27 T. L. R. 316, "the amount of the alimony . . . is in the discretion of the court," *per* EVANS, P., at p. 317.

(*l*) *Wilcocks* v. *Wilcocks* (1859), 32 L. J. (P. & M.) 205 (large income); *Louis* v. *Louis* (1866), L. R. 1 P. & D. 230 (husband's heavy expenses).

(*m*) *Taylor* v. *Taylor* (1791), Consistory Court of London, 28th May (unreported); *Cooke* v. *Cooke* (1812), 2 Phillim. 40; *Smith* v. *Smith* (1814), 2 Phillim. 235; *Deane* v. *Deane* (1858), 1 Sw. & Tr. 90, 93; *Avila* v. *Avila* (1862), 31 L. J. (P. M. & A.) 176; *Haigh* v. *Haigh* (1869), L. R. 1 P. & D. 709; and see note (*n*), p. 567, *post*.

(*n*) See pp. 518, 519, *ante*.

(*o*) *Hyde* v. *Hyde* (1865), 4 Sw. & Tr. 80.

(*p*) See p. 591, *post*. For the effect of bankruptcy on future payments of alimony, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 62 *et seq.*

(*q*) *Re Robinson* (1884), 27 Ch. D. 160, C. A.; and see title CHOSES IN ACTION, Vol. IV., p. 402.

(*r*) See *Sharpe* v. *Sharpe*, [1909] P. 20 (a case of impotence, where there had been a marriage settlement).

(*s*) Apparently within a year (*Robertson* v. *Robertson* (1883), 8 P. D. 94, C. A.). See also *Corbett* v. *Corbett* (1888), 13 P. D. 136; affirmed, 14 P. D. 7, C. A. (on an estate in fee simple under a will).

to her fortune, if any, to the ability of the husband, and to the conduct of the parties (*t*). For this purpose it may refer the matter to one of the conveyancing counsel to the court (*u*) to settle and approve a proper instrument, to be executed by all necessary parties, and may suspend its decree till such execution has taken place (*a*). Except for fraud, such a deed is irrevocable (*b*).

Deed to secure maintenance

In addition to or instead of such an order, the court may order the husband to pay to the wife during their joint lives a monthly or weekly sum for her maintenance (*c*).

Conditions.

1146. Although there is nothing to prevent a wife found guilty of adultery from petitioning for maintenance, it is not the practice to permit her to do so (*d*), and such a petition has been removed from the file (*e*). The court occasionally makes the granting of a small allowance a condition precedent to the pronouncing of a decree absolute in favour of a husband (*f*) (although the proviso *dum sola et casta vixerit* is usually (*g*), but not always (*h*), inserted), but such a condition is not usual where a decree of nullity is made, on the ground that the woman had a husband living at the time of the marriage in question (*i*).

Application and answer.

1147. Applications for maintenance must not be filed before the decree *nisi* (*k*), nor later (*l*) than one month (*m*) after decree absolute, except by leave of the judge. By consent the matter may be brought on on a summons; otherwise there must be a separate petition (*n*), a sealed copy of which is served on the husband unless substituted service be ordered (*o*). The husband, after appearing

(*t*) *Dunbar* v. *Dunbar*, [1909] P. 90 (petition for an allowance after decree absolute for nullity (impotence) dismissed with costs; marriage 1896, decree *nisi* 1907; delay).

(*u*) As to conveyancing counsel to the court, see title BARRISTERS, Vol. II., p. 381.

(*a*) Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), ss. 1 (1), 2, replacing the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 32.

(*b*) *Bradley* v. *Bradley* (1882), 7 P. D. 237; and compare note (*p*), p. 568; and p. 576, *post*.

(*c*) Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1 (2). This kind of order does not apply only to the case of a poor man (see *Jardine* v. *Jardine* (1881), 6 P. D. 213).

(*d*) See *Robertson* v. *Robertson* (1883), 8 P. D. 94, C. A.; but the court has an absolute discretion, and need not require special circumstances.

(*e*) *Winstone* v. *Winstone and Dyne* (1861), 2 Sw. & Tr. 246.

(*f*) *Bent* v. *Bent and Footman* (1861), 2 Sw. & Tr. 392; *Edwards* v. *Edwards*, [1894] P. 33; *Parry* v. *Parry*, [1896] P. 37; *Ashcroft* v. *Ashcroft*, [1902] P. 270, C. A.

(*g*) *Ashcroft* v. *Ashhroft*, *supra*.

(*h*) *Lander* v. *Lander*, [1891] P. 161 (guilty wife's very small allowance).

(*i*) *Bateman* v. *Bateman* (*otherwise Harrison*) (1898), 78 L. T. 472; explaining *Wilkins* v. *Wilkins*, [1896] P. 108, C. A.

(*k*) Divorce Rule, 96; see also *K.* v. *K.* (*otherwise R.*), [1910] P. 140 (nullity).

(*l*) It seems that this also applies in cases of nullity; see *Sharpe* v. *Sharpe*, [1909] P. 20.

(*m*) Divorce Rule 95, which would effectively dispose of *Vicars* v. *Vicars* (1859), 29 L. J. (P. M. & A.) 20, and of *Bradley* v. *Bradley* (1878), 3 P. D. 47, *contra*, had it been made since the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12). See *Stacey* v. *Stacey* (1860), 29 L. J. (P. M. & A.) 63; *Sharpe* v. *Sharpe*, *supra*.

(*n*) Divorce Rule 95; neither signed nor supported by affidavit.

(*o*) *Ibid.*, 97. An affidavit by the petitioner is not always insisted on; see *Schraml* v. *Schraml* (1899), 68 L. J. (P.) 47.

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thereto (*p*), may within fourteen days file an answer on oath, of which a copy must be delivered to the other side (*q*). Reply and rejoinder must be filed within similar periods (*r*).

Investigation.

1148. The pleadings, when completed, are referred to a registrar, who investigates the averments in the presence of the parties and their solicitors, and he may require the production of documents referred to in the pleadings, call for affidavits (*s*), order the attendance of the husband (*t*) or wife for examination or cross-examination, and take oral evidence, as in a reference as to alimony (*a*).

Registrar's report.

After the inquiry the registrar reports in writing to the court on the facts of the case and any special circumstances (*b*). This report is filed by the petitioner, who gives notice to the other side; and within fourteen days after notice, or on the first motion day after that period, either side may apply by motion to the judge to confirm or vary the report (*c*). The actual order cannot, however, be made until the decree becomes absolute (*d*).

Order.

Matters which affect allotment.

1149. The amount of maintenance for the wife is decided on grounds similar to those considered in the case of permanent alimony (*e*). After a decree of nullity the wife may (*f*) be placed in the same position as if the decree were for dissolution of marriage, but there is not any settled rule as to the proportion (*g*). In addition the following considerations may also apply:—

A voluntary allowance (*h*) made to the respondent may be taken into account;

The loss on a business, which was unsuccessful and has been abandoned, is not allowed to affect the average earnings (*i*);

Where the husband's income is very large, the wife will only be allowed what would be an adequate jointure for his widow (*k*);

(*p*) Divorce Rule 99.
(*q*) *Ibid.*, 98.
(*r*) *Ibid.*, 100.
(*s*) *Ibid.*, 101. If the husband has neither answered nor appeared, there must be an affidavit of service.
(*t*) Compare *Townend* v. *Townend* (1905), 21 T. L. R. 657.
(*a*) Divorce Rule 204; and see p. 563, *ante*. A wife, although convicted of adultery, may cross-examine her husband as to the deduction he claims to make from his income (*Driffield* v. *Driffield* (1891), 65 L. T. 795).
(*b*) Divorce Rule 101.
(*c*) *Ibid.*, 102.
(*d*) Compare *Midwinter* v. *Midwinter*, [1892] P. 28, C. A.; *Laxton* v. *Laxton* (1861), 30 L. J. (P. M. & A.) 208.
(*e*) See p. 564, *ante*.
(*f*) Since the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1.
(*g*) *Sharpe* v. *Sharpe*, [1909] P. 20. The court has no power to order the payment of a lump sum by way of maintenance; see *Twentyman* v. *Twentyman*, [1903] P. 82, where the cases of *Morris* v. *Morris* (1861), 31 L. J. (P. M. & A.) 33; *Stanley* v. *Stanley*, [1898] P. 227; and *Kirk* v. *Kirk*, [1902] P. 145, are considered and explained. *Hunt* v. *Hunt* (1883), 8 P. D. 161, lays down the correct principle; and see *Medley* v. *Medley* (1882), 7 P. D. 122, C. A.
(*h*) *Clinton* v. *Clinton* (1866), L. R. 1 P. & D. 215; *Moss* v. *Moss and Bush* (1867), 15 W. R. 532; *Bonsor* v. *Bonsor*, [1897] P. 77; notwithstanding *Haviland* v. *Haviland* (1863), 3 Sw. & Tr. 114.
(*i*) *Theobald* v. *Theobald* (1889), 15 P. D. 26.
(*k*) *Kettlewell* v. *Kettlewell*, [1898] P. 138.

The fact that a woman, by divorcing her husband, has lost her right to dower (*l*). Although the court has power to deal with reversionary interests (*m*), it will only resort to them when other sources from which she might be supported fail (*n*).

When clause *dum sola et casta* inserted.

1150. The condition *dum sola*, or *dum sola et casta vixerit*, is seldom (*o*) inserted in an order for maintenance where the wife has obtained a decree. In deciding this matter every circumstance of the case—conduct, social position, means, children, and the future of the wife—must be considered. An innocent wife should not be insulted by even a suggestion that she may become unchaste. Although it seems somewhat illogical that she should keep her allowance in that event, but lose it if she marries again respectably (*p*), yet in proper cases the order is made *dum sola* (*q*); and, in determining whether *et casta* should be added, the conduct of a wife, as well before as during the marriage, may be considered (*r*). The court has no power to vary the order by inserting the condition *dum sola et casta vixerit*, on an allegation that the wife has been guilty of adultery, nor will that condition be inferred (*s*).

Covenant not to sue for increase.

1151. The fact that a wife has, by a deed of separation, covenanted not to sue for an increased allowance does not necessarily preclude her from so doing after she has obtained a dissolution of marriage, if circumstances have arisen which she did not contemplate when executing the deed (*t*).

Effect of death of husband.

A covenant to pay a wife an allowance during her life should she continue to live separate ceases on her husband predeceasing her (*u*).

(*l*) *Frampton* v. *Stephens* (1882), 21 Ch. D. 164.

(*m*) Under the general power given by the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1 (1), replacing the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 32.

(*n*) *Harrison* v. *Harrison* (1887), 12 P. D. 130, 145; compare *Warren* v. *Warren* (1890), 63 L. T. 264 (nearly one-half joint income allotted; husband preferring that to one-third with an increase when reversions fell in).

(*o*) As to the gradual change of view which has taken place as to the insertion of this clause, see *Fisher* v. *Fisher* (1861), 2 Sw. & Tr. 410 (impolitic that dissolution should give a wife any great pecuniary advantage); *Medley* v. *Medley* (1882), 7 P. D. 122 (*dum sola et casta* usually inserted in the deed only); *Bradley* v. *Bradley* (1882), 7 P. D. 237 (*dum casta* refused); and *Lister* v. *Lister* (1889), 14 P. D. 175, affirmed 15 P. D. 4, C. A. (affirming the judge who had negatived the registrar's recommendation that the wife's allowance should only continue until she married again); and compare p. 445, *ante*.

(*p*) *Wood* v. *Wood*, [1891] P. 272, C. A.

(*q*) *Smith* v. *Smith*, [1898] P. 29; *Marigold* (*otherwise Evans*) v. *Marigold* (1911), 55 Sol. Jo. 387 (nullity suit; permanent maintenance *dum sola;* amount to be reduced on remarriage).

(*r*) *Kettlewell* v. *Kettlewell*, [1898] P. 138.

(*s*) *Collins* v. *Collins* (1910), 103 L. T. 80.

(*t*) *Morrall* v. *Morrall* (1881), 6 P. D. 98 (husband guilty of incestuous adultery); *Wilkinson* v. *Wilkinson* (1893), 69 L. T. 459 (separation, not dissolution, contemplated); *Bishop* v. *Bishop*, *Judkins* v. *Judkins*, [1897] P. 138, C. A. (in which case the decisions in *Gandy* v. *Gandy* (1882), 7 P. D. 77, 168, C. A., were considered, and the court disregarded an agreement not to sue for an increase even if the marriage were dissolved). It is probable that such an agreement is against public policy. As to deeds of separation generally, see pp. 439 *et seq.*, *ante*.

(*u*) *Re Gilling*, *Procter* v. *Watkins* (1905), 74 L. J. (CH.) 335.

SECT. 11. Incidental Proceedings after Decree.

Compulsory execution of deed.

1152. Where a respondent neglects to execute a maintenance deed, as ordered, the court may direct the registrar to do so (*x*); and on failure to comply with an order to secure maintenance a writ of attachment may be obtained (*a*).

Attachment.

Alienation.

Periodical payments are enforced as in the case of alimony *pendente lite* (*b*). Although such payments ordered to be made by a husband under the Matrimonial Causes Act, 1907 (*c*), do not constitute a debt at law, they are a debt (*d*) within the Debtors Act, 1869 (*e*). They are inalienable (*f*), and thus differ from an annuity secured to a wife who has obtained a divorce (*g*), and they cannot be released except by order of the court (*h*). As such payments are intended for the wife's support and not to be hoarded, arrears thereof can therefore only be recovered in respect of a short period, usually a year (*i*).

After order.

1153. Where an order for maintenance has been made (*k*), or where the registrar's report has been confirmed, and the husband has been directed to secure the maintenance as soon as the decree *nisi* is made absolute (*l*), he may be restrained from dealing with his property, until the necessary deed is executed (*m*), in such a way as to hinder the completion of (*n*) or endanger the security (*o*).

Injunction.

An injunction may, it appears, also be granted in the Chancery Division to restrain a husband, under order which cannot be varied except on appeal (*p*) to pay maintenance to his wife,

(*x*) Judicature Act, 1885 (47 & 48 Vict. c. 61), s. 14; *Howarth* v. *Howarth* (1886), 11 P. D. 68, 95, C. A.; compare *De Ricci* v. *De Ricci*, [1891] P. 378 (application arising out of a compromise, which had become a rule of court).

(*a*) *Medley* v. *Medley* (1882), 7 P. D. 122, C. A.

(*b*) See p. 520, *ante*.

(*c*) 7 Edw. 7, c. 12, s. 1 (2), replacing the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 1.

(*d*) *Linton* v. *Linton* (1885), 15 Q. B. D. 239, C. A.; *Kerr* v. *Kerr* (1897), 77 L. T. 29 (HAWKINS and VAUGHAN WILLIAMS, JJ.; WRIGHT, J., dissenting).

(*e*) 32 & 33 Vict. c. 62, s. 5.

(*f*) Such payments must be distinguished from income, secured under the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12) s. 1 (1), replacing Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 32), which can be charged; see *Harrison* v. *Harrison* (1888), 13 P. D. 180, C. A.; *Maclurcan* v. *Maclurcan* (1897), 77 L. T. 474, C. A., where a wife, after accepting a sum for releasing her husband, applied to the court to set aside the deed of agreement.

(*g*) *Watkins* v. *Watkins*, [1896] P. 222, C. A., *per* LINDLEY, L.J., at p. 228; and see title CHOSES IN ACTION, Vol. IV., p. 402.

(*h*) *Watkins* v. *Watkins*, *supra*; *Underwood* v. *Underwood*, [1894] P. 204, C. A.

(*i*) *Watkins* v. *Watkins*, *supra*; *Underwood* v. *Underwood*, *supra*; *Robins* v. *Robins*, [1907] 2 K. B. 13; see *Wilson* v. *Wilson* (1830), 3 Hag. Ecc. 329, n.; *Re Robinson* (1884), 27 Ch. D. 160, 165, C. A. As to the effect of bankruptcy on such payments, see title BANKRUPTCY, Vol. II., pp. 62 *et seq.*; and as to enforcement by writ of sequestration etc., see p. 586, *post*.

(*k*) *Sidney* v. *Sidney* (1867), 17 L. T. 9.

(*l*) *Waterhouse* v. *Waterhouse*, [1893] P. 284, C. A.

(*m*) *Newton* v. *Newton*, [1896] P. 36. As to remedy by injunction, see p. 591, *post*.

(*n*) *Twentyman* v. *Twentyman*, [1903] P. 82.

(*o*) *Waterhouse* v. *Waterhouse*, *supra*.

(*p*) *Smith* v. *Smith* (1898), 79 L. T. 124; distinguishing *Shorthouse* v. *Shorthouse* (1898), 78 L. T. 687, affirmed 79 L. T. 366, C. A., where, *per incuriam*,

from exercising his power of advancement under a marriage settlement (*q*).

(iii.) *Payments on Disobedience to Order to Cohabit.*

Payments after disobedience.

1154. At the time of making a decree of restitution of conjugal rights in favour of a wife or at any time afterwards, the court may order (*r*), in case such decree should not be complied with, that the husband shall make periodical payments to her, and secure (*s*) such payments by a deed, to be prepared by one of the conveyancing counsel to the court (*t*) and executed by all necessary parties.

By husband.

Where the wife disobeys such a decree, and she is in receipt of any profits of trade or earnings (*u*), the court may order (*v*) any part (*a*) thereof to be periodically paid to the husband for his own benefit, or to him or any other person for the children of the marriage or any or either of them.

By wife.

The application is made by petition, which should only be filed (*b*) after the decree has been disobeyed; but the procedure, as far as applicable, is the same as on a petition for maintenance (*c*), and the orders are enforced in the same manner as orders for permanent alimony and maintenance (*d*).

Procedure.

(iv.) *Settlement of the Property of a Wife in Fault.*

Settlement of wife's property.

1155. Where a husband has obtained a dissolution of marriage or a judicial separation by reason of his wife's adultery (*e*), or where a wife has disobeyed an order for restitution of conjugal rights (*f*), and it appears that she is entitled to property either in possession or reversion (*g*), the court may (*h*) order a

the husband's capital was estimated to produce a larger income than in fact it would; and, on discovery of this, he was ordered only to secure a sum equal to one-third of his capital, but to make up the difference in income as it fell due; but see *Harrison* v. *Harrison* (1887), 12 P. D. 130, 145; and compare p. 576, *post*.

(*q*) *Oliver* v. *Lowther* (1880), 28 W. R. 381. As to injunctions generally, see title INJUNCTION.

(*r*) Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 2.

(*s*) *Theobald* v. *Theobald* (1889), 15 P. D. 26 (one-third secured).

(*t*) As to conveyancing counsel to the court, see title BARRISTERS, Vol. II., p. 381.

(*u*) If the wife has an income, the court need not ask whence it comes (*Swift* v. *Swift* (1890), 15 P. D. 118).

(*v*) Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 3.

(*a*) The court has a large discretion; the husband's earning power is considered (*Swift* v. *Swift*, [1891] P. 129).

(*b*) Divorce Rule 214.

(*c*) *Ibid.*, 215; and see p. 565, *ante*.

(*d*) Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 2, which only refers to the enforcement of unsecured payments of the husband; but the rest seems to follow; and see further pp. 564, 568, *ante*.

(*e*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 45. The inquiry may be before final decree, on the husband giving security for costs (*Midwinter* v. *Midwinter*, [1892] P. 28, C. A.).

(*f*) Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 3.

(*g*) See *Stone* v. *Stone and Brownrigg* (1864), 3 Sw. & Tr. 372; *Stedall* v. *Stedall* (1902), 50 W. R. 320 (policy on husband's life); *Milne* v. *Milne* (1871), L. R. 2 P. & D. 295.

(*h*) Ordered in *Bacon* v. *Bacon and Bacon* (1860), 2 Sw. & Tr. 86 (dissolution),

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settlement (*i*) of the whole or part of such property for the benefit of the husband or children of the marriage or any or either of them.

Restraint on anticipation.

While the wife's separate estate is subject to a restraint on anticipation (*k*), no order will be made; but otherwise the court can deal with capital in possession or reversion (*l*) as well as with income, and will act on similar principles as on variation of settlements (*m*), the procedure and the mode of enforcing the order being on the same lines as in cases of maintenance (*n*).

(v.) *Increasing and Decreasing Allowances.*

Petition.

1156. A wife may (*o*), at any time after alimony *pendente lite* (*p*) or permanent (*q*) has been allotted to her, file her petition for an increase thereof, by reason of the increased faculties of her husband; or the husband may file a petition for the diminution thereof, by reason of reduced faculties, but he may not do so merely because the wife's private means have increased (*r*). The course of proceeding in such cases is the same as in the original application for alimony, so far as applicable.

Procedure.

The court may also, where it has ordered a periodical payment of money in consequence of disobedience to a decree of restitution of conjugal rights, from time to time vary or modify such order by altering the times of payment, or by increasing or diminishing the amount, or may temporarily suspend the same, as to the whole or any part of the money so ordered to be paid, and may again revive the order wholly or in part (*s*).

Monthly or weekly payments by husband.

1157. Where the court has ordered a husband to pay his former wife during their joint lives a monthly or weekly sum for her maintenance, and he afterwards from any cause becomes unable to make such payments, the court may (*t*) modify or discharge the order, or temporarily suspend it, as to the whole or any part of the money so ordered to be paid, and may again revive the order

but refused in *Schofield* v. *Schofield and Cowper* (1891), 64 L. T. 838, where the husband, who was well off, desired to have the wife's jewels sold, and the proceeds settled on him, subject to her life interest.

(*i*) In *Midwinter* v. *Midwinter*, [1893] P. 93, the court declined to make the husband's allowance variable, or *dum solus;* and provided allowance to five children for life.

(*k*) *Michell* v. *Michell*, [1891] P. 208, C. A., reversing [1891] P. 166; but see *Churchward* v. *Churchward*, [1910] P. 195. As to restraint on anticipation, which, of course, ceases on dissolution of marriage, see pp. 359 *et seq.*, *ante.*

(*l*) *Savary* v. *Savary* (1898), 79 L. T. 607, C. A.

(*m*) *Lorriman* v. *Lorriman and Clair*, [1908] P. 282; and as to variation of settlements, see p. 571, *post.*

(*n*) Divorce Rules 95, 214, 215; and see p. 568, *ante.*

(*o*) Divorce Rule 92; see *De Blaquière* v. *Blaquière* (1830), 3 Hag. Ecc. 322; *Covell* v. *Covell* (1872), L. R. 2 P. & D. 411.

(*p*) Compare *Cox* v. *Cox* (1826), 3 Add. 276.

(*q*) It seems that the Ecclesiastical Court refused a husband any reduction, if he had brought his losses on himself (*Neil* v. *Neil* (1832), 4 Hag. Ecc. 273; compare *Shirley* v. *Wardrop* (1858), 1 Sw. & Tr. 317 (*pendente lite*)).

(*r*) *Sharpe* v. *Sharpe*, [1909] P. 20 (maintenance); *Saunders* v. *Saunders* (1858), 1 Sw. & Tr. 72 (permanent alimony); and compare note (*p*), p. 568, *ante.*

(*s*) Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 4.

(*t*) Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1 (2) (a).

wholly or in part. If, on the other hand, the court is satisfied that the means of the husband have increased, it may (*u*) increase the amount so ordered to be paid.

In the absence of any rule, it is submitted that, by analogy, the procedure in such cases should be the same as on an application to vary the amount of alimony (*a*).

SUB-SECT. 2.—*Variation of Settlements.*

When settlements may be varied.

1158. After a final decree of nullity or dissolution of marriage the court may inquire into the existence of ante-nuptial or post-nuptial settlements (*b*) made on the parties (*c*) whose marriage is affected, and may (having regard to their conduct (*d*)) make orders with reference to the whole or a portion of the property settled, either for the benefit of the children of the marriage (*e*) or of their respective parents (*f*), though not of others (*g*), and may do so even if there are no children of the marriage (*h*). There is, however, no power to vary after judicial separation (*i*), disobedience to an order for restitution of conjugal rights (*k*), or dissolution of marriage abroad (*l*).

Procedure.

1159. The application is made by a separate petition, and the procedure is, as far as practicable, the same as in a petition for maintenance (*m*). The petition should be signed by the petitioner (*n*), or, by leave obtained on affidavit, by the solicitor (*o*), and may be filed before (*p*) or after (*q*) decree absolute. No time is fixed, but undue delay (*r*), though sometimes overlooked on terms (*s*), may be fatal.

(*u*) Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1 (2) (b); see also *K.* v. *K.* (*otherwise R.*), [1910] P. 140 (nullity).

(*a*) See p. 570, *ante*.

(*b*) Even if made in the form prescribed by the place of marriage (*Nunneley* v. *Nunneley and Marrian* (1890), 15 P. D. 186). As to settlements generally, see title SETTLEMENTS.

(*c*) Even if married, or formerly domiciled, abroad (*Nunneley* v. *Nunneley and Marrian, supra*; *Forsyth* v. *Forsyth*, [1891] P. 363).

(*d*) *Wigney* v. *Wigney* (1882), 7 P. D. 177, C. A.

(*e*) *Maudslay* v. *Maudslay* (1877), 2 P. D. 256.

(*f*) Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5.

(*g*) *Sykes* v. *Sykes* (1870), L. R. 2 P. & D. 163.

(*h*) Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3, disposing of *Ansdell* v. *Ansdell* (1880), 5 P. D. 138 (suit commenced before the Act, which gives no retrospective power).

(*i*) *Gandy* v. *Gandy* (1882), 7 P. D. 168, C. A.

(*k*) See *Swift* v. *Swift* (1890), 15 P. D. 118; *Michell* v. *Michell*, [1891] P. 166, 208, C. A.

(*l*) *Moore* v. *Bull*, [1891] P. 279.

(*m*) Divorce Rules 95, 97—102, 204; and see p. 565, *ante*.

(*n*) It seems that a petition can be brought by the respondent to a suit for dissolution (*Wootton-Isaacson* v. *Wootton-Isaacson*, [1902] P. 146); compare *G.* v. *G.* (*falsely called K.*) (1908), 25 T. L. R. 328, C. A. A petition was successfully brought by a respondent to a nullity suit, the petitioner consenting (*Suart* v. *Suart*, [1910] P. 246).

(*o*) *Ross* v. *Ross* (1882), 7 P. D. 20.

(*p*) *Constantinidi* v. *Constantinidi*, [1904] P. 306, C. A.

(*q*) Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5.

(*r*) *Benyon* v. *Benyon* (1876), 1 P. D. 447.

(*s*) *Clifford* v. *Clifford* (1884), 9 P. D. 76, C. A.

SECT. 11. **Incidental Proceedings after Decree.**

Service and inquiry.

The petition must be served personally, unless service is dispensed with (*t*), or substituted service allowed (*a*), not only on the respondent, but on all persons who have a legal or beneficial interest in the property in respect of which the application is made, and these persons must, if necessary, similarly appear and plead (*b*), for which no leave is necessary. Notice of the appointment must be given to them, and *primâ facie* they are entitled to be heard at the inquiry; but it seems that, if they are wrongly served, an application to dismiss them might succeed (*c*). It is the practice to leave copies of the deeds of settlement with the registrar who holds the inquiry.

Effect of decree in cases of nullity.

1160. In any case where a decree of nullity is the ground of the petition, the court may make orders (*d*) as to the application of the property settled, even in favour of persons, and in circumstances, not contemplated in the settlement; so that it may be taken that "child" includes illegitimate child, that "marriage" includes a ceremony which has been declared void, and that "settlement" may refer to any settlement which existed when the decree was pronounced. On a voidable marriage being avoided, the marriage settlements in a certain sense (*e*) cease to exist (*f*), though an application for maintenance may be made (*g*), and the funds brought into settlement by either or both of the parties may be retransferred to (*h*), or resettled on, the settlor or settlors. Without variation, a covenant which was contained in a settlement on an avoided marriage cannot be enforced (*i*), nor can the variation be by way of ignoring that the settlement was only to come into force on marriage (*k*).

General principles.

1161. The court in varying settlements, without seeking to punish the offender (*l*), takes care that as far as possible the finances of the family shall remain *in statu quo ante* (*m*), and that

(*t*) In *Snelling* v. *Snelling* (1890), 63 L. T. 263, service was dispensed with, where respondent and his trustee were both bankrupt, and notice was given to the official receiver; *Taylor* v. *Taylor* (1892), 66 L. T. 267 (substituted service on trustee in Australia refused, and service dispensed with; neither he nor the other trustee, who had been served, having any beneficial interest).

(*a*) In *Nevill* v. *Nevill* (1893), 69 L. T. 463, substituted service of an amended petition for variation was ordered.

(*b*) Divorce Rules 97—99; and as to the official solicitor, see p. 575, *post*.

(*c*) *Re Vivian* (*Lord*) v. *Vivian* (*Lady*), [1909] P. 57, C. A.

(*d*) Under the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, as amended by the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3.

(*e*) But see *Attwood* v. *Attwood*, [1903] P. 7.

(*f*) *Dormer* v. *Ward*, [1900] P. 130; [1901] P. 20, C. A.; see *Sharpe* v. *Sharpe*, [1909] P. 20.

(*g*) Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1.

(*h*) *Attwood* v. *Attwood*, *supra*; *Leeds* v. *Leeds* (1886), 57 L. T. 373 (retransfer to each of property respectively brought in); *A.* v. *M.* (1884), 10 P. D. 178.

(*i*) *Dormer* v. *Ward*, *supra*.

(*k*) *Ibid.*

(*l*) *Maudslay* v. *Maudslay* (1877), 2 P. D. 256; *Symonds* v. *Symonds* (1872), L. R. 2 P. & D. 447, where a wife had been guilty of contempt in taking possession of the child.

(*m*) *Tupper* v. *Tupper and Terrell* (1890), 62 L. T. 665; *March* v. *March and Palumbo* (1867), L. R. 1 P. & D. 440.

the innocent party and children (*n*) shall not be adversely affected by the breaking up of the marriage (*o*); so much so that, if a sum be settled on a wife for life, out of which she is to keep up the joint establishment, and she divorce her husband, it seems she may keep the whole (*p*). If a husband has accepted an allowance from his wife whilst they have been separated, this does not prevent the court from so varying the settlements as to increase that allowance (*q*); but the court will protect certain rights of mortgagees and will not strip the respondent of reasonable means of subsistence (*r*).

Powers of appointment on remarriage.

1162. If a guilty respondent has power to appoint in favour of a second wife or husband, that power is usually varied by adding "who may be married after the death of the petitioner" (*s*); though the power to appoint to children, provided they are born after the death of the petitioner, may be allowed to stand (*t*). The similar powers, however, of a successful petitioner may be wholly or partly confirmed, provided they work no injustice, taken as a whole, to the children (*a*). The acceleration of the children's interests by the removal of the life interest of a parent may balance the disadvantage of the other parent being permitted either to appoint a portion of the fund to a future spouse or children (*b*), or even, in an improbable contingency, to extinguish the children's interest altogether (*c*).

Diminishing or extinguishing respondent's interests and powers.

1163. The whole or part (*d*) of the respondent's income under the settlement may be diverted to the children (*e*) or to the husband or wife and children (*f*), and the respondent's interests, including derivative interests (*g*), in the fund brought into settlement by the petitioner may be wholly extinguished, as if the respondent were dead (*h*), and so even in his or her own fund (*i*). Similarly a

(*n*) *Noel* v. *Noel* (1885), 10 P. D. 179; *Hartopp* v. *Hartopp*, [1899] P. 65.

(*o*) *Farrington* v. *Farrington* (1886), 11 P. D. 84 (no children; incomes equalised); *Bashall* v. *Bashall* (1897), 76 L. T. 165 (husband squandering unsettled property; wife given more than one-third (to be increased to more than one-half) *dum sola*); *Newall* v. *Newall and Platt* (1898), 78 L. T. 203; *Beauchamp* v. *Beauchamp and Watt* (1904), 20 T. L. R. 273, C. A. (compensation to children for lost annuity).

(*p*) *Wootton-Isaacson* v. *Wootton-Isaacson*, [1902] P. 146.

(*q*) *Benyon* v. *Benyon* (1876), 1 P. D. 447.

(*r*) *Smithe* v. *Smithe* (1868), L. R. 1 P. & D. 587.

(*s*) *Branton Day* v. *Branton Day and Erskine* (1898), 78 L T. 358. As to powers generally, see title POWERS.

(*t*) *Noel* v. *Noel*, *supra*; *Pollard* v. *Pollard*, [1894] P. 172.

(*a*) *Whitton* v. *Whitton*, [1901] P. 348; *Hodgson Roberts* v. *Hodgson Roberts and Whitaker*, [1906] P. 142

(*b*) *Whitton* v. *Whitton*, *supra*.

(*c*) *Creagh* v. *Creagh* (1896), 74 L. T. 430.

(*d*) *Tupper* v. *Tupper and Terrell* (1890), 62 L. T. 665.

(*e*) *Webster* v. *Webster and Mitford* (1862), 3 Sw. & Tr. 106.

(*f*) *Noel* v. *Noel*, *supra*.

(*g*) *Blood* v. *Blood*, [1902] P. 78, 190, C. A.

(*h*) *Pearce* v. *Pearce and French* (1861), 30 L. J. (P. M. & A.) 182; *Pryor* v. *Pryor* (1887), 12 P. D. 165; *Whitton* v. *Whitton*, [1901] P. 348; *Blood* v. *Blood*, *supra*.

(*i*) *Kaye* v. *Kaye* (1902), 86 L. T. 638, C. A., where there was one child, and an income of only £45 per annum; compare *Ponsonby* v. *Ponsonby* (1884), 9 P. D. 58, 122, C. A.

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respondent's powers of appointment may be, though they are not always (*k*), extinguished (*l*), on the ground that the opportunity of judging the children's requirements no longer exists, or a petitioner's powers may be postponed (*m*). The extinguishment of the power of appointing new trustees is, however, on a different footing, and, if the respondent has still an interest in the fund, the court usually (*n*) refuses to allow this to be done (*o*).

Insertion of *dum sola* clause.

The proviso *dum sola vixerit* may be inserted, but only when the husband has to give up some of his own means for the support of his wife (*p*). Where an innocent wife remarries after the filing of a petition for variation but before the order, the court may vary her settlement by putting an end to a restraint on anticipation (*q*).

When funds may be reconveyed.

1164. Where the interest of no one except by way of *spes successionis*, or at least of no one living except the respondent, is affected, but not otherwise (*r*), the court will sometimes order the property in settlement to be reconveyed to the petitioner (*s*).

What property can be dealt with.

1165. In making the inquiry, it is necessary to ascertain what the actual (not the gross) income of the trust fund is (*t*), and heirlooms may be dealt with (*u*).

"Property."

"Property settled."

"Property" includes not only income, but capital with which the court may also deal (*a*), and "property settled" is taken to mean the property of which, under the marriage settlement, the parties or their children are the beneficiaries (*b*). An annuity (*c*), or property taken under a settlement in a representative capacity (*d*), or an expectancy which has been settled (*e*), may be included.

"Settled estate."

A "settled estate," contrasted with an estate in fee simple, means one as to which the usual powers of alienation, devising and transmitting, are restrained by the limitations of the settlement (*f*).

(*k*) *Davies* v. *Davies and M'Carthy* (1868), 37 L. J. (P. & M.) 17; *Maudslay* v. *Maudslay* (1877), 2 P. D. 256; *Nevill* v. *Nevill* (1893), 69 L. T. 463 (continued *dum sola*).

(*l*) *Noel* v. *Noel* (1885), 10 P. D. 179; *Pryor* v. *Pryor* (1887), 12 P. D. 165; *Bosvile* v. *Bosvile* (1888), 13 P. D. 76.

(*m*) *Evered* v. *Evered and Graham* (1874), 31 L. T. 101 (in favour of the child of the marriage).

(*n*) But not in *Oppenheim* v. *Oppenheim* (1884), 9 P. D. 60, which does not clash with *Davies* v. *Davies and M'Carthy*, *supra*. In *Maudslay* v. *Maudslay*, *supra*, the power was extinguished by consent.

(*o*) *Hope* v. *Hope* (1874), L. R. 3 P. & D. 226; *Pryor* v. *Pryor*, *supra*; *Bosvile* v. *Bosvile*, *supra*; *Tupper* v. *Tupper and Terrell* (1890), 62 L. T. 665.

(*p*) *Gladstone* v. *Gladstone* (1876), 1 P. D. 442.

(*q*) *Churchward* v. *Churchward*, [1910] P. 195.

(*r*) *Pryor* v. *Pryor*, *supra*.

(*s*) *Meredyth* v. *Meredyth*, [1895] P. 92; *Morrissey* v. *Morrissey*, [1905] P. 90; *Blood* v. *Blood*, [1902] P. 78, 190, C. A. See *Wynne* v. *Wynne* (1898), 78 L. T. 796; *Merton* v. *Merton* (1900), 83 L. T. 223. But see *Walpole* v. *Walpole*, [1901] P. 196.

(*t*) See *Savary* v. *Savary* (1898), 79 L. T. 607, C. A.

(*u*) *Beauchamp* v. *Beauchamp and Watt* (1904), 20 T. L. R. 273, C. A.

(*a*) *Ponsonby* v. *Ponsonby* (1884), 9 P. D. 58, 122, C. A.

(*b*) *Dormer* v. *Ward*, [1900] P. 130; [1901] P. 20, C. A.

(*c*) *Jump* v. *Jump* (1883), 8 P. D. 159.

(*d*) *Blood* v. *Blood*, *supra*.

(*e*) *E.* v. *E.* (1902), 18 T. L. R. 643.

(*f*) *Micklethwait* v. *Micklethwait* (1858), 4 C. B. (N. S.) 790.

1166. A deed of separation (*g*), in which there is no *dum casta* clause (*h*), can be varied as a post-nuptial settlement (*i*), and, if there be no *dum casta* clause in a deed, the payments must continue (*k*) until it is so varied (*l*). An absolute assignment, however, of property to a husband by a wife is not a settlement (*m*). Deeds of separation.

1167. The application for variation is not limited to a husband or wife only (*n*); and, provided the suit has not abated, a guardian of the petitioner's children may be allowed to apply after the death of a petitioner (*o*); but the petitioner's executor, as such (*p*), has no interest, and therefore cannot intervene in the matter (*q*). Parties to application.

1168. Although a trustee cannot originate a petition for variation, he can be heard in opposition (*r*); and even if the property be so settled that the trustees have a discretion as to its application, the court may deal with the settlement (*s*). If trustees be ordered to pay an annuity for the maintenance of a child, although the order may be summarily enforced in the Chancery Division without a separate action (*t*), it seems that the application ought to be made in the Divorce Division. Trustees.

1169. The court will not, in proceedings for variation, decide a question of legitimacy (*u*); but may direct the official solicitor (*a*) to petition on behalf of the child for a declaration of legitimacy (*b*), as it is for the child's benefit (*c*), the variation proceedings meanwhile standing over. The court may also direct that the issue be tried separately in the Divorce Division with the petitioner as Proceedings in court.

(*g*) *Gandy* v. *Gandy* (1882), 7 P. D. 77, 168, C. A.
(*h*) *Worsley* v. *Worsley* (1869), L. R. 1 P. & D. 648.
(*i*) *Jump* v. *Jump* (1883), 8 P. D. 159; *Bullock* v. *Bullock* (1872), L. R. 2 P. & D. 389; *Saunders* v. *Saunders and Beck* (1893), 69 L. T. 498 (guilty wife's allowance under deed halved, and only to continue *dum sola et casta*).
(*k*) *Wasteneys* v. *Wasteneys*, [1900] A. C. 446, P. C.
(*l*) *Clifford* v. *Clifford* (1884), 9 P. D. 76, C. A.
(*m*) *Chalmers* v. *Chalmers* (1892), 68 L. T. 28 (though an innocent wife can obtain maintenance in respect thereof); *Hubbard* v. *Hubbard*, [1901] P. 157, C. A.
(*n*) See the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5.
(*o*) *Ling* v. *Ling and Croker* (1865), 4 Sw. & Tr. 99; *Smithe* v. *Smithe* (1868), L. R. 1 P. & D. 587.
(*p*) *Smithe* v. *Smithe*, *supra*.
(*q*) *Thomson* v. *Thomson*, [1896] P. 263, C. A.
(*r*) *Corrance* v. *Corrance* (1868), L. R. 1 P. & D. 495; *Smith* v. *Smith* (1887), 12 P. D. 102 (no children; ultimate trusts for children of a second marriage etc.; petitioner (husband) bankrupt; trustee successfully objected, as against the trustee in bankruptcy, to a division of the *corpus* between petitioner and respondent).
(*s*) *Vallance* v. *Vallance* (1907), 77 L. J. (P.) 33.
(*t*) *Blackett* v. *Blackett* (1884), 51 L. T. 427; compare *Oliver* v. *Lowther* (1880), 28 W. R. 381; see Consolidated Order XXIX., r. 2; compare R. S. C., Ord. 42, r. 6.
(*u*) *Pryor* v. *Pryor* (1887), 12 P. D. 165.
(*a*) As to the position of the official solicitor, see title COURTS, Vol. IX., p. 71.
(*b*) *Douglas* v. *Douglas and Trevor* (1897), 78 L. T. 88. As to declarations of legitimacy, see title BASTARDY, Vol. II., p. 433; and p. 315, *ante*.
(*c*) *Re Chaplin's Petition* (1867), L. R. 1 P. & D. 328.

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plaintiff and the trustees, the official solicitor (as guardian *ad litem*) and the respondent as defendants (*d*).

Revision of order.

1170. The court has power to revise its own order in respect of matters arising before the making of the order (*e*), as where a mistake, common to all parties, was made in drawing up the order (*f*), even though the applicant be appealing (*g*) against the order as made.

When order takes effect.

1171. It seems that a respondent cannot be restrained from selling property which is claimed by the petitioner as forming part of a marriage settlement, as to which it is intended to petition for variation, nor, if such property has been sold, can he be enjoined to bring the proceeds of sale into court, there being no order to pay a fixed sum (*h*).

Dividends.

1172. Up to the date of the order, dividends etc. due and payable pass under the original settlement (*i*) and thereafter in accordance with the variation of the settlement, due regard being had to the rights of those in the position of mortgagees (*k*) before the presentation of the petition (*l*) for variation. As soon, however, as such petition is filed, it is in the nature of a *lis pendens*, and nothing done afterwards, before it is heard, diminishes the power of the court over the settlement (*m*).

Costs of variation.

1173. The court will sometimes order the costs of the variation, or even of the petition generally (*n*), to be paid out of the *corpus* of a settled fund (*o*).

Trustees.

Where some only of the trustees appear, their costs may be allowed (*p*).

Guardian.

Where a guardian of children properly makes an application for variation of a settlement, he may be allowed his costs (*q*).

(*d*) *Evans* v. *Evans*, [1904] P. 274, 378.

(*e*) *Gladstone* v. *Gladstone* (1876), 1 P. D. 442; *Benyon* v. *Benyon* (1890), 15 P. D. 29, 54, C. A.; and compare, as to maintenance, p. 570, *ante*.

(*f*) *Arkwright* v. *Arkwright* (1895), 73 L. T. 287.

(*g*) *E.* v. *E.*, [1903] P. 88.

(*h*) See the comments of HANNEN, P., in *Newton* v. *Newton* (1885), 11 P. D. 11, on his own order in *Noakes* v. *Noakes* (1877), 4 P. D. 60; and see *North London Rail. Co.* v. *Great Northern Rail. Co.* (1883), 11 Q. B. D. 30, C. A.

(*i*) *Paul* v. *Paul* (1870), L. R. 2 P. & D. 93.

(*k*) *Nevill* v. *Nevill* (1893), 69 L. T. 463 (trustee in bankruptcy).

(*l*) *Wigney* v. *Wigney* (1882), 7 P. D. 228; and see *Chalmers* v. *Chalmers* (1892), 68 L. T. 28.

(*m*) *Constantinidi* v. *Constantinidi*, [1904] P. 306, C. A.

(*n*) *Hipwell* v. *Hipwell*, [1892] P. 147, where there were two children, but the fund came from the wife, and the costs could not be recovered from the husband; *Douglas* v. *Douglas* (1896), 74 L. T. 384, where the wife had no means, and the child was represented before the court; and see *Wigney* v. *Wigney*, *supra* (guilty husband, who had no other means and had mortgaged his life interest to his solicitor before decree *nisi*).

(*o*) *Hamilton* v. *Hamilton and Pralormo* (1893), 68 L. T. 467, where the children had an allowance, and all concerned consented.

(*p*) *Storer* v. *Storer* (1894), 71 L. T. 704.

(*q*) *Ling* v. *Ling and Croker* (1865), 4 Sw. & Tr. 99. As to the rights and duties of guardians generally, see title INFANTS AND CHILDREN.

Incidental Proceedings after Decree.

1174. Until a suit for judicial separation or for nullity or dissolution of marriage has been dismissed (*r*), the court (*s*) may (*a*), on application (*b*) after final decree (*c*), make orders from time to time with respect to the maintenance (*d*), custody and education of the children, or it may direct them to be placed under the protection of the Chancery Division (*e*). This power extends to orders which might have been made as *interim* orders, if the proceedings had been still pending, and is applicable to a case where a respondent fails to comply with a decree for restitution of conjugal rights as if the suit were one for judicial separation (*f*). Orders.

The procedure is the same, so far as applicable, as in a petition for maintenance (*g*). Procedure.

Further time may be granted to answer an application for custody, on an undertaking not to take the child out of the jurisdiction of the court (*h*), or a decree absolute may be postponed to give time to show that an applicant is not fit to have custody (*i*). Further time.

1175. A husband or wife, parties to a suit, may at any time after decree apply by summons (*j*) for access to the children of the marriage (*k*), and the registrar may make such order as he thinks fit, subject to appeal to the court by either party if dissatisfied. A wife's adultery ought not to be regarded for all time, and in all circumstances, as sufficient to disentitle her to access to, or even to custody of, her child, if under sixteen. The fact that change of custody or liberty of access may unsettle the mind of the infant is only a circumstance to be considered, and ought not to be regarded Access and change of custody.

(*r*) *Seddon* v. *Seddon and Doyle* (1862), 2 Sw. & Tr. 640.

(*s*) *I.e.*, the Divorce, not the Chancery, Division (*Manders* v. *Manders* (1890), 63 L. T. 627).

(*a*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 35; Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 4.

(*b*) The latter Act says by petition; but the practice is to apply by summons to the judge in matters of custody.

(*c*) With the same effect as if made before final decree (*Gladstone* v. *Gladstone* 1877), 2 P. D. 143, C. A.). As to similar applications pending suit, see p. 521, *ante*.

(*d*) See *Fisher* v. *Fisher* (1861), 2 Sw. & Tr. 410; and where the wife who had custody had £196 per annum, and her husband (guilty) £367 per annum, she was allowed £90 per annum for the support of three children, aged eleven, nine and eight (*Todd* v. *Todd* (1873), 42 L. J. (P. & M.) 62).

(*e*) Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 4.

(*f*) Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 6; and as to such suits, see p. 500, *ante*.

(*g*) Divorce Rules 195, 204, 215; and see pp. 471, 565, 569, *ante*.

(*h*) *Carter* v. *Carter* (1860), 29 L. J. (P. M. & A.) 167.

(*i*) *Robinson* v. *Robinson* (1886), 57 L. T. 118.

(*j*) The text here follows the wording of Divorce Rule 212, but although it seems to direct that all applications for access should be made to a registrar in the first instance, it is submitted that the true intention is that this should govern only applications *pendente lite* (as to which see p. 521, *ante*), and that where access is sought after decree the application should be made to the judge.

(*k*) Divorce Rule 212.

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as a complete bar to any change of custody or to a new order for access (*l*).

Maintenance.

1176. The court may provide maintenance for the children up to the age of twenty-one (*m*), including those of a void marriage (*n*); but cannot order security therefor (*o*).

Education.

On the question of education, the court considers the welfare of the children from the points of view of their religious education (*p*), worldly career (*q*) and general bringing up (*r*).

Whereabouts of children.

The court has no power to order relatives of the parties to attend and give evidence as to the whereabouts of the children, even if one of the parents be in contempt for not delivering them up (*s*).

If by a deed property is settled on a wife for life, and then on the children, and the husband and wife resume cohabitation, the children's interests are not thereby affected (*t*).

Penalties for defiance of court.

1177. A parent, who improperly removes a child from the custody ordered by the court, may be attached for contempt (*a*), or a writ of sequestration may issue (*b*), on *ex parte* application if service be impossible (*c*); but, notwithstanding the breach of an undertaking not to take a child out of the jurisdiction, the offender may be heard on an appeal in some though not in all matters of defence, apart from such contempt (*d*). If an order to give access be disobeyed, custody may be, temporarily at any rate, transferred to the other party (*e*), and the court ought not to hesitate to send to prison a party to a divorce suit who deliberately, not technically only, defies the court and takes the law into his own hands (*f*).

(*l*) *Stark* v. *Stark and Hitchins*, [1910] P. 190, C. A.; *Bagnall* v. *Bagnall and Hobbs* (1910), 26 T. L. R. 659.

(*m*) *Thomasset* v. *Thomasset*, [1894] P. 295, C. A.; *Stark* v. *Stark and Hitchins*, *supra*.

(*n*) *Langworthy* v. *Langworthy* (1886), 11 P. D. 85, C. A.; compare *D'Etchegoyen* v. *D'Etchegoyen* (1908), 25 T. L. R. 85.

(*o*) *Hunt* v. *Hunt* (1883), 8 P. D. 161 (judicial separation). A wife living apart from her husband and having a child of the marriage properly in her custody can pledge his credit for its maintenance (*Bazeley* v. *Forder* (1868), L. R. 3 Q. B. 559).

(*p*) *D'Alton* v. *D'Alton* (1878), 4 P. D. 87.

(*q*) *Symington* v. *Symington* (1875), L. R. 2 Sc. & Div. 415.

(*r*) *Witt* v. *Witt*, [1891] P. 163.

(*s*) *Hyde* v. *Hyde* (1888), 13 P. D. 166, 176, C. A. As to wards of court generally, see title INFANTS AND CHILDREN.

(*t*) *Re Spark's Trusts*, *Spark* v. *Massey*, [1904] 1 Ch. 451; see *Rowell* v. *Rowell* (1903), 89 L. T. 288, C. A.

(*a*) See *Symonds* v. *Symonds* (1872), L. R. 2 P. & D. 447; and as to attachment, see p. 585, *post*.

(*b*) *Allen* v. *Allen* (1885), 10 P. D. 187; *Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A.; and as to such writs, see p. 586, *post*, and title EXECUTION, Vol. XIV., pp. 79 *et seq.*

(*c*) *Symonds* v. *Symonds*, *supra*; *Hyde* v. *Hyde*, *supra*; *Allen* v. *Allen*, *supra*; *Favard* v. *Favard* (1896), 75 L. T. 664; *Gordon* v. *Gordon*, [1903] P. 141.

(*d*) *Gordon* v. *Gordon*, [1904] P. 163, C. A.

(*e*) *Portugal* v. *Portugal* (1866), 35 L. J. (P. & M.) 103.

(*f*) *Stark* v. *Stark and Hitchins*, *supra*. See, however, generally, the observations in title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL; Vol. VII., pp. 313, 315.

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Injunction.

1178. Although, it seems, an injunction will not be granted to restrain a party from dealing with property, until a writ of sequestration can issue to enforce an order for custody (*g*), an injunction may be obtained for the direct purpose of preventing the removal of children out of the jurisdiction (*h*). Where it happens that a respondent escapes from the country with the children, there is sometimes no remedy available, if there is no property here, unless the assistance of foreign police can be obtained.

Applications by third parties as to custody.

1179. Third parties may intervene (*i*) on questions of custody; and, if entrusting the children to an innocent mother would result in a change of their religion, the custody may be given to a third party (*k*). Such an application cannot, however, be made by a third party after the death of a petitioner (*l*), nor will a guilty husband's father be allowed to have the children, against the will of the wife, merely because he is able to provide for them better than she (*m*). A third party who unsuccessfully intervenes as to custody will be ordered to pay the costs (*n*), and a wife who takes out a summons for access, which has not been refused to her, will not be allowed her costs against her husband although she succeeds (*o*).

SUB-SECT. 4.—*Apportionment of Damages.*

Direction by court.

1180. After the amount of damages has been ascertained, the court has power to direct in what manner such damages shall be applied, and can order that the whole or any part thereof shall be settled for the benefit of any children of the marriage, or as a provision for the maintenance of the wife (*p*). Application for this purpose is usually made to the judge by summons, and may be made after decree absolute (*q*). After an apportionment has been made it may, in special circumstances, be varied (*r*).

General principles.

1181. An assignee of damages cannot intervene in the suit (*s*). A covenant to pay damages to a petitioner is void (*t*), and the court will not recognise any arrangement as to damages, unless made with its sanction (*a*). Each case must depend on its own facts, but damages may be apportioned to pay the extra costs of the petitioner

(*g*) *Wallis* v. *Wallis* (1891), 65 L. T. 796.
(*h*) *Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A.
(*i*) *March* v. *March and Palumbo* (1867), L. R. 1 P. & D. 437; *Godrich* v. *Godrich* (1873), L. R. 3 P. & D. 134; see *Chetwynd* v. *Chetwynd* (1865), 4 Sw. & Tr. 151.
(*k*) *D'Alton* v. *D'Alton* (1878), 4 P. D. 87; compare the Custody of Children Act, 1891 (54 & 55 Vict. c. 3), s. 4.
(*l*) *Davis* v. *Davis* (1889), 14 P. D. 162.
(*m*) *Milford* v. *Milford* (1869), L. R. 1 P. & D. 715; but where a husband was guilty of cruelty, and his wife of adultery, he was granted a decree only on condition that she had custody, her parents promising to take care of the child (*Pryor* v. *Pryor*, [1900] P. 157).
(*n*) *March* v. *March and Palumbo*, *supra*.
(*o*) *Bacon* v. *Bacon* (1866), L. R. 1 P. & D. 167.
(*p*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 33.
(*q*) *Billingay* v. *Billingay and Thomas* (1866), L. R. 1 P. & D. 168.
(*r*) *Forster* v. *Forster and Berridge* (1865), 4 Sw. & Tr. 131.
(*s*) *Hunt* v. *Hunt and Cooper*, [1894] P. 247.
(*t*) *Gipps* v. *Gipps* (1864), 11 H. L. Cas. 1, *per* Lord WENSLEYDALE, at p. 24.
(*a*) *Callwell* v. *Callwell and Kennedy* (1860), 3 Sw. & Tr. 259; *Lucas* v.

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above the taxed amount (*b*), and the balance may be assigned to a trustee for the use of the children of the marriage (*c*), even though they be of age (*d*), or it may be paid to the petitioner's solicitor to be dealt with by him (*e*). An annuity may be purchased for a child (*f*), or, although she has no claim (*g*), for the wife, *dum casta* or *dum sola et casta* (*h*), with a restraint on anticipation (*i*), and with remainder to the children (*k*), who, however, if they side with their mother against their father, may be excluded (*l*). The damages may be paid to the petitioner in consideration of a similar amount settled on his wife and children (*m*), or if there are no children and the wife is living with the co-respondent (*n*), or where the wife waives her claim and the petitioner undertakes to support the children and not to petition for variation of settlements (*o*), or on his undertaking to bring the damages in when received (*p*).

When damages may be paid to petitioner.

SUB-SECT. 5.—*Taxation of Costs.*

(i.) *Between Party and Party.*

Procedure on taxation.

1182. When a party is condemned in costs either in the Divorce Division or on appeal (*q*), the solicitor of the party to whom they are to be paid should forthwith file in the registry his bill, as between party and party, unless otherwise specially directed (*r*), and apply to the registrar for an appointment to tax. For this no special order is required (*s*); though, unless specially directed by the judge, the taxation cannot take place till the time for appeal etc. has expired, or the appeal etc., if any, has been disposed of (*t*). Notice of the appointment is sent to the applicant (*u*), who must give at least one clear day's notice and a copy of the bill to the other side (*a*). If any of the parties fail to attend within a quarter of an hour of the

Lucas and Georgetti (1909), 25 T. L. R. 248 (sanction of payment by a foreign co-respondent).

(*b*) *Taylor* v. *Taylor and Wolters* (1870), 39 L. J. (P. & M.) 23; *Billingay* v. *Billingay and Thomas* (1866), L. R. 1 P. & D. 168; see also p. 582, *post*.

(*c*) *Clark* v. *Clark and Bouck* (1861), 2 Sw. & Tr. 520; *Billingay* v. *Billingay and Thomas, supra; Spedding* v. *Spedding and Lander* (1862), 32 L. J. (P. M. & A.) 31.

(*d*) *Meyern* v. *Meyern* (1876), 2 P. D. 254.

(*e*) *Forster* v. *Forster and Berridge* (1863), 3 Sw. & Tr. 158.

(*f*) *Ibid.*

(*g*) *Taylor* v. *Taylor and Wolters, supra.*

(*h*) *Forster* v. *Forster and Berridge, supra; Meyern* v. *Meyern, supra; Narracott* v. *Narracott and Hesketh* (1865), 4 Sw. & Tr. 76.

(*i*) *Forster* v. *Forster and Berridge, supra.*

(*k*) *Ibid.; Bent* v. *Bent and Footman* (1861), 2 Sw. & Tr. 392.

(*l*) *Meyern* v. *Meyern, supra.*

(*m*) *Bent* v. *Bent and Footman, supra.*

(*n*) *Evans* v. *Evans and Bird* (1865), L. R. 1 P. & D. 36 (order inserted in decree *nisi*).

(*o*) *Dale* v. *Dale and Macdonell* (1867), 15 L. T. 595.

(*p*) *Gyte* v. *Gyte* (1885), 10 P. D. 185; see also p. 546, *ante*.

(*q*) Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 13.

(*r*) As was the case in *Edwards* v. *Edwards and Wilson* (1899), *Times*, 17th, 20th June.

(*s*) Divorce Rule 151.

(*t*) *Ibid.*, 177

(*u*) *Ibid.*, 152.

(*a*) *Ibid.*, 153.

time appointed, the registrar may proceed with the taxation, if satisfied by affidavit that due notice has been given (*b*). The fees payable on taxation are paid by the applicant, and allowed as part of his bill. There is an appeal to the judge from the registrar's certificate (*c*).

Principles of taxation.

1183. In taxing costs, the registrars proceed on lines very similar to those followed in other divisions of the High Court, though they do so, as between party and party, as understood in the ecclesiastical rather than in the common law courts (that is rather more generously), but not so as to include the costs of an issue vexatiously put on the record (*d*). The reckless employment of detectives by a guilty respondent is disapproved; and no costs of a defence so prepared are allowed unless it is successful (*e*).

The following points have been decided:—

Refreshers.

Term refresher fees may be allowed (*f*).

Three counsel.

The costs of three counsel (*g*) may be allowed in a case of sufficient importance (*h*).

Advice on answer.

Counsel's fee for advising on an answer, if more than a mere traverse, may be allowed (*i*).

But charges incurred before commencement of suit (*k*), and attendances on persons representing a petitioner, are not allowed (*l*); nor are the costs of a country solicitor as well as of a London solicitor allowed against a husband (*m*).

The allowance of a petitioner's costs of proving the adultery of the respondent and co-respondent means that the co-respondent is liable for all the costs incurred in proving the case apart from the proof of any misconduct of the petitioner (*n*).

Who may attend taxation.

A husband who has not defended a suit may be allowed to attend the taxation of costs against himself (*o*); and where, after paying a sum of money into court by way of security for his wife's costs, a husband dies, the solicitors of his executors may be allowed to attend the taxation (*p*).

(*b*) Divorce Rule 154.

(*c*) Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), s. 13; not by way of an act on petition (*Dickens* v. *Dickens* (1859), 28 L. J. (P. & M.) 94); but see further on this point *Cooke* v. *Cooke* (1864), 3 Sw. & Tr. 374; *Campbell* v. *Campbell*, [1887] W. N. 83, C. A.

(*d*) *Allen* v. *Allen and D'Arcy* (1860), 2 Sw. & Tr. 107.

(*e*) *Wilson* v. *Wilson* (1872), L. R. 2 P. & D. 435.

(*f*) *Stoate* v. *Stoate* (1861), 30 L. J. (P. M. & A.) 214.

(*g*) See *Hartopp* v. *Hartopp and Cowley* (1904), 20 T. L. R. 216, C. A.; *Campbell* v. *Campbell, supra*; compare *Money* v. *Money* (1853), 1 Ecc. & Ad. 117.

(*h*) The rule of the Ecclesiastical Court to allow only two counsel is not applicable (*Suggate* v. *Suggate* (1859), 1 Sw. & Tr. 492, 497).

(*i*) *Hepworth* v. *Hepworth* (1861), 30 L. J. (P. M. & A.) 253.

(*k*) But see the memorandum of JEUNE, P., dated 21st January, 1902, which authorises reasonable costs of preliminary proceedings, including opinion of counsel and charges of detectives, when necessary; though these are not to be dealt with on taxation of wife's costs up to setting down.

(*l*) *Dickens* v. *Dickens, supra.*

(*m*) *Suggate* v. *Suggate, supra.*

(*n*) *Baker* v. *Baker and Grigg* (1867), 36 L. J. (P. & M.) 119.

(*o*) *Letts* v. *Letts* (1869), L. R. 2 P. & D. 16.

(*p*) *Hall* v. *Hall* (1864), 3 Sw. & Tr. 390.

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(ii.) *Between Solicitor and Client.*

Notice. Costs of taxation if over one-sixth disallowed.

1184. As between solicitor and client, a bill may be taxed, on the application of either, after sufficient notice (*q*). The fees payable on taxation are paid by the applicant and, where necessary, allowed as part of the bill. If more than one-sixth of the bill is disallowed, no costs incurred in such taxation are allowed (*r*) to be added, but the person liable to pay may deduct from the bill the costs incurred by him in taxing; or, if so much does not remain due, the solicitor must pay the balance (*s*). There is an appeal to the judge against the registrar's certificate (*t*).

(iii.) *Costs usually Allowed.*

Costs. Lower scale. Higher scale. Fees.

1185. Solicitors' costs in matrimonial causes, so far as applicable, are to be allowed on the lower scale (*u*) unless the court or a judge, on special grounds, orders at the trial, or on further consideration, or on application (whether the cause be or be not brought to trial, hearing, or further consideration), that such costs be allowed on the higher scale; or unless the taxing registrar, under direction of the court or a judge, shall think such allowance on the higher scale ought to be made (*a*). The taxing registrar proceeds in a similar manner in taxing a bill for the purpose of ascertaining the amount due to a solicitor (*b*). There are also in existence two tables of fees to be taken by solicitors, in respect of divorce and matrimonial causes, one for their own use, and the other for the use of other persons (*c*).

(iv.) *Extra Costs.*

In what cases allowed.

1186. Where a husband has obtained damages as well as costs, he is often allowed to be repaid out of the damages the extra costs, *i.e.*, the difference between the costs as taxed and what he has to pay his solicitor (*d*).

In the case of a wife, such extra costs are necessaries at common law, for which she can pledge her husband's credit (*e*), but not if the parties be judicially separated, provided the alimony ordered by the court has been duly paid (*f*), even though the husband bring a further suit for dissolution of marriage. It seems, however, that a husband is not liable to his wife's solicitor for her costs in bringing a judicial separation suit, unless the actual necessity for the suit can be shown, in spite of the fact that the wife's statements

(*q*) Divorce Rule 155; and as to solicitors' remuneration generally, see title SOLICITORS.
(*r*) Divorce Rule 156.
(*s*) *I bid.*, 200.
(*t*) See p. 559, *ante*.
(*u*) Divorce Rule 216. As to the scales, see R. S. C., Appendix N.
(*a*) Divorce Rule 217.
(*b*) *I bid.*, 218.
(*c*) As to court fees, see Supreme Court Fees Order, 1884, rr. 2, 3, 6 and Schedule, and especially heads 29, 52, 82, 83 in the Schedule. As to sheriff's fees, see p. 585, *post*.
(*d*) See pp. 579, 580, *ante*.
(*e*) See pp. 428, 429, *ante*; compare *Prole* v. *Soady* (1868), 3 Ch. App. 220; *Capel* v. *Powell* (1864), 17 C. B. (N. S.) 743 (as to effect of dissolution).
(*f*) See note (*l*), p. 424, *ante*.

to her solicitor have satisfied him of the necessity (*g*), and the solicitor may have to show that he agreed with the wife that he was to look to her husband for his costs (*h*).

If a husband becomes bankrupt, a wife may be liable jointly with him to her solicitor for costs incurred (*i*). For a bill delivered to a husband for his wife's extra costs to be a sufficient bill (*j*) it must also set out the costs between party and party.

It is not to be implied that, where a wife's petition for judicial separation has failed and she has been given a usual order for costs (*k*), extra costs can also be recovered from her husband.

SUB-SECT. 6.—*Recovery of Costs.*

Registrar's order.

1187. An order for payment of costs may be obtained on the amount thereof being certified by the registrar (*l*), and as soon as his certificate is signed he will issue an order for payment within seven days of service (*m*). On non-compliance with this order, a writ of *fieri facias* or of sequestration may issue as of course in the registry, upon an affidavit of service of the order and of non-payment (*n*). Costs may also be recovered by means of a writ of *elegit* or by equitable execution; but no action lies in the King's Bench Division or elsewhere to enforce an order for payment of costs made in the Divorce Division (*o*). Where the enforcement of an order for costs against a co-respondent has been delayed for more than six years after the date of order, leave to issue execution may be obtained, if good cause be shown (*p*).

Execution.

Enforcing husband's bond.

1188. The bond given by a husband to secure his wife's costs is not delivered out to be sued upon without an order of the court (*q*), and the wife's solicitor should not seek to enforce the bond, for he has no greater rights than his client (*r*); but, as soon as the costs are paid, the bond can be delivered out to the husband's solicitor to be cancelled.

Recovering costs where King's Proctor intervenes.

1189. Although the King's Proctor show cause against a decree *nisi* obtained by a wife, she may be allowed to enforce her order for costs without waiting for the result (*s*), and a petitioner, whether husband (*t*) or wife (*a*), who is found to have committed adultery after decree *nisi*, may nevertheless enforce an order for costs,

(*g*) *Taylor* v. *Hailstone* (1882), 52 L. J. (Q. B.) 101; and see p. 429, *ante*.
(*h*) *Clark* v. *Field or Monteith*, [1885] W. N. 108, H. L.
(*i*) *Pead* v. *Price* (1903), 19 T. L. R. 563.
(*j*) Within the meaning of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37.
(*k*) See p. 548, *ante*.
(*l*) Divorce Rule 157.
(*m*) *Ibid.*, 178.
(*n*) *Ibid.*, 179; and as to these remedies, see pp. 586, 587, *post*.
(*o*) *Ivimey* v. *Ivimey*, [1908] 2 K. B. 260, C. A.; compare *Bailey* v. *Bailey* (1884), 13 Q. B. D. 855, C. A. (alimony *pendente lite*); and see p. 585, *post*.
(*p*) *Goodwin* v. *Goodwin*, [1897] P. 87 (a delay of upwards of six years); compare R. S. C., Ord. 42, r. 23.
(*q*) Divorce Rule 199.
(*r*) *Russell* v. *Russell*, [1892] P. 152, C. A.
(*s*) *Gladstone* v. *Gladstone* (1875), L. R. 3 P. & D. 260.
(*t*) *Hulse* v. *Hulse* (1871), L. R. 2 P. & D. 357.
(*a*) *Whitmore* v. *Whitmore* (1866), L. R. 1 P. & D. 96.

SECT. 11. Incidental Proceedings after Decree.

though this does not include the right of a wife to obtain the security given for her costs in the suit (*b*). If, however, a petition be dismissed at the instance of the King's Proctor on the ground of collusion, an order for costs against a co-respondent may be rescinded (*c*), but not if it be dismissed on the ground of renewed cohabitation (*d*) or of adultery since decree (*e*).

Payment of costs into and out of court.

1190. Where a respondent or co-respondent has been condemned in costs by a decree *nisi*, the order for payment, if applied for before such decree is made absolute, directs payment into the registry, the money not to be paid out before decree absolute; but an unsuccessful wife, who has obtained a "usual" order, may nevertheless proceed at once to obtain payment as soon as the amount has been ascertained and allowed on taxation (*f*).

SECT. 12.—*Enforcing Orders and the Authority of the Court.*

SUB-SECT. 1.—*In General.*

The powers of the court, whence derived.

1191. The power of the Divorce Division to enforce its orders and authority, in so far as it is not innate (*g*), appears to be conferred by the Judicature Act, 1873 (*h*), under which it would seem to have the powers possessed in October, 1875, by the courts (*i*), including the Court for Divorce and Matrimonial Causes (*k*), which were combined to form the High Court of Justice (*l*), and also new powers as to injunctions and receivers (*m*). All these powers remain (*n*) as at the date of its commencement, except in so far as they have since been altered, if at all, by statute or by the Divorce Rules. It must, however, be borne in mind that where there is no statute, rule, or practice bearing on a point in question, it is the

(*b*) *Butler* v. *Butler* (1890), 15 P. D. 126, C. A.
(*c*) *Hechler* v. *Hechler and Bennett* (1888), 58 L. J. (P.) 27.
(*d*) *Hyman* v. *Hyman*, [1904] P. 403.
(*e*) *Hulse* v. *Hulse* (1871), L. R. 2 P. & D. 357.
(*f*) Divorce Rule 201. See further, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 24 *et seq.*
(*g*) See p. 462, *ante*.
(*h*) 36 & 37 Vict. c. 66, ss. 16, 23, 24.
(*i*) Particularly the High Court of Chancery and the Court of Queen's Bench; see p. 468, *ante*.
(*k*) And the powers which it inherited from the Ecclesiastical Courts; see *Harvey* v. *Lovekin* (*otherwise Harvey*) (1884), 10 P. D. 122, *per* BRETT, M.R., at p. 127. The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 76, makes Acts of Parliament, which relate to former courts, apply to courts under it; and the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 21, saves existing procedure where not inconsistent; and see title COURTS, Vol. IX., p. 53.
(*l*) As to the powers of the Divorce Court immediately before the Judicature Acts, see *Clarke* v. *Clarke* (1873), L. R. 3 P. & D. 57; compare p. 588, *post;* and see *Edwards & Co.* v. *Picard*, [1909] 2 K. B. 903, C. A., *per* FLETCHER MOULTON, L.J., at p. 907.
(*m*) Conferred by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8).
(*n*) Although many of the orders and regulations of the High Court of Chancery, under which the power of the court derived from the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 57), s. 52, was administered, were annulled by the R. S. C., 1883 (see the preamble and Appendix O thereto), it is submitted that this does not affect them so far as the Divorce Division is concerned (see R. S. C., Ord. 68, r. 1 (d)). The President, Sir J. Hannen, was one of the Rule Committee who signed the R. S. C.; and see *Re Hailstone, Hopkinson* v. *Carter*, [1909] P. 118, C. A.

SECT. 12. Enforcing Orders and the Authority of the Court.

practice to proceed by analogy (*o*) to the principles of the Rules of the Supreme Court (*p*). The order (*q*) as to fees under the Sheriffs Act, 1887 (*r*), applies to divorce matters.

An order made in divorce proceedings for the payment of costs or for alimony cannot be enforced by an action on the order (*s*).

The suspension of a decree absolute is sometimes used to expedite obedience to an order (*t*); but settlements are not varied with extra stringency as against a party who has improperly obtained possession of a child of the marriage (*u*).

SUB-SECT. 2.—*Attachment.*

Of parties and others.

1192. Obedience to orders of the Divorce Division (other than for the actual payment of money (*a*)) can be enforced by attachment of one of the parties to the suit in accordance with the practice of the Court of Chancery (*b*); and, in addition to such attachment for contempt, there is another kind which may be the subject of an independent application against a person, even though not a party, in respect of an act of a criminal nature done outside the suit (*c*).

Issue of writ.

1193. Application for a writ of attachment, which may be made *ex parte* (*d*), must be to a judge on motion (*e*). The writ, if ordered to

(*o*) Compare *In the Goods of Patrick* (*John*) (1889), 14 P. D. 42, C. A.

(*p*) *Giles* v. *Giles*, [1900] P. 17, is an instance of this.

(*q*) 31st August, 1888 (W. N. (1888), Part II., p. 441).

(*r*) 50 & 51 Vict. c. 55, s. 20 (2).

(*s*) *Ivimey* v. *Ivimey*, [1908] 2 K. B. 260, C. A. (costs); *Bailey* v. *Bailey* (1884), 13 Q. B. D. 855 (alimony *pendente lite*); *Robins* v. *Robins*, [1907] 2 K. B. 13 (permanent alimony). The R. S. C. do not apply to such proceedings (R. S. C., Ord. 68, r. 1; *Ivimey* v. *Ivimey*, *supra*).

(*t*) See p. 593, *post*.

(*u*) *Symonds* v. *Symonds* (1872), L. R. 2 P. & D. 447.

(*a*) Though the Divorce Court formerly had this power also. Applications in this respect are now (where execution is impracticable) regulated by the Debtors Act, 1869 (32 & 33 Vict. c. 62), and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52); see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 337 *et seq.*

(*b*) See *Re Evans*, *Evans* v. *Noton*, [1893] 1 Ch. 252, C. A., where the difference, before the Judicature Acts, between attachment and committal is discussed. This process may be resorted to in respect of custody *pendente lite* (see p. 522, *ante*), security for wife's costs (see p. 525, *ante*), maintenance (see p. 568, *ante*), and custody (see p. 578, *ante*); see also title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 280 *et seq.* As to refusal to be inspected, see p. 527, *ante*, and as to molestation, see p. 591, *post*.

(*c*) *O'Shea* v. *O'Shea and Parnell* (1890), 15 P. D. 59, C. A. (an editor fined £100 for commenting on the conduct of a petitioner whose case was *sub judice*); *Re Mulock* (1864), 3 Sw. & Tr. 599 (a stranger fined £300 for writing a threatening letter to a petitioner); compare *Shaw* v. *Shaw* (1861), 2 Sw. & Tr. 517 (a petitioner, alleged to have intimidated a witness, ordered to pay the costs of the application); *Brodribb* v. *Brodribb* (1886), 11 P. D. 66 (similar order against co-respondent who had advertised, denying charges in petition and offering reward for discovery of the instigators); *Butler* v. *Butler* (1888), 13 P. D. 73 (writ of attachment against husband who had advertised for evidence, apparently with the object of prejudicing his wife's case). These decisions seem to depend on the inherent jurisdiction of the court, as to which compare *Sparks* v. *Martyn* (1668), 1 Vent. 1; and as to appeal and generally, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 280 *et seq.*

(*d*) *Favard* v. *Favard* (1896), 75 L. T. 664.

(*e*) Divorce Rule 110. The writ cannot issue without an order; see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 310.

SECT. 12. Enforcing Orders and the Authority of the Court.

issue, is prepared by the applicant and taken to the registry, with an office copy, and, when approved, is signed by a registrar and sealed (*f*). It has the same effect as in other divisions of the High Court (*g*), and if it is required to serve an original order which has already been filed in the registry, it may be delivered out on application, supported by affidavit (*h*). A judge of the King's Bench Division has no power to order attachment to enforce an order for costs in a matrimonial suit (*i*).

It seems that an affidavit in support of a motion to commit must be filed before the notice of motion is served (*k*). A person served with notice of motion for his attachment is not entitled to conduct money (*l*).

It seems that a party who has been served with a citation etc. wherein his name is misspelt cannot on that account take advantage to have an order for attachment issued against him set aside (*m*).

Discharge from custody.

When the court is not sitting, a registrar for good cause may, on application, order the discharge of the order for attachment (*n*), and a husband who has been attached for not paying or securing his wife's costs is entitled to his release on complying with the order,

Costs.

but an order on him to pay her costs of the motion to attach and the motion to release is not a condition precedent to release (*o*).

SUB-SECT. 3.—*Sequestration.*

Application.

1194. Obedience to an order (*p*) may also be enforced by a writ of sequestration (*q*), application for which must also be made to a judge (*r*), on motion, except where there is default in the payment of a sum of money ordered to be paid, in which case the writ is issued as of course in the registry, upon affidavit of service of the order and non-payment (*s*). The issue of the writ need not be preceded by attachment (*t*).

(*f*) Divorce Rule 111.

(*g*) Compare R. S. C., Ord. 44, r. 1. It is submitted, however, that where an order is intended to be enforced by attachment the correct indorsement thereon is made under Consolidated Order XXIII., r. 10, as varied by the General Order of 7th January, 1870, r. 1 (see p. 584, *ante*); compare *Pace* v. *Pace* (1891), 61 L. J. (P.) 114.

(*h*) *Davies* v. *Davies and Dalby* (1862), 2 Sw. & Tr. 437.

(*i*) *Cook* v. *Cook* (1885), 2 T. L. R. 10.

(*k*) *Symons* v. *Symons and Pike* (1861), 30 L. J. (P. M. & A.) 215.

(*l*) *Jeffries* v. *Jeffries* (1907), 51 Sol. Jo. 572.

(*m*) *Churchill* v. *Churchill* (1868), L. R. 1 P. & D. 485; and see *Parr* v. *Parr and White* (1863), 4 Sw. & Tr. 229, as to what is sufficient service of an order, on non-compliance with which attachment is sought.

(*n*) Divorce Rule 112.

(*o*) *Ayres* v. *Ayres* (1901), 71 L. J. (P.) 18.

(*p*) Also derived from the Court of Chancery; see General Order of 7th January, 1870, r. 6; and p. 584, *ante*. Compare R. S. C., Ord. 43, r. 6.

(*q*) See title EXECUTION, Vol. XIV., pp. 79 *et seq.*

(*r*) Divorce Rule 110; as in cases of attachment, see p. 585, *ante*.

(*s*) Divorce Rule 203; as to alimony *pendente lite*, see p. 519, *ante;* as to security for wife's costs, see p. 525, *ante;* as to costs, p. 583, *ante;* as to damages, see p. 546, *ante;* as to permanent alimony, see p. 564, *ante;* as to maintenance, see p. 568, *ante;* as to payments on refusal to cohabit, see p. 569, *ante*.

(*t*) *Dent* v. *Dent* (1867), L. R. 1 P. & D. 366 (payment of money); *Miller* v. *Miller* (1870), L. R. 2 P. & D. 54 (obedience); *Re East of England Bank* (1864), 10 Jur. (N.S.) 1093; *Hodgson* v. *Hodgson* (1857), 23 Beav. 604; and see *Buttler* v. *Mathews* (1854), 19 Beav. 549. As to attachment, see p. 585, *ante*.

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1195. The writ issues in general terms (*a*), but neither the future income of a married woman restrained from anticipation (*b*), nor a fund on which the offender's solicitors have a lien in another suit (*c*), is subject to it; though where a trust is being administered in the Chancery Division, the judge may order funds to which a beneficiary is entitled to be paid to sequestrators appointed by the Divorce Division (*d*).

What property is affected.

The court has no power, on a motion, to make an order in favour of sequestrators against a stranger who disputes his liability to the contemnor (*e*).

Effect of the writ.

1196. The effect of a writ of sequestration and the manner of dealing with the proceeds are as in other divisions of the High Court (*f*); but when the order for payment (usually within seven days) of costs is issued by the registrar, after he has signed the certificate, and is served on the party liable or his solicitor, and is not complied with, a writ of sequestration or *fieri facias* may be issued, as of course, on affidavit of service and non-payment (*g*).

Summary issue.

A writ of sequestration may issue after substituted or constructive service of the order disobeyed, where the person in contempt is keeping out of the way (*h*).

SUB-SECT. 4.—*Fieri Facias. Elegit. Writs in Aid.*

Where and how issued.

1197. In default of payment of a sum of money at the time appointed by order of the court, a writ (*i*) of *fieri facias* (*k*), or of

(*a*) *Miller* v. *Miller* (1870), L. R. 2 P. & D. 54; *Clinton* v. *Clinton* (1866), L. R. 1 P. & D. 215, where a husband's sole income was in the discretion of trustees.

(*b*) *Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A. (custody); *Re Glanvill, Ellis* v. *Johnson* (1886), 31 Ch. D. 532, C. A.; *Worrall* v. *Worrall and Jones* (1895), 11 T. L. R. 573; and see, further, title EXECUTION, Vol. XIV., p. 84.

(*c*) *Munt* v. *Munt* (1862), 2 Sw. & Tr. 661.

(*d*) *Re Slade, Slade* v. *Hulme* (1881), 18 Ch. D. 653.

(*e*) *Craig* v. *Craig*, [1896] P. 171 (refusal of a co-respondent's trustees to pay money, alleged to be his, into court); GORELL BARNES, J., observed, at p. 174, that he had not been asked to consider R. S. C., Ord. 45, rr. 3, 4. See generally, title EXECUTION, Vol. XIV., pp. 1 *et seq.*

(*f*) R. S. C., Ord. 42, r. 6; and see generally, title EXECUTION, Vol. XIV., pp. 1 *et seq.*

(*g*) Divorce Rule 179, which is similar to the General Order of 7th January, 1870, rr. 5, 6, but differs from R. S. C., Ord. 43, r. 7; compare Divorce Rule 203, and see note (*a*), *supra*.

(*h*) See *Allport* v. *Allport* (1909), 25 T. L. R. 588; compare *Allen* v. *Allen* (1885), 10 P. D. 187; *Hyde* v. *Hyde, supra*. As to registration of the writ, see title EXECUTION, Vol. XIV., p. 70, and as to vacation of registration, see Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 19, which disposes of *Cook* v. *Cook* (1890), 15 P. D. 116, where it was held that the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), did not give this power. As to effect of death of contemnor, see *Pratt* v. *Inman* (1889), 43 Ch. D. 175, and title EXECUTION, Vol. XIV., pp. 85, 86.

(*i*) See note (*n*), p. 584, *ante*. This power also is derived from the Court of Chancery, or it might be exercised under the former practice of the superior courts of common law (see *Hyde* v. *Hyde, supra, per* COTTON, L.J., at pp. 172, 173). As to the provision (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11)) that, if there is any conflict or variance, the rules of equity prevail, not applying to rules of practice (or, *quære*, to the Divorce Division; see *Morris* v. *Freeman* (1878), 3 P. D. 65, *per* HANNEN, P., at p. 69); compare *Temperton* v. *Russell*, [1893] 1 Q. B. 435, C. A., *per* LINDLEY, L. J., at p. 438.

(*k*) See *Underwood* v. *Underwood*, [1894] P. 204, C. A., *per* LINDLEY, L.J., at p. 208 (in 1839 the writ of *fieri facias* had been introduced into the Court of

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elegit (*l*), may be issued as of course in the registry, upon affidavit (*m*) of service of the order and non-payment.

These writs must be prepared by the applicant, and taken to the registry with an office copy to be signed by the registrar and sealed (*n*). They are executed in similar manner to those in other divisions of the High Court (*o*), as are also writs in aid of them, such as writs of *venditioni exponas* (*p*), of *distringas nuper vicecomitem* (*q*), and of *fieri* (or *sequestrari*) *facias de bonis ecclesiasticis* (*r*).

Writs in aid.

If the writ is unproductive, the creditor can issue a judgment summons in bankruptcy, provided it can be proved that the debtor can pay instalments of £5 per month; otherwise it is the practice to issue it in the county court of the district in which the debtor resides.

SUB-SECT. 5.—*Charging Orders. Distringas. Stop Orders.*

Charging orders.

1198. If by a decree or order of the Divorce Division any costs, charges, or expenses are made payable (*a*) to any person, he is for certain purposes (*b*) deemed a judgment creditor; and charging orders may be made (*c*) in manner and with effect similar to those in other divisions of the High Court (*d*). The more usual practice (*e*) is for the order absolute to be made by a registrar as well as the order *nisi* (*f*).

Distringas.

A writ of *distringas* (*g*) may be sued out to restrain the Bank of England from transferring stock or paying dividends (*h*) until

Chancery and was, at the time of the passing of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 52, one of the ordinary modes of enforcing an order of the court for payment of money to a person).

(*l*) See *Kippax* v. *Kippax* (1891), 67 L. T. 382 (inquisition by the sheriff with witnesses served with *subpœna*).

(*m*) Divorce Rule 203.

(*n*) *Ibid.*, 111.

(*o*) Compare R. S. C., Ord. 43, r. 1. As to the indorsement, see Consolidated Order XXIX., rr. 10, 12, and p. 586, *ante*.

(*p*) Compare R. S. C., Ord. 43, r. 2, which followed Consolidated Order XXIX., r. 9; and see title EXECUTION, Vol. XIV., p. 60.

(*q*) See title EXECUTION, Vol. XIV., p. 61.

(*r*) Compare R. S. C., Ord. 43, rr. 3, 4, which followed Consolidated Order XXIX., rr. 11, 13; and see titles ECCLESIASTICAL LAW, Vol. XI., pp. 616 *et seq.*; EXECUTION, Vol. XIV., p. 89.

(*a*) This includes the cases mentioned in note (*s*), p. 586, *ante*. The Divorce Court had not this power before the Judicature Act, 1873 (36 & 37 Vict. c. 66); see *Clarke* v. *Clarke* (1873), L. R. 3 P. & D. 57, and p. 584, *ante*.

(*b*) Under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 18; and see *Oliver* v. *Lowther* (1880), 28 W. R. 381.

(*c*) Judgments Act, 1838 (1 & 2 Vict. c. 110), ss. 14, 15; Judgments Act, 1840 (3 & 4 Vict. c. 82), s. 1.

(*d*) Compare R. S. C., Ord. 46, r. 1; and see title EXECUTION, Vol. XIV., pp. 101 *et seq.*

(*e*) Compare R. S. C., Ord. 54, r. 12, as amended in 1908.

(*f*) See also *Ricketts* v. *Ricketts*, [1891] W. N. 29 (order absolute charging a husband's Consols in respect of alimony for his wife in the Queen's Bench Division (intituled in a suit in the Divorce Division); mortgagee's action, commenced in Chancery Division by originating summons, to enforce the charge; default in appearance; foreclosure order and transfer of Consols to wife ordered by NORTH, J.).

(*g*) See title EXECUTION, Vol. XIV., pp. 108, 112.

(*h*) See Consolidated Order XXVII., rr. 1, 2, and note (*n*), p. 584, *ante*; compare R. S. C., Ord. 46, rr. 2, 3.

the rights of claimants be decided; but the effect is only temporary (*i*).

Stop orders (*k*) have the same effect as in the other divisions of the High Court (*l*).

Solicitors' charging orders (*m*) are, in proper cases, made as in other divisions of the High Court, and may affect maintenance secured to a wife which is property for this purpose; but the solicitor must show that his contract is with the wife and has reference to her separate estate (*n*).

Solicitors' charging orders.

SUB-SECT. 6.—*Garnishee Orders.*

1199. It is the practice for the registrars (*o*) to make garnishee orders *nisi* on *ex parte* applications supported by affidavit (*p*), and such orders indicate the period at the expiration of which they may be made absolute (*q*). They may be made (*r*) in respect of costs or of arrears of alimony (*s*). The application may be adjourned from the registrar to the judge in chambers, who sometimes (*t*) hears the application to make the order absolute. This application may be adjourned into court and the order absolute, when made, is similar in effect to that in the other divisions of the High Court (*a*).

Garnishee orders.

The property available under such orders is specified elsewhere (*b*).

SUB-SECT. 7.—*Receivers.*

1200. A receiver may be appointed by an interlocutory (*c*) order

Receivers.

(*i*) See Consolidated Order XXVII., r. 4; and compare R. S. C., Ord. 46, r. 10. The object is to prevent a fund being dealt with without a person, who has a claim, being able to assert it.

(*k*) It is submitted that these are governed by Consolidated Order XXVI., rr. 1, 2, (as modified by the Supreme Court Funds Rules, 1905; see *Brereton* v. *Edwards* (1888), 21 Q. B. D. 488, C. A., and see title EXECUTION, Vol. XIV., p. 110.

(*l*) Compare R. S. C., Ord. 46, rr. 2, 12, 13.

(*m*) Under the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28; and see title SOLICITORS.

(*n*) *Harrison* v. *Harrison* (1888), 13 P. D. 180, C. A.

(*o*) Though in *Whittaker* v. *Whittaker* (1881), 7 P. D. 15, the application seems to have been made to a judge; see generally title EXECUTION, Vol. XIV., pp. 90 *et seq.*

(*p*) Irregularity in the affidavit may be remedied by appearance to the summons to make absolute (*Edmunds* v. *Edmunds*, [1904] P. 362).

(*q*) These orders seem to be made under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 61—67; as, although repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), the jurisdiction thereby conferred is saved (*ibid.*, s. 5 (b); but see *Whittaker*, *supra*, cited in *Edmunds* v. *Edmunds*, *supra*; and compare *Ivimey* v. *Ivimey*, [1908] 2 K. B. 260, C. A.; *Robins* v. *Robins*, [1907] 2 K. B. 13, *per* JOYCE, J., at p. 17. The Divorce Court could not make such orders; see *Clarke* v. *Clarke* (1873), L. R. 3 P. & D. 57; and compare *Crispin* v. *Cumano* (1869), L. R. 1 P. & D. 622, 625.

(*r*) Though this seems inconsistent with the *dicta* of Lord ESHER, M.R., and of BOWEN, L.J., in *Bailey* v. *Bailey* (1884), 13 Q. B. D. 855, C. A., to the effect that the only remedy for disobedience to an order is that pointed out by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 52; see also *Ivimey* v. *Ivimey*, *supra*; and the same observation seems to apply to proceedings under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.

(*s*) For the other cases to which these orders are applicable, see note (*s*), p. 586, *ante*.

(*t*) *Edmunds* v. *Edmunds*, *supra*.

(*a*) Compare R. S. C., Ord. 45, r. 1; and see title EXECUTION, Vol. XIV., pp. 90 *et seq.*

(*b*) See title EXECUTION, Vol. XIV., pp. 84, 93, 94, 121; and as to the availability of pensions, *ibid.*, and title CHOSES IN ACTION, Vol. IV., pp. 400, 401.

(*c*) Before or after a final judgment (*Smith* v. *Cowell* (1880), 6 Q. B. D. 75, C. A.).

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of the court, unconditionally or on terms, in all cases in which it appears just and convenient (*d*), and such appointment has the same effect as in the other divisions (*e*) of the High Court (*f*).

The practice as to the making of these orders in the Divorce Division is similar to that in garnishee proceedings or for charging orders (*g*). The application may be made *ex parte* in the first instance supported by an affidavit of service of the order for payment of the amount due, and of the property to be received. The application is then usually adjourned till the debtor or his solicitor is served with a summons.

An *interim* order may be made pending the order absolute, which must be served personally or by substituted service.

Under what circumstances.

In the absence of special circumstances, however, a receiver will not be appointed if execution can be obtained in the ordinary way (*h*), nor should an order be granted *ex parte* except in cases of emergency; but it seems that, if a husband fail to pay maintenance ordered, a receiver may be appointed as to the marriage settlement in spite of possible damage to the interests of the children (*i*).

SUB-SECT. 8.—*Discovery in aid of Execution.*

Oral examination of debtor.

1201. A creditor may apply at the registry, in respect of an order obtained for payment, for an order that the judgment debtor (*k*) shall be orally examined as to what, if any, debts are owing to him (*a*), and in due course the registrar will make an appointment for that purpose.

SUB-SECT. 9.—*Injunctions. Mandamus.*

When granted.

1202. An injunction (*b*) or mandamus (*c*) may be granted where

(*d*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); see also p. 584, *ante*; Consolidated Order XXIV., rr. 1, 2; compare R. S. C., Ord. 50, rr. 16, 18, and Consolidated Order XXXV., r. 23 (compare R. S. C., Ord. 50, r. 21). BUTT, J., in *Waddell* v. *Waddell*, [1892] P. 226, said, "I have all the power of the Chancery Division," and ordered a receiver of the estate of a dead co-respondent, under R. S. C., Ord. 17, r. 4, and Ord. 42, r. 8; but see *Ivimey* v. *Ivimey*, [1908] 2 K. B. 260, C. A., *per* COZENS-HARDY, M.R., at p. 263; *Brydyes* v. *Brydges and Wood*, [1909] P. 187, C. A.

(*e*) *Ibid.*

(*f*) See generally, and as to what property is available, titles EXECUTION, Vol. XIV., pp. 117 *et seq.*, 124 *et seq.*; RECEIVERS.

(*g*) See p. 589, *ante*. As to the practice in the King's Bench and Chancery Divisions, see title EXECUTION, Vol. XIV., pp. 122 *et seq.*

(*h*) *Manchester and Liverpool District Banking Co.* v. *Parkinson* (1888), 22 Q. B. D. 173, C. A., disposing of *Whittaker* v. *Whittaker* (1881), 7 P. D. 15, where an order *nisi* for the attachment of a debt and the appointment of a receiver was made in chambers; and see *Willis* v. *Cooper* (1900), 44 Sol. Jo. 698; *Hills* v. *Webber* (1901), 17 T. L. R. 513, C. A.

(*i*) *Oliver* v. *Lowther* (1880), 28 W. R. 381; and see, further, title EXECUTION, Vol. XIV., pp. 109, 110, 115 *et seq.*

(*k*) See note (*b*), p. 588, *ante*.

(*a*) Apparently under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 53, 54, 60 (still effective as to divorce practice); compare R. S. C., Ord. 42, rr. 32—34; and see title EXECUTION, Vol. XIV., p. 126.

(*b*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); and see, generally, title INJUNCTION.

(*c*) *E.g.*, in respect of evidence required to be taken in India or one of the Crown colonies; and see title CROWN PRACTICE, Vol. X., pp. 1 *et seq.*

it is just or convenient; thus, where a matrimonial suit is pending, but not after final decree (*d*), one spouse will be restrained from forcing his or her society upon the other, or from other acts of molestation (*e*). Similar protection may be obtained as to the property of the parties, and it is the practice of the court to enjoin in proper cases (*f*), although no writ has been issued asking for an injunction, and no reference to one appears in the petition (*g*).

Molestation.

The mere bringing of a suit for judicial separation or of a suit for dissolution abroad is not molestation; and an injunction will not be granted to restrain a respondent from taking proceedings in a foreign country (*h*), nor to ensure payment where no fixed sum has been ordered to be paid (*i*); nor will the court exact an undertaking so stringent that it would be almost impossible to abide by it (*k*).

Exceptions.

SECT. 13.—*Final Decrees. Effect on Status.*

SUB-SECT. 1.—*In Suits for Dissolution and Nullity of Marriage.*

(i.) *Decree Absolute.*

1203. Every decree of dissolution or nullity (*l*) of marriage is, in the first instance, a decree *nisi* (*m*), and is not made absolute till the expiration of six calendar months (*n*) from the pronouncing

Decree *nisi* usually made absolute in six months.

(*d*) *Smith* v. *Smith* (1889), 59 L. J. (P.) 15.

(*e*) *Northledge* v. *Northledge* (1894), 70 L. T. 815 (respondent restrained from remaining in wife's licensed house); *Phillips* v. *Phillips* (1905), *Times*, 14th and 17th August, 5th October, 19th December; compare *Stevens* v. *Stevens* (1907), 24 T. L. R. 20, where a son was restrained from breaking and entering his mother's house; see also p. 451, *ante*.

(*f*) But a petitioner cannot be restrained from prosecuting a suit; see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5); *Marshall* v. *Marshall* (1879), 5 P. D. 19. Compare *Besant* v. *Wood* (1879), 12 Ch. D. 605, where a wife, who had entered into a deed of separation, was restrained from suing *in futuro* for restitution of conjugal rights.

(*g*) See *Vardopulo* v. *Vardopulo* (1909), 25 T. L. R. 518, C. A., *per* COZENS-HARDY, M.R.; see also *Brydges* v. *Brydges and Wood*, [1909] P. 187, C. A., *per* FARWELL, L.J., at p. 191; R. S. C., Ord. 50, r. 6; *Regulae Generales*, Michaelmas Vacation, 1854, Form 36; R. S. C., Ord. 41, r. 5.

(*h*) *Vardopulo* v. *Vardopulo*, *supra*; compare *Von Eckhardstein* v. *Von Eckhardstein* (1907), 23 T. L. R. 539, 593, C. A.; but see, *contra*, *Christian* v. *Christian* (1897), 78 L. T. 86 (wife's petition for judicial separation; husband's proceedings in Scotland for dissolution restrained, although he disputed the jurisdiction of the English court); and compare *Armstrong* v. *Armstrong*, [1892] P. 98, where the co-respondent had filed an act on petition, and the petitioner's commission to Vienna was consequently suspended, the petitioner who intended examining the witness before the court in Vienna being restrained.

(*i*) *Newton* v. *Newton* (1885), 11 P. D. 11.

(*k*) *Brydges* v. *Brydges and Wood*, *supra*, *per* FARWELL, L.J., at p. 192.

(*l*) Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31), s. 1.

(*m*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7.

(*n*) So that if, for instance, a decree *nisi* be pronounced on 1st April, it cannot be made absolute before 2nd October unless the court fixes a shorter period.

SECT. 13. Final Decrees. Effect on Status.

thereof; unless the court fixes a shorter time (*o*), which cannot, however, be less than three months (*p*).

Application to make a decree absolute is by a written notice, filed in the registry; and the decree is pronounced in open court on the first motion day (*q*).

Application. Evidence.

The notice must be accompanied by an affidavit (*r*) of search up to within two days of the filing of the affidavit, stating that no one has obtained leave to intervene, that no appearance (*s*) has been entered, and that no affidavit has been filed on behalf of any person wishing to show cause; or, if this be not the case, explaining what has been done (*t*). If the motion day be more than six days after this affidavit, a further similar affidavit of search up to within six clear days of the motion must be filed (*u*); and should the application be delayed for more than twelve months, it is the practice to require a further affidavit from the petitioner, if available, explaining the delay.

Rights of petitioner and respondent.

1204. The application can only be made by the injured party (*v*), and, if it be delayed, the fact that the party in fault desires a decree does not entitle him or her to apply either in dissolution (*w*) or in nullity (*x*) of marriage. The remedy of such party is to have the suit dismissed for want of prosecution (*a*), as the petitioner has not the right to keep the suit in an inchoate state (*b*); but the court will allow him or her a reasonable time, after six months, to decide what course should be taken (*c*), seeing that he or she has not

(*o*) Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 3; see also Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 5. This discretion was exercised in *Fitzgerald* v. *Fitzgerald* (1874), L. R. 3 P. & D. 136 (changed to three months, after long litigation); *Sheffield* v. *Sheffield and Paice* (1881), 29 W. R. 523 (after second trial; recital of both decrees *nisi*); *Rogers* v. *Rogers* (1894), 6 R. 589 (in three months after second decree *nisi*, the first having been rescinded on the ground of collusion); *Edwards* v. *Edwards and Wilson* (1899), *Times*, 17th, 20th June; and in an unreported case in July, 1909, in less than six months, after petitioner's application in chambers, the King's Proctor attending and not objecting, to enable the husband to marry a woman who was about to be confined; but not merely on the ground of convenience (*Rippingall* v. *Rippingall and Lockhart* (1882), 48 L. T. 126); nor on the ground of bad health and anxiety (*Shelton* v. *Shelton and Campbell* (1869), 38 L. J. (P. & M.) 34; and see *M.* v. *B.* (1874), L. R. 3 P. & D. 200).

(*p*) *Watton* v. *Watton* (1866), L. R. 1 P. & D. 227.

(*q*) Divorce Rule 207.

(*r*) *Boddy* v. *Boddy and Grover* (1861), 30 L. J. (P. M. & A.) 95; compare *Stone* v. *Stone and Brownrigg* (1862), 3 Sw. & Tr. 113.

(*s*) Any appearance which has been entered for any purpose since decree *nisi* must be included.

(*t*) Divorce Rule 80.

(*u*) *Ibid.*, 194; and as to security for costs, see p. 523, *ante*.

(*v*) But see *G.* v. *G.*, *falsely called K.* (1908), 25 T. L. R. 328, C. A. (nullity on the ground of relative impotence of both).

(*w*) *Ousey* v. *Ousey* (1875), 1 P. D. 56.

(*x*) *Halfen* v. *Boddington* (1881), 6 P. D. 13 (wife's petition for restitution, amended to nullity; decree *nisi;* her application to dismiss petition, and husband's for decree absolute, refused by court; ultimately decree absolute on her application).

(*a*) *Ibid.*

(*b*) *Lewis* v. *Lewis*, [1892] P. 212.

(*c*) *Parsons* v. *Parsons*, [1907] P. 331.

the right to insist on a decree absolute immediately that period has expired (*d*); though ultimately he or she is entitled, except for reasons provided by statute (*e*). Accordingly, where it is in the discretion of the court to grant or refuse a decree (*f*), or when, in the exercise of its jurisdiction (*g*), it orders that provision shall be made for a wife (*h*) or child (*i*), the decree may be suspended till its conditions are complied with (*k*).

Taking out costs and damages.

1205. After decree absolute, costs and damages can be drawn (*l*) from the registry (*m*); and, in the absence of objection, it is the practice for any original documents put in during the proceedings to be handed out on copies being left.

When the decree takes effect.

1206. The decree absolute is the final decree in the suit (*n*), for until such decree the marriage still subsists (*o*), but it acts as if it had been made at the time of the decree *nisi* (*p*); though not for the purpose of an alteration of status (*q*). If a marriage be

(*d*) *Watton* v. *Watton* (1866), L. R. 1 P. & D. 227; and where the King's Proctor has unsuccessfully shown cause, the decree need not be made absolute till he has had time to appeal, if he so desire (*Dering* v. *Dering* (1868), L. R. 1 P. & D. 531); and see p. 555, *ante*. The King's Proctor is sometimes allowed time to decide if he should show cause (*Palmer* v. *Palmer* (1865), 4 Sw. & Tr. 143; *Richards* v. *Richards and Cook* (1869), 21 L. T. 598; *Hamilton* v. *Hamilton and Riding* (1875), 33 L. T. 462.

(*e*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 30, 31; Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 2; Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1 (1). See *Patterson* v. *Patterson* (1870), L. R. 2 P. & D. 192 (decree absolute, although petitioner's solicitor's costs not paid). In *Worsley* v. *Worsley and Worsley* (1904), 20 T. L. R. 171, the C. A., on the application of a co-respondent, after witnesses had been convicted of perjury, ordered a new trial, and, the petitioner having failed to set the case down, the co-respondent was dismissed from the suit, the court refusing a decree absolute against the respondent.

(*f*) As in *Lander* v. *Lander, Temple Fox and Fox* (1890), 63 L. T. 257 (subject to allowance); *Parry* v. *Parry*, [1896] P. 37 (conduct conducing; decree subject to allowance); *Pryor* v. *Pryor*, [1900] P. 157 (husband's cruelty; custody of child to wife and her parents the price of his decree).

(*g*) *Langworthy* v. *Langworthy* (1886), 11 P. D. 85, C. A.; and see Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1 (1).

(*h*) *Latham* v. *Latham and Gethin* (1861), 2 Sw. & Tr. 299 (not till alimony *pendente lite* paid); *Bent* v. *Bent and Footman* (1861), 2 Sw. & Tr. 392 (not till damages settled on wife *dum sola et casta*, and then on children); *Ashcroft* v. *Ashcroft*, [1902] P. 270, C. A. (not till £1 a week secured to invalid wife during joint lives *dum sola et casta*).

(*i*) *Clark* v. *Clark and Bouck* (1861), 2 Sw. & Tr. 520 (not till damages assigned to trustee for child); *Langworthy* v. *Langworthy*, *supra* (nullity not decreed till child provided for).

(*k*) Compare *Forth* v. *Forth* (1867), 16 L. T. 574 (decree of judicial separation suspended for allowance to be made); *Phillip* v. *Phillip* (1873), 21 W. R. 392 (the same; till alimony secured by deed).

(*l*) Divorce Rule 201.

(*m*) Compare note (*b*), p. 524, *ante*.

(*n*) *Hyman* v. *Hyman*, [1904] P. 403; this *dictum* is cited (though without approval) in *Brydges* v. *Brydges and Wood*, [1909] P. 187, 193, C. A.

(*o*) *Stanhope* v. *Stanhope* (1886), 11 P. D. 103, C. A., commenting on *Laxton* v. *Laxton* (1861), 30 L. J. (P. M. & A.) 208; *Hulse* v. *Hulse* (1871), L. R. 2 P. & D. 259; *Ellis* v. *Ellis* (1883), 8 P. D. 188, C. A.

(*p*) *Prole* v. *Soady* (1868), 3 Ch. App. 220.

(*q*) *Norman* v. *Villars* (1877), 2 Ex. D. 359, C. A.

SECT. 13. Final Decrees. Effect on Status.

twice celebrated and, *per incuriam*, the second celebration only be alleged in the petition, this may be rectified by amending the decrees, both *nisi* and absolute, provided the respondent have notice (*r*).

Where there is a suit for the administration of the trusts of a marriage settlement in the Chancery Division, a husband against whom a decree *nisi* has been made need not necessarily be made a party to it (*s*).

(ii.) *Right to Name.*

Right to name.

1207. When a marriage has been dissolved or annulled on the petition either of husband or wife, the latter is entitled to call herself by her late husband's name, or by her former name, or by any other name she may obtain by reputation; provided no one thereby suffers any injury of which the law can take notice (*t*).

The court has no power to enjoin a peeress who obtains a decree of divorce against her husband from afterwards continuing to call herself by the title of which she had the use whilst married to her first husband, even if she remarry with a commoner (*a*). Even the House of Lords would adjudicate upon such a question only in its capacity of Committee for Privileges (*b*).

(iii.) *Remarriage.*

(a) *After Dissolution.*

When.

1208. As soon as a decree absolute dissolving a marriage has been pronounced, a respondent (unless intending to appeal), and also, it seems (*c*), a petitioner, if the respondent has had time and opportunity to appeal against the decree *nisi*, and has not done so (*d*), may marry again (*e*) as if the marriage had been dissolved by death (*f*). A man may not, however, marry the sister of his divorced wife whilst the latter is alive (*g*).

With whom.

There is nothing to prevent persons whose marriage has been dissolved from marrying one another again (*h*).

(*r*) *Hampson* v. *Hampson*, [1908] P. 355 (no costs against respondent); *Marshall* v. *Marshall* (1909), 25 T. L. R. 716.

(*s*) *Stephenson* v. *Strutt* (1872), 26 L. T. 690.

(*t*) *Cowley* v. *Cowley*, [1900] P. 118, 305, C. A.; affirmed *Cowley* (*Earl*) v. *Cowley* (*Countess*), [1901] A. C. 450; *Fendall* v. *Goldsmid* (1877), 2 P. D. 263; *Du Boulay* v. *Du Boulay* (1869), L. R. 2 P. C. 430; and see title NAME AND ARMS, CHANGE OF.

(*a*) *Cowley* v. *Cowley*, *supra*.

(*b*) *Ibid.*; and see titles CONSTITUTIONAL LAW, Vol. VI., p. 454; COURTS, Vol. IX., p. 20; PEERAGES AND DIGNITIES.

(*c*) But see regulations issued by the superintendent registrar on the point.

(*d*) Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9.

(*e*) A ceremony gone through before these requirements are fulfilled is, of course, void; see *Chichester* v. *Mure* (*falsely called Chichester*) (1863), 3 Sw. & Tr. 223; *Rogers, otherwise Briscoe* (*falsely called Halmshaw*) v. *Halmshaw* (1864), 3 Sw. & Tr. 509.

(*f*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 57.

(*g*) Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), s. 3 (2).

(*h*) *Fendall* v. *Goldsmid* (1877), 2 P. D. 263. As to the duty of a minister

(b) *After Nullity.*

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1209. The right to remarry after a final sentence of nullity seems not to depend upon any statute but on the ecclesiastical law (*i*), whereby if there were remarriage and the production of children by the impotent spouse, after sentence of nullity on the ground of impotence, *quoad hanc* or otherwise, apparently (*k*) the first marriage might be held good and the second disregarded (*l*).

Governed by ecclesiastical law.

SUB-SECT. 2.—*In other Matrimonial Suits.*

(i.) *Judicial Separation.*

1210. The effect of judicial separation is, for some purposes, only local (*m*); and if, after such a decree, a decree of dissolution of marriage be pronounced by the court of the domicil of the parties abroad, it seems that this may put an end to orders for alimony and custody, which were ancillary to the earlier decree made in this country, and that a declaration may be obtained to that effect, either absolute or conditioned on payment of alimony and costs already due, and on a future allowance being made, and on access to children being allowed (*n*).

Limited effect.

Foreign decree.

(ii.) *Jactitation of Marriage.*

1211. A decree in a suit for jactitation of marriage, pronouncing a person free from matrimonial engagements, does not act as an estoppel to the proof of such person's marriage with the other party to such suit in support of an indictment for bigamy (*o*).

Decree does not estop proof of marriage on an indictment.

SUB-SECT. 3.—*In Suits for Declaration of Legitimacy etc.*

1212. The effect of decrees under the Legitimacy Declaration Act, 1858 (*p*), and the Greek Marriages Act, 1884 (*q*), is stated elsewhere (*r*).

Effect of decree

with regard to the solemnisation of the marriage of a divorced person, see title ECCLESIASTICAL LAW, Vol. XI., p. 694.

(*i*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22. The Divorce Amendment Act, 1868 (31 & 32 Vict. c. 77), s. 4, can only refer (if the first lines of the section repealed by the Statute Law Revision Act, 1893 (56 & 57 Vict. c. 14), be restored) to the Act of 1857, which does not deal with nullity; and the Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31), has no reference to remarriage.

(*k*) *I.e.*, if the old cases were followed.

(*l*) *Essex's (Countess) Divorce* (1613), 2 State Tr. 786, 858; *Welde (alias Aston)* v. *Welde* (1731), 2 Lee, 580; *Norton* v. *Seton* (1819), 3 Phillim. 147, 162, 164; *N——r, falsely called M——e*, v. *M——e* (1853), 2 Rob. Eccl. 625, 636; *W——* v. *H——, falsely called W——* (1861), 30 L. J. (P. M. & A.) 73, 75; *G.* v. *G., falsely called K.* (1908), 25 T. L. R. 328, C. A.

(*m*) *Armytage* v. *Armytage*, [1898] P. 178, 196. As to the effect of judicial separation upon the domicil of the wife, see title CONFLICT OF LAWS, Vol. VI., p. 192; *Re Mackenzie, Mackenzie* v. *Edwards-Moss* (1911), 27 T. L. R. 337.

(*n*) *W.* v. *W.* (1908), 13th April, unreported, C. A., affirming decision of GORELL BARNES, P., in chambers.

(*o*) *Kingston's (Duchess) Case* (1776), 20 State Tr. 355, 538.

(*p*) 21 & 22 Vict. c. 93, s. 8.

(*q*) 47 & 48 Vict. c. 20, s. 2.

(*r*) See p. 315, *ante*; and title BASTARDY, Vol. II., p. 433.

SECT. 14. Summary Jurisdiction.

SECT. 14.—*Summary Jurisdiction.*

SUB-SECT. 1.—*On what Grounds, and by what Court, Relief may be given.*

Grounds for application by wife.

1213. A court of summary jurisdiction (*a*) may grant relief (*b*) on the application of a wife in any of the following cases (*c*):

(1) Where her husband has been convicted summarily of an aggravated assault upon her (*d*);

(2) Where her husband has been convicted on indictment of an assault upon her, and sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months (*e*);

(3) Where she has been deserted by her husband;

(4) Where her husband has been guilty of persistent cruelty (*f*) to her, or of wilful neglect (*g*) to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain (*h*), and by such cruelty or neglect has caused her to leave him and live separately and apart from him (*i*);

(5) Where her husband is an habitual drunkard (*k*).

(*a*) As to such courts, see title MAGISTRATES.

(*b*) As to the relief which may be given by such an order, see p. 598, *post*.

(*c*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4, as extended by the Licensing Act, 1902 (2 Edw. 7, c. 28), s. 5 (1).

(*d*) That is to say, of an aggravated assault within the meaning of the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 43; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 383, 610. Where a husband, on an indictment for an attempt to shoot his wife, with intent to murder her, was convicted of a common assault, and bound over to come up for judgment when called upon, it was held that it was not an aggravated assault, and that there was no jurisdiction to grant a separation order (*R.* v. *Corrigan* (1898), 62 J. P. 522).

(*e*) See *R.* v. *Corrigan, supra*; *R.* v. *Knowles* (1900), 65 J. P. 26 (throwing corrosive fluid).

(*f*) It seems that a number of acts of cruelty on one day, if it appears that they were not the result of one quarrel, may amount to persistent cruelty (*Broad* v. *Broad* (1898), 78 L. T. 687). See further, as to the meaning of persistent cruelty, *Cornall* v. *Cornall* (1910), 74 J. P. 379.

(*g*) To justify an order on the ground of wilful neglect to maintain, there must be evidence of means, or at all events that the husband is capable of earning means (*Earnshaw* v. *Earnshaw*, [1896] P. 160). Where the husband had no means of his own, but a relative had offered to provide £1 a week, it was held that that was sufficient evidence to justify an order (*Walton* v. *Walton* (1900), 64 J. P. 264).

(*h*) As to the liability of a husband to maintain his wife, see p. 316, *ante*; as to his liability for maintenance of his children, see title INFANTS AND CHILDREN.

(*i*) If the parties have been living apart by mutual consent for more than six months before the application by the wife, the mere fact that the husband has within the preceding six months refused or neglected to pay the wife an agreed allowance does not justify an order on the ground that his neglect to maintain her has caused her to leave him and live apart (*Rowlands* v. *Rowlands* (1902), 86 L. T. 125; *Medway* v. *Medway*, [1900] P. 141; and see *Wassell* v. *Wassell* (1899), 68 L. J. (P.) 127; *Jones* v. *Jones* (1895), 43 W. R. 424). But where husband and wife separated in 1887, and in March, 1900, he called at her house and cohabited with her for a few days, and in May, 1900, on her going to his house, he refused to admit her, it was held that the court was justified in finding that his conduct in May, 1900, had caused her to leave and live apart from him within the meaning of the Act (*Snape* v. *Snape* (1900), 64 J. P. 793). As to the necessity for taking proceedings within six months of the ground of complaint, see p. 601, *post*.

(*k*) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 5 (1); Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 3; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 417, note (*p*). In *Robson* v. *Robson* (1904), 68 J. P. 416, where there was evidence that the husband constantly drank, was rarely sober, and

SECT. 14. Summary Jurisdiction.

1214. An order (*l*) may be granted on the application of a husband where his wife is an habitual drunkard (*m*). Application by husband.

1215. To constitute desertion within the meaning of the enactment, there must be an existing cohabitation which is broken by the wrongful act of the husband (*n*), and there must be an intention on his part to break off matrimonial relations with the wife (*o*). If the parties are living apart in pursuance of a separation deed or agreement, or by mutual consent, there can be no desertion unless and until cohabitation has been resumed (*p*). A refusal by the husband to continue payment of an agreed allowance does not in such case amount to desertion (*p*). What constitutes desertion.

There may be an existing state of cohabitation for this purpose although the parties do not live together under one roof (*q*). A What is interruption of cohabitation.

that he had assaulted the wife and threatened other persons, it was held that the justices were right in finding that he was an habitual drunkard within the definition. Whether drunkenness is or is not habitual is a question of fact in each case.

(*l*) As to the provisions which may be made by such an order, see p. 598, *post*.

(*m*) Licensing Act, 1902 (2 Edw. 7, c. 28), s. 5 (2). See note (*k*), p. 596, *ante*.

(*n*) *Bradshaw* v. *Bradshaw*, [1897] P. 24; *Huxtable* v. *Huxtable* (1899), 68 L. J. (P.) 83; *Fitzgerald* v. *Fitzgerald* (1869), L. R. 1 P. & D. 694; *R.* v. *Leresche*, [1891] 2 Q. B. 418, C. A.; *Mahoney* v. *M'Carthy*, [1892] P. 21.

(*o*) *Charter* v. *Charter* (1901), 84 L. T. 272 (after a quarrel the husband told the wife she could go where she liked and do what she liked, in consequence of which she left him and refused to return at his request. Held, no desertion, though there would have been if he had intended to compel the wife to leave the house and permanently break off matrimonial relations); *Wassell* v. *Wassell* (1899), 68 L. J. (P.) 127 (refusal of husband to take his wife back on one particular occasion held not sufficient, *per se*, to constitute desertion).

(*p*) *Piper* v. *Piper*, [1902] P. 198 (separation deed held a bar to the jurisdiction of the court on the ground of desertion, though the husband did not keep up payments of the allowance thereunder); *R.* v. *Leresche*, *supra*; *Pape* v. *Pape* (1887), 20 Q. B. D. 76 (agreement for separation with weekly allowance; refusal to continue allowance held no evidence of desertion; decided under the repealed Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52)); *Fitzgerald* v. *Fitzgerald*, *supra* (separation by consent; refusal by husband to resume matrimonial relations. Held, no desertion). Compare *Edwards* v. *Edwards* (1905), 69 J. P. 344, cited in note (*q*), *infra*; and as to the general effect of separation deeds, see p. 447, *ante*.

(*q*) *Huxtable* v. *Huxtable*, *supra* (cohabitation in common domestic service until 1892, when the spouses parted by mutual agreement to find work until they had saved sufficient to get a home together. The husband obtained work, and made the wife an allowance until November, 1898. In 1899 he wrote saying that he was not going to have anything more to do with her as his wife. The justices found that there was no desertion, because they were living apart by mutual consent. Held, on appeal, that the husband had deserted his wife); *Bradshaw* v. *Bradshaw*, *supra* (wife a domestic servant. Husband visited her from time to time, and marital intercourse took place. Held, sufficient cohabitation); *Edwards* v. *Edwards*, *supra* (living apart under a verbal agreement for a weekly allowance, marital intercourse taking place from time to time during the separation. Held, that a refusal by the husband to continue the allowance, alleging adultery by the wife as a reason, was evidence of desertion); *Brown* v. *Brown* (1898), 79 L. T. 102 (wife lived apart on an allowance for some years without any definite agreement for separation. Summons on the ground of desertion dismissed. The wife then returned to the husband's house, and they cohabited for a few days, when he said that he was giving up house, and that she must find a home for herself. Held, sufficient evidence of desertion); *Chudley* v. *Chudley* (1893), 69 L. T. 617, C. A. (temporary separation for mutual convenience; refusal to take wife back again. Held, evidence of desertion).

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merely temporary separation for mutual convenience, or a separation for the performance of official or business duties, or by reason of domestic service, where there is no intention to break off matrimonial relations altogether, is not such an interruption of cohabitation as to preclude the possibility of desertion (*r*).

Desertion a question of fact.

Where a husband actually leaves his wife, the question whether his doing so amounts to desertion is one of fact, depending on the circumstances of each particular case (*s*). There may be desertion, although the husband offers to return to cohabitation, if the offer is not made in good faith (*t*), and although he is really willing to return, if at the time of the offer he is living with another woman (*u*).

Reasonable cause or excuse.

If a husband has reasonable cause or excuse for refusing to cohabit with his wife, his leaving her and living apart does not constitute desertion for the purposes of the statute (*a*); and there can be no desertion while a suit for dissolution of marriage is pending between the parties (*b*).

It is not necessary, in order to give the court jurisdiction on the ground of desertion, that the desertion should have continued for two years (*c*).

Application, to what court.

1216. The application for relief may be made to any court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which the conviction on which it is founded has taken place, or in which the cause of complaint has wholly or partially arisen (*d*), or, where the application is made on the ground of the conviction of the husband on indictment, it may be made to the court before whom he has been convicted, and that court, for the purposes of the application, becomes a court of summary jurisdiction, and has the power, without a jury, to hear the application and make the order or orders applied for (*e*).

SUB-SECT. 2.—*Nature of Relief given.*

Powers of court.

1217. The court of summary jurisdiction, to which the application for relief is made, may make an order or orders containing all or any of the following provisions (*f*) :—

(*r*) See note (*q*), p. 597, *ante*.

(*s*) *R.* v. *Birtwhistle* (1889), 58 L. J. (M. C.) 158; *R.* v. *Davidson* (1889), 5 T. L. R. 199; *Re Duckworth* (1889), 5 T. L. R. 608.

(*t*) *R.* v. *Davidson*, *supra*; *Re Duckworth*, *supra*.

(*u*) *Edwards* v. *Edwards* (1893), 62 L. J. (P.) 33.

(*a*) *Frowd* v. *Frowd*, [1904] P. 177. In this respect desertion has the same meaning as under the Matrimonial Causes Acts; see p. 481, *ante*. There may be reasonable cause or excuse without actual misconduct on the wife's part (*ibid.*). But the mere fact that the wife before marriage made a false statement to the husband as to the paternity of a child conceived before marriage has been held to be not a reasonable cause or excuse (*Holt* v. *Holt* (1908), 53 Sol. Jo. 84).

(*b*) *Craxton* v. *Craxton* (1907), 23 T. L. R. 527.

(*c*) *Smith* v. *Smith*, [1905] P. 249. For cases in which such period is necessary, see p. 481, *ante*.

(*d*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4. Desertion being a continuing offence, any court of summary jurisdiction for the place where the wife is residing for the time being has jurisdiction to make an order on that ground (*Cobb* v. *Cobb*, [1900] P. 145).

(*e*) *Ibid.*; see *R.* v. *Knowles* (1900), 65 J. P. 27.

(*f*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39),

(1) A provision that the applicant be no longer bound to cohabit with his or her wife or husband, which provision while in force has the same effect in all respects as a decree of judicial separation on the ground of cruelty;

(2) In the case of an application by the wife, a provision that the legal custody of any children of the marriage, while under the age of sixteen, be committed to the applicant; and in the case of an application by the husband, a provision for the legal custody of any children of the marriage;

(3) A provision that the husband shall pay to the wife personally, or for her use to any officer of the court or to any other person on her behalf, such weekly sum, not exceeding £2, as the court, having regard to the means of the husband and wife, considers reasonable (*g*);

(4) A provision for the payment by the husband or wife, or both of them, of the costs of the court, and of the reasonable costs of the parties or either of them (*h*).

When the application is made by the husband, the court, instead of making an order providing that the applicant be no longer bound to cohabit with his wife, may, with her consent, order her to be committed to and detained in a licensed retreat for inebriates (*i*).

Adultery by wife.

1218. No order may be made on the application of the wife, where it is proved that she has been guilty of adultery, unless the husband connived at, or by his wilful neglect or misconduct conduced to, or has condoned, the adultery (*k*); and if a wife on whose application an order has been made, subsequently commits an act of adultery, the order, on proof thereof, must on the application of the husband be discharged, although he may by his misconduct have conduced to the adultery (*l*).

Amount of weekly allowance.

1219. Where there are no children for the wife to support, the weekly allowance to her, subject to the statutory limit, should as a general rule be one-third of the joint incomes (*m*); but a voluntary provision made by relatives or others to either husband or wife should be taken into consideration (*n*), and also any other special

s. 5; Licensing Act, 1902 (2 Edw. 7, c. 28), s. 5 (2). See further, as to costs, p. 603, *post*.

(*g*) A weekly sum so ordered to be paid is inalienable and cannot be made the subject of equitable execution (*Paquine* v. *Snary*, [1909] 1 K. B. 688, C. A.); and see title EXECUTION, Vol. XIV., pp. 95, 121.

(*h*) See note (*f*), p. 598, *ante*.

(*i*) *Ibid.* Such an order has the same effect as if the wife had been admitted to the retreat under the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 10. See title INTOXICATING LIQUORS.

(*k*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 6; *Weightman* v. *Weightman* (1906), 94 L. T. 620.

(*l*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 7; *Ruther* v. *Ruther*, [1903] 2 K. B. 270. Where a separation order is made, there is a presumption of non-access from the date of the order, and if a child is born more than nine months thereafter, the court is bound to receive the evidence of the husband and admissions of the wife regarding the paternity of the child, on an application to discharge the order on the ground of her adultery (*Hetherington* v. *Hetherington* (1887), 12 P. D. 112).

(*m*) *Cobb* v. *Cobb*, [1900] P 294; *Wilcox* v. *Wilcox* (1902), 66 J. P. 166.

(*n*) *Nott* v. *Nott*, [1901] P. 241 (voluntary allowance to wife); *Walton* v.

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circumstances, such as the existence of infant children of the wife by a former marriage (*o*).

Resumption of cohabitation.

1220. If a wife voluntarily resumes cohabitation pending the hearing of an application by her, that puts an end to the cause of complaint, and deprives the court of jurisdiction to make any order on the application (*p*), and if cohabitation is voluntarily resumed after an order is made, the order, on the application of the husband, must be discharged (*q*).

Varying or discharging order.

1221. A court of summary jurisdiction acting within the district in which any order has been made may, on the application of either party, and upon cause being shown (*r*) upon fresh evidence to the satisfaction of the court at any time (*s*), alter, vary, or discharge any such order, and from time to time increase or diminish the amount of any weekly payment, subject to the limit of £2 a week (*t*).

Fresh evidence.

"Fresh evidence" means evidence which had not come to the knowledge of the party applying to vary or discharge the order at the time of the hearing of the original application, or evidence which he could not then have called; but not evidence which he could have called and did not (*u*).

SUB-SECT. 3.—*Procedure.*

Applications, how made.

1222. All applications for relief to a court of summary jurisdiction must be made in accordance with the Summary Jurisdiction

Walton (1900), 64 J. P. 264 (husband had no means of his own, but a relative offered to provide £1 a week. Held, that the court was justified in making an order for that amount, leaving the husband to apply for a reduction if he found himself unable to pay it).

(*o*) *Hill* v. *Hill*, [1902] P. 140. A husband is bound to maintain his step-children; see title INFANTS AND CHILDREN.

(*p*) *Williams* v. *Williams*, [1904] P. 145 (summons on ground of desertion; cohabitation resumed pending an adjournment).

(*q*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 7. In *Haddon* v. *Haddon* (1887), 18 Q. B. D. 778, decided under the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 4, it was held that an order for maintenance made on the conviction of the husband for an aggravated assault on the wife was annulled by the resumption of cohabitation, and, the wife having again left her husband, that she was not entitled to enforce payment of sums subsequently accruing due under the order.

(*r*) There is no jurisdiction, in the absence of evidence of the misconduct of the wife, to vary an order giving her the custody of children of the marriage (*Cobbe* v. *Cobbe* (1909), 73 J. P. 208).

(*s*) The time limit of six months (see p. 601, *post*) does not apply to an application to vary or discharge any order (*Weightman* v. *Weightman* (1906), 94 L. T. 620).

(*t*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 7. This provision applies to orders made under the repealed Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 4, and the repealed Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52).

(*u*) *Johnson* v. *Johnson*, [1900] P. 19; *Weightman* v. *Weightman* (1906), 94 L. T. 620 (more than six months after the granting of a separation order the husband discovered that the wife had committed adultery before the order was made. Held, fresh evidence justifying a discharge of the order); *Groves* v. *Groves* (1906), 71 J. P. 167 (certificate obtained from New Zealand after a separation order had been made, showing that at the date of her marriage with the respondent the applicant's first husband was alive. Held, fresh evidence justifying the discharge of the order).

Acts (*a*), and, in the case of a conviction of a husband for an aggravated assault on his wife, her application may, by leave of the court, be made by summons to be issued and made returnable immediately upon such conviction (*b*).

Limit of time, application.

1223. The application must be made within six months of the ground of complaint (*c*). This rule applies where the offence complained of is persistent cruelty, or wilful neglect to provide reasonable maintenance, causing the wife to leave and live separately from her husband (*d*), but desertion is a continuing offence, and it is not necessary, in the case of desertion, that the application should be made within six months of the time when the husband first left his wife (*e*).

Withdrawal of application

1224. An application cannot be withdrawn without leave of the court (*f*). The effect of a withdrawal at the hearing is to extinguish the ground of complaint, and the court has no jurisdiction to entertain a fresh application on the same ground (*f*).

Form of order.

1225. Any order made should contain a recital of the grounds on which it is made, and the findings of fact in reference thereto (*g*).

Enforcement of order.

1226. The payment of any sum of money directed to be paid by any order may be enforced in the same manner as the payment of money is enforced under an affiliation order (*h*).

An order giving the custody of children of the marriage to the wife may be enforced, should the husband refuse to give up the children, by attachment (*i*).

(*a*) See title MAGISTRATES.

(*b*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 8. The husband is entitled to give evidence on the hearing of any such application (*Jones* v. *Jones*, [1895] P. 201).

(*c*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11; *Ellis* v. *Ellis*, [1896] P. 251; *Medway* v. *Medway*, [1900] P. 141; *Rowlands* v. *Rowlands* (1902), 86 L. T. 125. The objection that the application is out of time should be taken at the hearing (*Pickavance* v. *Pickavance*, [1901] P. 60).

(*d*) *Ellis* v. *Ellis*, *supra*; *Medway* v. *Medway*, *supra*.

(*e*) *Heard* v. *Heard*, [1896] P. 188; *Brown* v. *Brown* (1898), 79 L. T. 102; *Cobb* v. *Cobb*, [1900] P. 145.

(*f*) *Pickavance* v. *Pickavance*, *supra*.

(*g*) *Bullivant* v. *Bullivant* (1902), 18 T. L. R. 317. In *Brown* v. *Brown*, *supra*, where an order was made on the ground of desertion, and contained no finding of the fact of desertion, it was held, on appeal, that the order was irregular, but that the court had jurisdiction under R. S. C., Ord. 59, rr. 4A, 7, to correct the irregularity and make a fresh order to the same effect as the order appealed against. As to the use of printed forms, see *Holden* v. *Holden* (1910), 27 T. L. R. 38. The rule adopted in the Divorce Division that the evidence of a wife should be corroborated applies to summary proceedings (*Forster* v. *Forster* (1910), 54 Sol. Jo. 403).

(*h*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 9. The enforcement is by distress and committal (Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4). See title BASTARDY, Vol. II., p. 452. Imprisonment may be ordered in default of sufficient distress, without proof of means (*R.* v. *Richardson*, [1909] 2 K. B. 851).

(*i*) *Brown* v. *Brown* (1898), 62 J. P. 568; and see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 307 *et seq.*

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Refusal of order if case more fit for High Court.

1227. A court of summary jurisdiction may refuse to make any order when in its opinion the matters in question would be more conveniently dealt with by the High Court, and no appeal lies from such refusal; but the High Court, in any proceeding relating to or comprising the same subject-matter as the application so refused or any part thereof, may direct the court of summary jurisdiction to rehear and determine the same (*k*).

If a matrimonial suit is pending between the parties in the High Court, no application for a separation or maintenance order ought to be entertained by a court of summary jurisdiction (*l*).

Appeal.

1228. Except where an order is refused on the ground that the matters in question between the parties can be more conveniently dealt with by the High Court, an appeal lies to a divisional court of the Divorce Division from any decision of a court of summary jurisdiction on an application for a separation or maintenance order (*m*).

Notice of motion.

1229. Every such appeal is by an eight days' notice of motion, which must state the grounds of the appeal, and whether all or part only of the order is complained of, and must be served on every party directly affected by the appeal (*n*). The appeal must be entered by lodging a copy of the notice at the Divorce Registry (*o*).

Time for appeal.

1230. The notice of motion must be served and the appeal entered within twenty-one days from the date of the order complained of, such period to be calculated from the time at which the order is signed or otherwise perfected, or from the time at which the refusal to make an order is given (*p*).

(*k*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 10.

(*l*) *Craxton* v. *Craxton* (1907), 23 T. L. R. 527.

(*m*) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 11; R. S. C., Ord. 59, r. 4A. Rules 7, 8, 10, 11, 12, 16 of this Order apply to such appeals, with the substitution of the Divorce Registry for the Crown Office Department of the Central Office. The justices have no power on any such application to state a case for the King's Bench Division (*Manders* v. *Manders*, [1897] 1 Q. B. 474). But an appeal from a decision of the court of summary jurisdiction on an information or complaint by a wife as to the non-payment of any weekly sums under an order is by special case to the King's Bench Division, and not by appeal to the Divorce Division (*Ruther* v. *Ruther*, [1903] 2 K. B. 270; *Griffiths* v. *Griffiths* (1909), 73 J. P. 391). Where an order is made on the ground of the conviction of the husband of an aggravated assault, he can only appeal against the separation order, and not against the conviction, to the Divorce Division. An appeal against the conviction must be taken to quarter sessions; but such appeal does not prevent the Divorce Division from entertaining an appeal against the separation order, although, as a general rule, it is obviously more convenient that the hearing of such an appeal should be postponed until after the appeal to quarter sessions has been determined (*Lewin* v. *Lewin*, [1891] P. 254; *Goodwin* v. *Goodwin* (1887), 51 J. P. 583). As to appeals to quarter sessions generally, see title MAGISTRATES.

(*n*) R. S. C., Ord. 59, r. 10. It is not necessary that any case should be stated or filed (*Swoffer* v. *Swoffer*, [1896] P. 131), or that any rule *nisi* or order to show cause should be obtained.

(*o*) R. S. C., Ord. 59, r. 11; see p. 463, *ante*.

(*p*) *Ibid.*, r. 12.

1231. The High Court has power to extend the time for appealing to amend the grounds of appeal, or to make any other order, on such terms as are considered just, to ensure the determination on the merits of the real questions in controversy between the parties (*q*). Extension of time.

1232. It is the duty of the clerk to the magistrate or justices to take a full note of the evidence given at the hearing of the application, of the decision of the court, and of the reasons for the decision, which it is the duty of the magistrate or justices to state (*r*). Notes of proceedings.

Either party is entitled, on application to the clerk, to be furnished with a copy of the note (*s*), and it is the duty of the appellant to supply two copies for the use of the court on an appeal (*t*).

The court will not proceed with the hearing of an appeal unless it is supplied with a proper note of the evidence and reasons for the decision in the court below (*u*), and will not, as a general rule permit an imperfect note to be supplemented or amplified by an affidavit (*a*).

1233. On a motion by way of appeal, the court has power to draw all inferences of fact which might have been drawn in the court below, and to make any order which ought to have been made (*b*). Powers of court on appeal.

The court will not reverse any finding of fact by the court of summary jurisdiction unless it appears that such finding is clearly wrong (*c*), and only in very rare instances will any fresh evidence be received by the divisional court (*d*).

1234. The court of summary jurisdiction, to which an application for a separation or maintenance order is made, has exclusive jurisdiction with regard to the payment, as between the parties, of the costs of and incident to the application; and if the court refuses to order the husband to pay the wife's costs, no action can be maintained against the husband by her solicitor for the recovery thereof (*e*). Costs of application.

(*q*) R. S. C., Ord. 59, r. 16.

(*r*) *Wenham* v. *Wenham* (1906), 95 L. T. 548; *Barker* v. *Barker* (1905), 74 L. J. (P.) 74; *Cobb* v. *Cobb* [1900] P. 145; *Robinson* v. *Robinson*, [1898] P. 153; *Bowen* v. *Bowen* (1908), 73 J. P. 87.

(*s*) *Barker* v. *Barker*, *supra*. Though a shorthand note may be taken, the parties are entitled to copies of an ordinary note, unless a copy of the shorthand note is supplied free of charge, and, where a shorthand note is taken, it is the duty of the justices' clerk to verify it (*Royle* v. *Royle*, [1909] P. 24).

(*t*) *Walton* v. *Walton*, [1900] P. 147; *Robinson* v. *Robinson*, *supra*; *McHugh* v. *McHugh* (1909), 26 T. L. R. 60.

(*u*) *Wenham* v. *Wenham*, *supra*; *Bowen* v. *Bowen* (1908), 73 J. P. 87.

(*a*) *Ibid.*; *contra*, *Snape* v. *Snape* (1897), 62 J. P. 153. See R. S. C., Ord. 59, r. 8.

(*b*) R. S. C., Ord. 59, r. 7. The divisional court is not bound by the findings of fact in the court below (*Forster* v. *Forster* (1910), 54 Sol. Jo. 403).

(*c*) *Harling* v. *Harling* (1896), 74 L. T. 559; *Forster* v. *Forster*, *supra*. The wife's evidence should be corroborated (*ibid.*).

(*d*) *Snape* v. *Snape*, *supra*.

(*e*) *Cale* v. *James*, [1897] 1 Q. B. 418; *Cobbett* v. *Wood*, [1908] 1 K. B. 590; reversed, [1908] 2 K. B. 420, C. A.

SECT. 14. Summary Jurisdiction.

Costs of appeal.

1235. Where the wife, having obtained an order in the court below, is the respondent to an appeal, the practice is to allow her her costs of the appeal, even if it is successful (*f*), and the husband may be ordered to pay into court or give security for her costs (*g*) of the appeal, the hearing being stayed until he does so (*h*); but this practice has no application where the wife is the appellant (*i*).

The cost of furnishing copies of the notes of the proceedings in the court below will be allowed on taxation as part of the costs of the appeal (*k*).

(*f*) *Huxtable* v. *Huxtable* (1899), 68 L. J. (P.) 83; *Medway* v. *Medway*, [1900] P. 141; *Pickavance* v. *Pickavance*, [1901] P. 60. But see *Davies* v. *Davies* (1907), 51 Sol. Jo. 412.

(*g*) Even if the wife be without means (*L.* v. *L.* (1911), 55 Sol. Jo. 330).

(*h*) *Sirrell* v. *Sirrell*, [1911] P. 38.

(*i*) *Earnshaw* v. *Earnshaw*, [1896] P. 160. In *Jackson* v. *Jackson* (1909), 25 T. L. R. 713, where the wife was an unsuccessful appellant, the appeal was dismissed without costs. In *Partington* v. *Partington* (1909), 73 J. P. 200, an application by the wife for relief on the ground of desertion was dismissed on the ground that the husband had just cause for the desertion. The wife appealed, and, the husband having published an apology and a retractation of the evidence given by him, and cohabitation having been resumed, it was held that the wife was entitled to the costs of the appeal.

(*k*) *Harling* v. *Harling* (1896), 74 L. T. 559; *Walton* v. *Walton*, [1900] P. 147. In *Bowen* v. *Bowen* (1908), 73 J. P. 87, where a proper note was not furnished, the case was sent back for rehearing and the respondent given the costs of the appeal.

HYPOTHECATION.

See LIEN; MORTGAGE; SHIPPING AND NAVIGATION.

IDIOTS.

See LUNATICS AND PERSONS OF UNSOUND MIND.

IDLE AND DISORDERLY PERSONS.

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See BASTARDY.

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IMMIGRATION.

See ALIENS.

IMMORAL CONTRACTS.

See CONTRACT.

IMPEACHMENT.

See CONSTITUTIONAL LAW; COURTS; CRIMINAL LAW AND PROCEDURE; PARLIAMENT.

IMPEACHMENT OF WASTE.

See REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

IMPERIAL DEFENCE, COMMITTEE OF.

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See LAND IMPROVEMENT; SETTLEMENTS; SEWERS AND DRAINS.

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See CRIMINAL LAW AND PROCEDURE; HUSBAND AND WIFE.

INCLOSURE.

See COPYHOLDS; HIGHWAYS, STREETS, AND BRIDGES; OPEN SPACES AND RECREATION GROUNDS.

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For Crown, Revenue of - - *See title* CONSTITUTIONAL LAW.
Inhabited House Duty - „ INHABITED HOUSE DUTY.
Practice on the Revenue Side of the King's Bench Division - - - „ CROWN PRACTICE.
Revenue Authorities - - „ CONSTITUTIONAL LAW; REVENUE.

Part I.—Introductory.

1236. An Income Tax Act was introduced into this country in 1799 (*a*), and again in 1803 (*b*). The duty at varying rates continued to be in force until 1815, when it was dropped. It was again imposed in 1842 by Sir Robert Peel, and has thenceforward continued to exist down to the present time. Since 1860 the duty

Origin of the duty.

(*a*) Stat. (1799) 39 Geo. 3, c. 13.
(*b*) Stat. (1803) 43 Geo. 3, c. 122

PART I. Introductory.

has been imposed for a single financial year only, and is, therefore, unlike the Inhabited House Duty, an annual tax, but by the terms of the Act by which it is annually reimposed, the provisions of the general Acts relating to income tax, including the originating Act of 1842, are made applicable to it. Since 1842 the lowest point which the duty has reached has been 2*d.* in the £ in 1874-5, and the highest 1*s.* 4*d.* in the £ in 1855-6 and in 1856-7.

Nature of the legislation now in force.

1237. Although numerous amending Acts are in force, yet the Act which in great measure governs the machinery for the assessment and the incidence of the tax is still the originating Act of 1842. This Act is unusually prolix, and in parts is very loosely drawn, and therefore obscure. A considerable part of this Act and the amending Acts relate to matters which are of importance only to persons who are concerned in administering the duty; and, with reference to these provisions, the general tenor of the enactment only is indicated in this title, together with a reference in a note to the statutory provisions on the subject. All provisions, however, which relate to matters of general importance are fully stated in the text, but it would often be impossible, consistently with due regard to the relative importance of the article, and to intelligibility, to give the *ipsissima verba* of the statute. Where this is the case the provisions are summarised, but, as is believed, in such a way as to fully and correctly represent their effect. In certain special cases of doubt the provision itself is set out in a note (*c*).

(*c*) The following is a list of the enactments relating to Income Tax which are now in force, and where the Act relates to one or two subjects only the general nature of the provision is indicated:—

Income Tax Act, 1842 (5 & 6 Vict. c. 35) (General): the whole Act, except ss. 1, 2, 3 (part), 12, 13, 25, 26, 54 (part), 63 (No. VII. (part)), 69, 77, 90—92 inclusive, 100 (1st and 2nd Cases, Rule 3 (part)), 106 (part), 107, 133 (which is retained so far as referred to or incorporated in any other enactment, see Finance Act, 1907 (7 Edw. 7, c. 13), Sched. III.), 143—145 inclusive, 167 (part), 175, 176 (part), 183 (part), 186 (part), 193, 194.

The Land Tax Act, 1842 (5 & 6 Vict. c. 37) (Jurisdiction), ss. 3—6 inclusive.

Income Tax (Foreign Dividends) Act, 1842 (5 & 6 Vict. c. 80) (Foreign Dividends), s. 2 (part).

Income Tax Act, 1853 (16 & 17 Vict. c. 34) (General): the whole Act, except ss. 1, 11—25 inclusive, 27, 28, 31, 33, 38, 41, 43—46 inclusive, 57, 59.

Income Tax (Insurance) Act, 1853 (16 & 17 Vict. c. 91) (Deduction of Insurance etc. Premiums).

Income Tax Act, 1854 (17 & 18 Vict. c. 24) (Interest on Exchequer Bills): the whole Act, except ss. 1—3 (part), 4, 6, 7.

Income Tax (Insurance) Act, 1855 (18 & 19 Vict. c. 35) (Deduction of Insurance etc. Premiums), s. 1 (part).

Income Tax Act, 1859 (22 & 23 Vict. c. 18) (Deduction of Insurance etc. Premiums), s. 6.

Income Tax Act, 1860 (23 & 24 Vict. c. 14) ((1) Jurisdiction of Special Commissioners; (2) Limitation of Claims for repayment), ss. 5 (part), 6, 7, 10.

Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91) (Deduction of Dividends on Colonial Companies etc.), s. 36.

Revenue Act, 1863 (26 & 27 Vict. c 33) (Production of Documents), s. 22.

General scope of the duty and method of collection.

1238. The duty is charged under five schedules, of which Schedule A charges the profits derived from property or ownership in lands, tenements, and hereditaments, corporeal and incorporeal;

Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18) (Deduction of tax from rent and interest), s. 15.

Revenue Act, 1866 (29 & 30 Vict. c. 36) ((1) Assessment under Sched. A, No. 3; (2) Foreign etc. dividends), ss. 8, 9.

Revenue Act, 1868 (31 & 32 Vict. c. 28) (Dividends on Indian Funds), s. 5.

Income Tax (Public Offices) Act, 1872 (35 & 36 Vict. c. 82) (Remuneration of Income Tax Officers), s. 1 (part).

Customs and Inland Revenue Act, 1876 (39 & 40 Vict. c. 16) (Exemption of Incomes under £150), s. 8 (part).

Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15) ((1) Depreciation of plant; (2) Serjeants' Inn), ss. 12, 16 (part).

Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21) (Officers of Corporations etc. to assist in assessment of employees), s. 18.

Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12) (Collectors' duties), s. 23.

Revenue Act, 1883 (46 & 47 Vict. c. 55) (Powers of Commissioners), s. 12

Revenue Act, 1884 (47 & 48 Vict. c. 62) (Divided Parishes etc.), s. 6.

Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51) ((1) Allowances to assessors and collectors; (2) Foreign and Colonial Dividends), ss. 25, 26.

Customs and Inland Revenue Act, 1887 (50 & 51 Vict. c. 15) (Farmer may elect to be charged under Sched. D), s. 18.

Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8) (Foreign and Colonial Dividends), s. 24.

Revenue Act, 1889 (52 & 53 Vict. c. 42) ((1) Prepayment of tax; (2) Friendly Societies; (3) Collectors' duties and remuneration), ss. 10, 12—14 inclusive.

Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8) (Various), ss. 23, 24, 27, 28, 30.

Taxes (Regulation of Remuneration) Act, 1891 (54 & 55 Vict. c. 13) (Remuneration of Officers), the whole Act.

Taxes (Regulation of Remuneration) Amendment Act, 1892 (55 & 56 Vict. c. 25) (Remuneration of Officers), the whole Act.

Finance Act, 1894 (57 & 58 Vict. c. 30) (Various), ss. 34, 35, 36, 38.

Finance Act, 1896 (59 & 60 Vict. c. 28) (Various), ss. 26, 27, 28, 30.

Finance Act, 1897 (60 & 61 Vict. c. 24) (Income of Married Woman), s. 5.

Finance Act, 1898 (61 & 62 Vict. c. 10) ((1) Scale of Abatements of Incomes; (2) Deductions under Sched. D; (3) Payment of Sched. A tax by landlords; (4) Barristers' and Solicitors' right of audience before General Commissioners), ss. 8, 9, 10, 16.

Finance Act, 1903 (3 Edw. 7, c. 8) (Application of previous enactments, s. 5 (2)).

Revenue Act, 1903 (3 Edw. 7, c. 46) ((1) Deduction of premiums upon insurance with Friendly Societies; (2) Barristers' and Solicitors' right of audience), ss. 10, 13.

Finance Act, 1904 (4 Edw. 7, c. 7) (Deduction of insurance premiums etc.), ss. 7, 8, 9.

Revenue Act, 1906 (6 Edw. 7, c. 20) (Extension of assessments under Sched. A), s. 11.

Finance Act, 1907 (7 Edw. 7, c. 13) (Differentiation of Earned Incomes and Various), ss. 18—28 inclusive, 30.

Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 65—72 inclusive.

Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35), s. 3.

The Taxes Management Act, 1880 (43 & 44 Vict. c. 19), deals with the management and regulation of the duties of income tax together with those of land tax and inhabited house duty: ss. 12, 20 (part), 59 (2) (part), 114 (part), are repealed.

The Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), regulates generally the appointment of Commissioners of Inland Revenue and certain officers under them.

PART I. Introductory.

Schedule B charges profits from the occupation of lands, but not of dwelling-houses other than farm-houses, nor from incorporeal hereditaments; Schedule C charges interest, annuities, and dividends payable by British, foreign or colonial Governments; Schedule D charges (a) profits arising from professions, trades, employments or vocations, (b) profits derived from foreign property, and (c) interest of money, annuities, and such other annual profits and gains as are not charged under any of the other schedules; Schedule E charges profits arising from public offices or employments of profit, and from annuities, pensions, or stipends payable by His Majesty out of the public revenue of the United Kingdom, except those charged under Schedule C.

These several schedules are set out and are dealt with *seriatim* hereinafter.

Super-tax

1239. An additional income tax called the super-tax upon incomes exceeding £5,000 was introduced in 1910, taking effect for the financial year 1909 (*d*).

Controlling authority.

1240. The duties are under the direction and management of the Commissioners of Inland Revenue (*e*).

The functionaries concerned in the assessment and collection of the duties are the Commissioners for the General purposes of Income Tax and Inhabited House Duty (hereinafter called the General Commissioners), the Additional Commissioners, the Commissioners for Special Purposes (hereinafter called the Special Commissioners), and officials of certain public departments or offices who perform the duties of Commissioners in reference to their respective departments and offices.

There are also subordinate officials, namely, clerks to the General Commissioners, assessors, inspectors, surveyors, collectors, and officers for receipt.

The General and Special Commissioners respectively also perform important judicial functions in reference to appeals from assessments, claims by persons charged for relief of various kinds, and the infliction of penalties. In the exercise of their functions the General Commissioners are wholly independent of the Commissioners of Inland Revenue.

The following non-revenue statutes contain provisions relating to Income Tax:—

Trade Union (Provident Funds) Act, 1893 (56 & 57 Vict. c. 2) (Exemption), s. 1.

Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39) (Exemption), s. 24.

As to exemption of the Thames Conservancy Board under the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 289, see *Stewart* v. *Thames Conservators*, [1908] 1 K. B. 893.

(*d*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), continued for the subsequent year by the Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35). See p. 689, *post*.

(*e*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 4; Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 4.

Part II.—Matters Preliminary to Assessment.

SECT. 1—*Officials and their Duties.*

SECT. 1. Officials and their Duties.

SUB-SECT. 1.—*General, Additional, Ex-officio, and Special Commissioners.*

General Commissioners, how appointed.

1241. The General Commissioners for each district are, with the exception mentioned below, chosen by the Commissioners of Land Tax from among their number. Certain of the persons chosen, not being more than seven nor less than three, are the acting Commissioners for the county, district, or borough, and certain others are put on a list, to supply vacancies in the acting list as they arise. In certain large towns (*f*), including London, Commissioners to act with the General Commissioners are chosen by the mayor, magistrates, and other public bodies (*g*).

Their functions.

The General Commissioners perform all the functions which by the Acts are assigned to commissioners, except such as are specially assigned to other commissioners (*h*).

Additional Commissioners.

1242. The General Commissioners, when appointed, may appoint Additional Commissioners to act in their district, and may divide such Additional Commissioners into Committees to act in particular parishes, wards, or places of the district (*i*).

The General Commissioners may also, under special conditions, appoint additional General Commissioners to perform the functions of Additional Commissioners instead of appointing Additional Commissioners (*j*). The General Commissioners may be required to act as Additional Commissioners (*k*).

Their functions.

The functions of the Additional Commissioners as such are the making of assessments to the duties chargeable under Schedule D of the Income Tax Act, 1853 (*l*), in their respective districts, subject to appeal to the General Commissioners (*m*).

(*f*) Namely, London, Bristol, Exeter, Kingston-upon-Hull, Newcastle-upon-Tyne, Norwich, Birmingham, Liverpool, Leeds, Manchester, King's Lynn, and Great Yarmouth.

(*g*) As to the appointment of General Commissioners generally, see Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 4—8 inclusive, 17, and Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 28. As to the qualification of a General Commissioner, see Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 10—15, 17. As to the power of the Board of Inland Revenue to increase the number of Commissioners, see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 28. As to the appointment of Commissioners in places not having persons qualified, see Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 17. As to the number forming a quorum, see *ibid.*, s. 191, and Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 5.

(*h*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 22. As to the duties and powers generally of the Commissioners, see *ibid.*, and Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 27—35 inclusive. As to the assessment of Commissioners to the duty, see Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 135, and Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 35.

(*i*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 16, 17, 19, 20. As to the qualification of Additional Commissioners, see *ibid.*, s. 16.

(*j*) *Ibid.*, s. 21.

(*k*) *Ibid.*, ss. 16, 21.

(*l*) 16 & 17 Vict. c. 34.

(*m*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 111—117 inclusive.

SECT. 1. Officials and their Duties.

Commissioners for Special Purposes. Their functions.

1243. The Commissioners for Special Purposes consist of the Commissioners of Inland Revenue acting *ex officio*, together with persons appointed by the Treasury by warrant (*n*).

The Special Commissioners have exclusive jurisdiction to assess duty in the following cases:—

(1) Dividends etc. on foreign and colonial Government securities chargeable under Schedule C (*o*);

(2) Dividends etc. on shares and securities of foreign and colonial companies received in the United Kingdom, when assessed by way of deduction before they reach the hands of the person entitled (*p*);

(3) Profits of railway companies situate in the United Kingdom, and of persons holding offices or employments of profit under such railways (*q*); and

(4) (if required by the party chargeable, but not otherwise) profits and gains chargeable under Schedule D (*r*).

(5) The Super-tax (*s*).

They have also exclusive jurisdiction over—

(6) Claims for exemption from the duty payable under Schedule A by charitable and other kindred institutions and persons in respect of rents and profits applied to charitable purposes (*t*), and over similar claims for exemption from the duty payable under Schedules C and D (*u*).

(7) Claims for return of duty, by reason of payment of insurance premiums, deferred annuity payments etc. (*v*).

They have (if required by the party chargeable, but not otherwise) jurisdiction to hear appeals from assessments by—

(8) Persons assessed by the General Commissioners in respect of mines or of quarries of stone or slate (*w*);

(9) Persons assessed by the General Commissioners on profits and gains chargeable under Schedule D (*x*).

They have concurrent jurisdiction with the General Commissioners over applications under the Customs and Inland Revenue Act, 1890 (*y*), s. 23 (*z*).

In reference to making assessments and to appeals therefrom they have the powers of the General and Additional Commissioners, and no appeal lies from their decisions to the General Commissioners (*a*).

(*n*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 23, 186.

(*o*) *Ibid.*, ss. 29, 96; and see p. 639, *post*. The Special Commissioners have no jurisdiction in the case of the distribution of these dividends being made by the Bank of England; see pp. 615, 639, *post*.

(*p*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 10; Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), s. 36; and see pp. 657, 659, *post*.

(*q*) Income Tax Act, 1860 (23 & 24 Vict. c. 14), ss. 5, 6; and see p. 626, *post*.

(*r*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 131; and see p. 666, *post*.

(*s*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 72 (1).

(*t*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 61, 62; and see pp. 628, 629, *post*.

(*u*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 98; and see pp. 641, 665, *post*.

(*v*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 54; and see pp. 670, 671, *post*.

(*w*) Income Tax Act, 1860 (23 & 24 Vict. c. 14), s. 7.

(*x*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 130; and see p. 666, *post*.

(*y*) 53 & 54 Vict. c. 8.

(*z*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 27; and see pp. 638, 650, *post*.

(*a*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 23, 132. They have, however, in certain cases no power of examining persons *vivâ voce* (see *ibid.*, s. 23).

SECT. 1. Officials and their Duties.

1244. Besides the above bodies constituted for the purpose, the officials of certain existing public bodies are constituted Commissioners for the purpose of executing the Income Tax Acts in reference to matters connected with their respective offices, who, to distinguish them, are hereinafter called *ex officio* Commissioners.

Ex officio Commissioners.

Thus the Governor and Directors of the Bank of England are constituted Commissioners for the purpose of assessing and charging the duties on annuities, dividends, pensions and salaries paid by the Bank and the duties on the profits of the Bank (*a*): the Commissioners for the Reduction of the National Debt are Commissioners for assessing the duties on the annuities, salaries and pensions paid by them (*b*); and the Lord Chancellor, the judges, and the principal officer of each court or public department of office under His Majesty (*c*), the Speaker and the principal clerk of either House of Parliament, the principal officers in the counties palatine and the Duchy of Cornwall (*d*), the mayor, aldermen and common council of every corporate city, borough, town or place (*e*), and the paymaster of Civil Service salaries and pensions, or other person appointed by the Treasury (*f*), are also constituted Commissioners for analogous purposes in matters appertaining to the duties payable in connection with their respective offices or places. Their appointments are to be notified to the Commissioners of Inland Revenue, and in default the appointment devolves upon the Treasury, or if they fail to appoint, the execution of the Act falls on the General Commissioners of the district (*g*).

Quorum of commissioners.

1245. In the case of all the above-mentioned bodies of commissioners two members form a quorum (*h*).

SUB-SECT. 2.—*Clerks, Assessors and Collectors, Inspectors and Surveyors.*

Clerk

1246. The General Commissioners are required to appoint a clerk and if necessary an assistant, and the clerk is subjected to penalties for misconduct. The appointment is for a year, subject to removal for just cause (*i*).

Assessors, collectors, and officers for receipt.

1247. Assessors and collectors are appointed by the General Commissioners from the inhabitants of every parish within their district, or in cases where able and sufficient inhabitants cannot be found, from persons residing near such parish (*j*). Provision is made for any default in making an appointment.

(*a*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 24.
(*b*) *Ibid.*, s. 28.
(*c*) *Ibid.*, s. 30.
(*d*) *Ibid.*, s. 31.
(*e*) *Ibid.*, s. 32.
(*f*) *Ibid.*, s. 34.
(*g*) *Ibid.*, s. 33. As to assessment of the Universities of Oxford and Cambridge, see Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 28.
(*h*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 20, 191; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 5 (1).
(*i*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 9, and Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 29, 41. As to the clerk's remuneration, see note (*m*), p. 616, *post*.
(*j*) As to the appointment of assessors, see Income Tax Act, 1842 (5 & 6

SECT. 1. Officials and their Duties.

The duties of the assessors are in connection with the assessment of the income tax (*k*).

The duties of the collectors are in connection with the collection of income tax and to make distresses when necessary. It is a part of the duty of the collectors to furnish schedules of arrears, and returns, from which the General Commissioners make out schedules of defaulters. They are also required to render accounts to the Crown at the termination of their year of office (*l*). The office both of assessor and collector is an annual one.

The officers for receipt of the land tax and assessed taxes, and the inspectors and surveyors appointed and to be appointed for the assessed taxes, are respectively constituted officers for receipt, inspectors, and surveyors, of the duties of income tax, and the Treasury are empowered to appoint other surveyors and inspectors, the persons so appointed by them being in the service of, and their salaries and pensions being defrayed by, the Crown (*m*).

SECT. 2.—*Proceedings before Assessment.*

SUB-SECT. 1.—*Oath of Office.*

Oath.

1248. Every person appointed a commissioner either for general, additional, or special purposes, and also every assessor, collector, clerk or clerk's assistant, inspector, surveyor, and officer for receipt, is required under a penalty to take a prescribed oath or affirmation before he begins to act in the execution of his duties (*n*).

Vict. c. 35), s. 36; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 42—45 inclusive. As to the appointment of collectors, see Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 36; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 73—79 inclusive. No appointments of assessors are made for the metropolis as defined by the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67); see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 43 (2). The office of collector under the Income Tax Acts must not be confounded with that of the collector of Inland Revenue. The latter is an officer appointed by the Commissioners of Inland Revenue under the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 4, for the collection and receipt of various taxes. This officer has, however, certain duties in connection with Income Tax and Inhabited House Duty (see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 5, 101, 103, 104).

(*k*) As to the duties of assessors, see Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 46—48 inclusive, 57, 58, 150; and Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 49, 50.

(*l*) As to the duties of collectors, see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 108—112 inclusive, 114 (11), (12), ss. 115—121 inclusive.

(*m*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 37; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 17. As to the remuneration of clerks, assessors, inspectors, surveyors, and collectors, see Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 183, 186 (in part repealed by Statute Law Revision Act, 1874 (37 & 38 Vict. c. 96)); Income Tax (Public Offices Act), 1872 (35 & 36 Vict. c. 82), s. 1; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 41 (4); Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 25; Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 13; Taxes (Regulation of Remuneration) Act, 1891 (54 & 55 Vict. c. 13), ss. 2—6 inclusive; Taxes (Regulation of Remuneration) Amendment Act, 1892 (55 & 56 Vict. c. 25), ss. 1, 2.

(*n*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 38, 46, 189, 192; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 32, 45.

SUB-SECT. 2.—*Notices to Persons to be Charged, and Others.*

SECT. 2. **Proceedings before Assessment.**

1249. The proceedings preparatory to assessment are initiated by precepts issued by the General Commissioners to the assessors within their districts requiring them to appear and take the prescribed oaths and serve the notices prescribed by the Act. Such notices consist of (1) a general notice to be affixed on or near to the door of the church or chapel, and market house or cross, if any, of the city, town, parish, or place for which the assessors act, or if none such exist, then on the church or chapel nearest thereto, requiring all persons who are required to make out and deliver any list, declaration, or statement, to deliver the same to the assessors or commissioners within a time prescribed, not exceeding twenty-one days, and these notices are to be deemed sufficient notice to all persons resident in such city, town, parish, or place, and the affixing of the same, good service of such notice (*o*); (2) a special notice to the same effect delivered to every person chargeable to the duties in respect of property or profits situate or arising within the limits of the place (*p*).

Precepts issued to assessors.

Notices affixed to church doors etc.

Personal notices.

SUB-SECT. 3.—*Returns.*

1250. The list, declaration, and statement which the party is required to fill up and return is supplied to him upon a form, together with the notice, and consists of printed particulars framed with a view of obtaining the information necessary for an assessment under any of the schedules to the Income Tax Act, and for dealing with a claim for allowance, exemption, or abatement if such be made. The document when filled up is usually called an income tax return, and it forms the basis of the assessment of the party making it (*q*).

Printed forms on which to make returns.

In the case of a corporation, fraternity, fellowship, or society of persons whether corporate or not, the declaration is to be made by the chamberlain or other officer acting as treasurer, auditor, or receiver (*r*), and in the case of a company, by the secretary or other officer, by whatever name called, performing the duties of secretary (*s*).

Returns on behalf of corporate or *quasi*-corporate bodies.

Provision is made for a return being made by trustees, guardians, tutors, curators, or committees of any person being an infant, married woman, lunatic, idiot or insane, in the place of such person, and, in the case of principals not resident in Great Britain,

Returns by trustees, guardians etc.

(*o*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 47. For the definition of "parish," see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 5. As to provision for detached parishes, see Land Tax Act, 1842 (5 & 6 Vict. c. 37), ss. 3—6 inclusive. As to the power of Land Tax Commissioners to transfer, unite, or group parishes, or to adopt a parish formed for poor law purposes, see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 36—38 inclusive, 72.

(*p*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 48.

(*q*) *Ibid.*, ss. 48, 49, 52. Any claim for relief under the Finance Act, 1907 (7 Edw. 7, c. 13), and for deduction for wear and tear of machinery must be included in the return (*ibid.*, ss. 19 (4), 26 (1)).

(*r*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 40, 54; and see p. 676, *post*.

(*s*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 22 (2); and see p. 676, *post*.

SECT. 2. Proceedings before Assessment.

by any factor, agent, or receiver for such principal having the receipt of any profits or gains belonging to such principal (*t*).

Penalties.

Penalties are provided for failing to make a correct return (*u*).

Assessors to make a list of persons served.

The assessor is required to make out a list of the persons on whom notices have been served, with other particulars, and make oath of due service (*v*).

Duties of clerk in reference to returns.

When the declarations are returned, the clerk to the Commissioners is to abstract them in books provided for that purpose, to which the inspectors and surveyors are to have access, and of which they may take copies (*w*). The matter is then ripe for assessing duty.

SECT. 3.—*The Schedules.*

1251. The duty is charged upon annual profits and gains in the nature of income from whatever source derived, and is imposed under five schedules, A to E inclusive, which are framed to include all such sources of income (*x*). The properties, profits and gains upon which the duty is charged are therein thus described:—

Schedule A.

"For and in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, and to be charged for every twenty shillings of the annual value thereof" (*y*).

Schedule B.

"For and in respect of the occupation of all such lands, tenements, hereditaments, and heritages as aforesaid, and to be charged for every twenty shillings of the annual value thereof" (*z*).

Schedule C.

"For and in respect of all profits arising from interest, annuities, dividends, and shares of annuities payable to any person, body politic or corporate, company or society, whether corporate or not corporate, out of any public revenue, and to be charged for every twenty shillings of the annual amount thereof" (*a*).

Schedule D (the operation of which is limited to classes of income not charged under any other schedule (*b*)).

"For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains.

(*t*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 41, 45, 53; and see p. 676, *post*.
(*u*) See pp. 685 *et seq.*, *post*.
(*v*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 57, 58.
(*w*) *Ibid.*, s. 59.
(*x*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2.
(*y*) See pp. 619 *et seq.*, *post*.
(*z*) See pp. 636 *et seq.*, *post*.
(*a*) See pp. 639 *et seq.*, *post*.
(*b*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, first Case; see pp. 642 *et seq.*, *post*.

"And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation, exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains.

"And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, and to be charged for every twenty shillings of the annual amount thereof."

Schedule E.

"For and in respect of every public office or employment of profit, and upon every annuity, pension, or stipend, payable by her Majesty or out of the public revenue of the United Kingdom, except annuities charged to the duties under the said Schedule C, and to be charged for every twenty shillings of the annual amount thereof" (*c*).

Part III.—Schedule A.

SECT. 1.—*Scope of Schedule. Classes of Property.*

Properties chargeable divided into three classes.

1252. It has been seen that under Schedule A, income tax is payable in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, and is to be charged for every twenty shillings of the annual value thereof (*d*). For the purpose of ascertaining the annual value upon which duty is chargeable under this schedule, properties are divided into three classes, the two latter of which classes are again sub-divided into various heads.

SECT. 2.—*Class No.* 1 (*Lands and Buildings*).

SUB-SECT. 1.—*What Properties are comprised in.*

Class No. 1. To what properties applicable.

1253. Class No. 1 is the general head, and applies to all properties which do not fall within Class No. 2 or Class No. 3.

It applies generally to all corporeal hereditaments capable of actual physical occupation, with the exception of mines and quarries and certain other large trading concerns enumerated in Class No. 3, and comprises dwelling-houses, shops, and other buildings, as well as lands (*e*).

(*c*) See pp. 666 *et seq.*, *post*.

(*d*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sched. A; and see p. 618, *ante*.

(*e*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. I. A sewer partly carried on arches over ground which is vested in and used by a sewerage board to carry off the drainage of the district is chargeable under Class No. 1 (*Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted*, [1907] A. C. 264). It is not clear whether such a sewer constructed entirely underground is chargeable, and in practice they are not charged. Compare *Ystradyfodwg and Pontypridd*

SECT. 2. SUB-SECT. 2.—*Ascertainment of Assessable Value.*

Class No. 1 (Lands and Buildings).

Assessments: (1) in metropolitan districts as defined;

1254. In districts to which the Valuation (Metropolis) Act, 1869 (*f*) applies, the gross value of a house or tenement stated in the quinquennial valuation list for the time being in force therein, is deemed to be the annual value thereof for the purpose of Schedule A (as also of Schedule B) in all cases where the tax is charged on the gross value of the property and not on profits (*g*). This provision is therefore applicable to all cases coming within Class No. 1, but not to those coming within either Class No. 2, or Class No. 3. Within these districts the functions of the assessors are performed by the surveyors (*h*), and the General Commissioners do not make valuations.

Main Sewerage Board v. *Newport Assessment Committee*, [1901] 1 K. B. 406, C. A.; *R.* v. *Metropolitan Board of Works* (1868), L. R. 4 Q. B. 15; *London County Council* v. *Erith (Churchwardens etc.) and Dartford Union Assessment Committee; West Ham (Churchwardens etc.)* v. *London County Council; St. George's Union Assessment Committee* v. *London County Council*, [1893] A. C. 562, 597. As to a tithe commutation rentcharge, see p. 623, *post;* and as to tithe rentcharges generally, see title ECCLESIASTICAL LAW, Vol. XI., pp. 742 *et seq.*

(*f*) 32 & 33 Vict. c. 67.

(*g*) *Ibid.*, s. 45. The section, so far as material, is in the following terms:—

"The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted; that is to say,

.

"(2) For the purpose of the following taxes which become chargeable during the year that the list is in force

.

"(b) Any tax assessed in pursuance of the Income Tax Act, and any Acts continuing or amending the same, on any lands, tenements, and hereditaments, in all cases where the tax is charged on the gross value, and not on profits

.

"And in construing the Income Tax Act, and any Acts continuing or amending that Act, with respect to Schedules A and B thereof, annual value shall be deemed to mean the gross value stated in such list."

Powers of objecting to and of appealing from the valuation of property by the assessment committee and various powers incidental thereto are by the Act given to the surveyors of taxes (see *ibid.*, ss. 4, 8, 12, 19, 32, 33, 42 (6), 49, 53, 56, 69). The list is subject to revision at the instance of the surveyor of taxes and others during the quinquennial period (see *ibid.*, ss. 46, 47 (1), (4)).

By s. 77 and Sched. V. (*ibid.*), the following income tax provisions are repealed so far as they relate to the Metropolitan Districts as defined by the Act, namely:—

Income Tax Act, 1842 (5 & 6 Vict. c. 35),	s. 60,	No. I.;
		No. II., paras. 1, 3;
		No. IV., paras. 2, 4;
		No. V., as far as respects the deductions allowed by the Act;
,,	,,	s. 63, No. X., paras. 1, 2, 3, 4;
,,	,,	ss. 64—68 inclusive, 78, 81, 82, 87, and any other part which relates to the ascertainment of the value of lands etc. with respect to which the valuation list is made conclusive.

(*h*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 43 (2).

(2) in non-metropolitan districts.

1255. In other districts the annual value for purposes of assessment, in cases where the amount of rent has been fixed by agreement commencing within seven years preceding the 5th April next before the assessment, is the rent by the year at which the hereditament is let at rack rent, but if not so let, then at the rack rent at which the same is worth to let by the year (*i*).

Rack rent, how ascertained.

In ascertaining the rack rent, it is to be assumed that the tenant pays the ordinary tenant's rates and taxes, and any assessments which by law are a charge on the occupier, and that the landlord is liable for any aids, taxes, rates or assessments by law chargeable on or payable by the landlord, and the repairs, and, where this is not the case, a corresponding deduction from or addition to the actual rent paid is to be made accordingly (*k*). Where the rent paid is a grain or produce rent, provision is made for valuing the same (*l*).

Incidental powers of commissioners and assessors.

There are special provisions for enabling the commissioners to ascertain the true rack rent, and, in cases where premises are expressed to be demised at a rack rent, to ascertain whether such is the *bonâ fide* full rent (*m*). The assessors and commissioners respectively have power to call for the production of leases and agreements (*n*), and of the rate books of the district (*o*), and, in certain circumstances, to require accounts from the occupier (*p*). In districts outside the metropolis the valuation is nominally made for the current year only; but in practice it also is usually quinquennial, a provision being inserted in the Finance Act of each of the four years subsequent to the year in which the valuation is made which enacts that the value adopted for the previous year shall be the value for the current year, and the value so adopted for these years cannot during that period be questioned by appeal (*q*). During these subsequent years the inspectors and surveyors are the persons who certify the assessment to the commissioners (*r*).

SUB-SECT. 3.—*Deductions from Assessed Value.*

Deductions.

1256. From the annual value ascertained as above the following deductions are for the purposes of collection to be made in metropolitan as well as in other districts (*s*).

(*i*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 60, No. I., 66.
(*k*) *Ibid.*, ss. 63, No X. (1), (2), 65.
(*l*) *Ibid.*, ss. 63, No. X. (3), (4), 65.
(*m*) *Ibid.*, ss. 64—68 inclusive.
(*n*) *Ibid.*, ss. 66, 68.
(*o*) *Ibid.*, ss. 75, 76. The Act contains rules (s. 64, No. XI. (1)—(4)) for assessing the duty by reference to the existing poor rate; but these rules are in practice inoperative, because at the present day the poor rate is not made upon the full, *i.e.*, gross, annual value, but upon the net annual value, *i.e.*, the rental value after making the statutory reductions for cost of repairs, insurance and other expenses. See *Walker* v. *Brisley* (1900), 4 Tax Cas. 254, and title INHABITED HOUSE DUTY. The commissioners are not bound by the poor rate assessment.
(*p*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 67.
(*q*) See, *e.g.*, Finance Act, 1906 (6 Edw. 7, c. 8), s. 6; *Turner* v. *Carlton*, [1909] 1 K. B. 932.
(*r*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 30.
(*s*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 35. The provisions are

SECT. 2.
Class No. 1 (Lands and Buildings).

In the case of an assessment on lands (inclusive of a farmhouse and other buildings included with lands in the assessment) a sum is to be deducted equal to one-eighth of the assessment.

In the case of an assessment upon a house or building (except a farmhouse or building included with lands as above)—(1) where the owner is occupier or assessable as landlord, or where the tenant is occupier and the landlord undertook to bear the cost of repairs, a sum is to be deducted equal to one-sixth of the assessment; (2) where a tenant is occupier and undertook to bear the cost of repairs, there is to be deducted such sum, not exceeding one-sixth of the assessment, as may be necessary to reduce it to the amount of rent payable by him.

(1) In the case of lands including farm buildings.

(2) In the case of other houses and buildings.

In certain cases the right of deduction is limited.

But this deduction of one-eighth or one-sixth, as the case may be, is not allowable where the amount of the assessment is respectively more than one-eighth, or more than one-sixth below the rent, after deducting therefrom any outgoing which should by law be deducted in making the assessment.

Further relief granted to owners of land and of houses of not exceeding £8 assessed value.

1257. In addition to the above deductions the owner of any land (inclusive of farmhouses and other buildings, if any) chargeable under this class (*t*), and of any house the annual value of which, as adopted for the purpose of income tax under Schedule A, does not exceed £8, is entitled to a further deduction upon showing that the cost to him of maintenance, repairs, insurance, and management as hereinafter defined according to the average of the preceding five years has exceeded, in the case of land, the one-eighth part of the annual value of the land as defined above, and, in the case of houses, the one-sixth part as so defined. On such proof he is entitled, on making a claim for the purpose, to repayment of the amount of the duty upon the excess not exceeding in the case of the land one-eighth part, and in the case of houses one-twelfth part of the duty on an amount equal to the annual value (*u*).

Cost of maintenance, how ascertained.

1258. For the above purpose the term "maintenance" includes the replacement of farmhouses, farm buildings, cottages, fences, and other works where the replacement is necessary to maintain the existing rent (*v*), and in comparing the cost of maintenance, repairs, insurance, and management of any land or houses for this

summarised in the text. The deductions are intended to cover the cost of repairs.

(*t*) See p. 619, *ante*.

(*u*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 69 (1), (2).

(*v*) *Ibid.*, s. 69 (1). Some obscurity is created by the final words of this sub-section, namely, the words "necessary to maintain the existing rent." The expression "owner" in the earlier part of the sub-section, taken alone, seems clearly applicable to an owner who is also occupier, as well as to an owner who has let to a tenant. But in the former case the owner cannot, it seems, bring himself within the words quoted because there is no "existing rent." There appear to be three possible constructions of the clause: (1) that the words quoted confine the relief given by the section to owners who are landlords; (2) that while occupying owners are within the section they are precluded from including in the five-yearly average anything on account of the cost of replacement of buildings etc., as distinguished from other cost of management; (3) that in the case of occupying owners the words "existing rent" must be read as meaning "existing rental value."

purpose with the annual value thereof, the total cost of the maintenance on any land managed as one estate, or of any houses on such land, is to be compared with the total annual value of the land or houses as the case may be (*x*).

Definition of five years' average.

In computing the five-year average (*y*), the year is to be taken to be the year ending on the 31st March, or such other date as may be adopted by the owner of the land or houses with the consent of the surveyor of taxes of the district, and the five preceding years are to be taken to be those preceding the commencement of the year for which the duty in respect of which a claim for repayment is made is charged (*z*).

Ancillary provisions with reference to making claim.

All the provisions of the Income Tax Acts (*a*) which relate to claims for exemption, relief, or abatement, or to the proof to be given with respect to those claims, apply to claims for repayment under para. 1257, and to the proof to be given with respect to those claims, but if the owner of any land or house makes and delivers to the surveyor of taxes of any district in which the land or house is wholly or partly situate a declaration as to the cost to him of maintenance, repairs, insurance, and management, and the surveyor is satisfied as to the correctness of the declaration, the amount of the allowance to which the owner is entitled is to be certified by the surveyor, and repayment thereupon made in accordance with his certificate (*b*).

Further, in addition to the deductions mentioned above (*c*), certain other deductions or allowances of duty are, in the case of certain special classes of property, authorised by rules applicable to Schedule A generally. These are dealt with hereinafter (*d*).

Tithe rentcharge.

1259. A tithe commutation rentcharge may, at the option of the commissioners and on certain conditions, be assessed upon the owner thereof, the amount being allowed as a deduction in the assessment of the lands upon which it is charged (*e*). When so assessed it is chargeable under Class No. 1, and the necessary expenses of collection may be deducted (*f*).

SECT. 3.—*Class No. 2 (Incorporeal Hereditaments).*

SUB-SECT. 1.—*What Properties are comprised in.*

Class No. 2 to what properties applicable.

1260. Class No. 2 includes all incorporeal hereditaments and generally such tenements as are not capable of actual occupation (*g*).

SUB-SECT. 2.—*Ascertainment of Assessable Value.*

The assessment is made upon the profits or average profits.

1261. In the case of properties comprised in Class No. 2, the annual value is to be ascertained by reference to the profits which are received therefrom. These profits are to be ascertained in

(*x*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 69 (3).
(*y*) See p. 622, *ante*.
(*z*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 69 (5).
(*a*) see p. 610, *ante*.
(*b*) *Ibid.*, s. 69 (4).
(*c*) See p. 622, *ante*.
(*d*) See pp. 627—630, *post*.
(*e*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 32. As to tithe rentcharge generally, see title ECCLESIASTICAL LAW, Vol. XI., pp. 742 *et seq.*
(*f*) *Stevens* v. *Bishop* (1888), 20 Q. B. D. 442, C. A.
(*g*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. II.

SECT. 3. Class No. 2 (Incorporeal Hereditaments).

certain cases for a single year, and in others upon an average of a certain number of years, as follows (*h*):—

Tithes in kind etc.

(1) In the case of tithes taken in kind the profits are to be ascertained upon an average of the three preceding years (*i*).

Church dues etc.

(2) In the case of dues and money payments in right of the Church, or by endowment, or in lieu of tithes (not being tithes arising from lands), the profits are to be ascertained in the same way.

Money payments for tithes other than commutation rentcharges.

(3) In the case of tithes arising from lands, and of rents and money payments in lieu of such tithes, except rentcharges confirmed under the Tithe Commutation Act, 1836 (*j*), the profits are the amount received in the year preceding.

Manors and royalties.

(4) In the case of manors and other royalties, including dues and other services or other casual profits (not being rents or other annual payments reserved or charged), the profits are to be ascertained on an average of the seven preceding years.

Fines etc.

(5) In the case of fines received in consideration of any demise of lands or tenements (not being parcel of a manor or royalty demisable by the custom thereof), the profits are the amount received in the year preceding.

Other profits.

(6) In the case of other profits arising from lands, tenements, hereditaments, or heritages not in the actual possession or occupation of the party to be charged (*k*), and not before enumerated, the commissioners are to fix the number of years proper for average.

Expenses of collection.

Fines applied as productive capital.

1262. In assessing duty under (4) upon manorial income, the expenses of collection are not to be deducted, at any rate unless the expense is necessary and not merely convenient and usual (*l*). In making an assessment under (5), fines received which have been applied as productive capital on which a profit chargeable to income tax has arisen or will arise for the year of assessment, are deductible upon proof thereof to the satisfaction of the commissioners; but money temporarily deposited in a bank is not deductible under this rule (*m*).

SECT. 4.—*Class No. 3 (Mines, Quarries, and certain Commercial Undertakings).*

SUB-SECT. 1.—*What Properties are comprised in—Rule in reference to Municipal Undertakings.*

Class No. 3, to what trading concerns applicable.

1263. Class No. 3 comprises a variety of hereditaments, corporeal or otherwise, by means of which a trade or business is carried on

(*h*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. II. These provisions, so far as they relate to the metropolis, are repealed by the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 77, and Sched. V. Sched. III. (*ibid.*) contains substituted provisions.

(*i*) As to tithe generally, see title ECCLESIASTICAL LAW, Vol. XI., pp. 742 *et seq.*

(*j*) 6 & 7 Will. 4, c. 71.

(*k*) It is not clear to what lands or tenements these words apply.

(*l*) *Norfolk* (*Duke*) v. *Lamarque* (1890), 24 Q. B. D. 485, distinguishing *Stevens* v. *Bishop* (1888), 20 Q. B. D. 442, C. A.

(*m*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. II. (5); *Mostyn* (*Lord*) v. *London*, [1895] 1 Q. B. 170.

or profits or gains received, and these are dealt with under three separate sub-heads, and are respectively chargeable by reference to the profit made from them for a specified period or average of years. The provisions may be summarised as follows (*n*):—

(1) Quarries of stone, slate, limestone or chalk are charged upon the profits of the preceding year (*o*). Quarries.

(2) Mines of coal, tin, lead, copper, mundic, iron, and other mines are charged upon the average profits of the five preceding years (*p*). But in the case of a mine which from some unavoidable cause has decreased and is decreasing in annual value, so that the average would give an unfair estimate of value, the commissioners may compute the value on the profits and gains of the preceding year, subject to a certain abatement, or, if the mine has wholly failed, may discharge the assessment (*q*). Mines.

(3) Ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains and levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries and other concerns of the like nature from or arising out of any lands, tenements, hereditaments or heritages are charged upon the profits of the preceding year (*r*). Ironworks, gasworks, railways etc. and other trading concerns arising out of the ownership of land.

1264. In order that a concern may be chargeable under Class No. 3, it must be one which is carried on with a view to earning profits (*s*). Legal decisions.

A slate quarry from which the slate is gotten by underground workings is chargeable as a quarry under Class No. 3 (1), and not as a mine under Class No. 3 (3) (*t*). Slate quarries.

A municipal corporation owning gas or water works is chargeable under Class No. 3 (3) upon the profits made by the sale of gas and water to voluntary customers both within and without their district (*u*). Similarly, municipal corporations are chargeable in respect of profits derived from baths, markets, slaughterhouses, and similar undertakings carried on by them (*v*). Trades carried on by municipal corporations.

But when for the purpose of defraying the cost of a water supply to their town a municipal corporation is authorised to levy a general

(*n*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. III.
(*o*) *Ibid.*, No. III. (1).
(*p*) *Ibid.*, No. III. (2).
(*q*) *Ibid.*, No. IV. (5).
(*r*) *Ibid.*, No. III. (3).
(*s*) See *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted*, [1907] A. C. 264, where a sewer which was primarily used by a sewerage board to carry off the drainage of the district, but the use of which was permitted to other sewerage districts in consideration of a money payment, was held not to be chargeable under Class No. 3. See note (*e*), p. 619, *ante*.
(*t*) *Jones* v. *Cwmorthen Slate Co.* (1879), 5 Ex. D. 93, C. A.
(*u*) *Glasgow Gas Commissioners* v. *Inland Revenue* (1876), 3 R. (Ct. of Sess.) 857; *Glasgow Water Commissioners* v. *Miller* (1886), 3 R. (Ct. of Sess.) 489; *Allan* v. *Hamilton Water Works Commissioners* (1887), 14 R. (Ct. of Sess.) 485; *Dublin Corporation* v. *M'Adam* (1887), 20 L. R. Ir. 497; *Dillon* v. *Haverfordwest Corporation*, [1891] 1 Q. B. 575.
(*v*) *Adam* v. *Maughan* (1889), 30 Sc. L. R. 258.

SECT. 4. Class No. 3 (Mines, Quarries etc.).

rate upon all occupiers therein, whether they take a supply of water or not, the rate so levied is not chargeable to tax as profits (*w*).

Where a municipal corporation is authorised, on condition of lighting their town with gas, to supply gas to customers for domestic purposes on payment, the cost of lighting the town cannot be deducted in arriving at the profits derived from that supply (*x*). Under the heads "rights of markets and fairs, tolls," the following receipts (amongst others) are chargeable:—Coal duties payable to a corporation for landing coals within the borough in whatever way such duties are applied (*y*); profits derived by the City of London from renewal fines, profits of markets, corn and fruit metages, broker's rents, Mayor's Court and other fees (*z*), and burgess and freedom fines and petty customs (*a*).

The tax should be assessed upon the net profit accruing under each head, after deducting the cost immediately incurred in earning it (*b*).

Burial boards.

A cemetery company or burial board deriving income from the sale of graves in a burial ground in their occupation are chargeable under the head "other concerns" (*c*).

Foreign undertakings.

1265. Profits from undertakings of the description mentioned in Class No. 3, if situate abroad, are chargeable, if at all, not under Schedule A, but under Schedule D (*d*).

Profits of railway companies and salaries of employés.

The profits of railway companies situated in the United Kingdom, as well as the salaries of persons holding offices or employment therein, are assessed by the Special Commissioners (*e*).

SUB-SECT. 2.—*Duty, how Assessed.*

Concerns chargeable under Class No. 3 are assessed according to rules prescribed by Schedule D.

1266. Concerns which are chargeable under Class No. 3 are to be charged and assessed (*f*) according to the rules prescribed by Schedule D, so far as such rules are consistent with the provisions relating to such concerns in this section. Those rules of Schedule D, which specify what deductions from gross takings are allowable in arriving at the assessable profits are applicable to such concerns when in the nature of trades (*g*), and they are entitled to the same deductions for depreciation of machinery and plant as

(*w*) *Inland Revenue Commissioners* v. *Glasgow Corporation Water Commissioners* (1875), 12 Sc. L. R. 466.

(*x*) *Dillon* v. *Haverfordwest Corporation*, [1891] 1 Q. B. 575.

(*y*) *A.-G.* v. *Black* (1871), L. R. 6 Exch. 308, Ex. Ch.

(*z*) *A.-G.* v. *Scott* (1873), 28 L. T. 302.

(*a*) *Webber* v. *Glasgow Corporation* (1893), 30 Sc. L. R. 255.

(*b*) *A.-G.* v. *Scott*, *supra*.

(*c*) *Edinburgh Southern Cemetery Co.* v. *Inland Revenue Solicitor* (1889), 27 Sc. L. R. 71; *Portobello Magistrates* v. *Surveyor of Taxes* (1890), 27 Sc. L. R. 863.

(*d*) *Imperial Continental Gas Association* v. *Nicholson* (1877), 37 L. T. 717; *Alianza Co., Ltd.* v. *Bell*, [1906] A. C. 18; and see p. 643, *post*.

(*e*) Income Tax Act, 1860 (23 & 24 Vict. c. 14), ss. 6, 7; and see p. 614, *ante*.

(*f*) Revenue Act, 1866 (29 & 30 Vict. c. 36), s. 8.

(*g*) *Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 315, overruling *Knowles* v. *McAdam* (1877), 3 Ex. D. 23.

are concerns chargeable under that Schedule (*h*). They are therefore dealt with under that Schedule (*i*).

SECT. 4. Class No. 3 (Mines, Quarries etc.).

SECT. 5.—*Allowances by way of Abatement or Exemption.*

SUB-SECT. 1.—*Allowances by way of Abatement.*

Allowances by way of abatement.

1267. In addition to the deductions referred to above (*j*), other deductions or allowances are sanctioned in the case of certain classes of property coming within Schedule A in reduction of the amount upon which the duty is payable. These deductions may be summarised as follows:—

Ecclesiastical dues.

(1) The amount of the tenths and first fruits, duties and fees on presentations paid by any ecclesiastical person within the year preceding the year of assessment (*k*);

Procurations and synodals.

(2) The amount of payments by ecclesiastical persons for procurations and synodals on a seven years' average (*l*);

Repairs of churches.

(3) The amount expended in the year preceding the year of assessment by any ecclesiastical person or collegiate body, rector, vicar or other person bound to repair the same, for repairs of collegiate churches, chapels, and chancels of churches or of any college or hall in any of the universities of the United Kingdom (*m*);

Taxes etc. on tithe rentcharge.

(4) The amount paid for parochial rates, taxes, and assessments upon and in respect of any rentcharge confirmed under the Tithe Act, 1836 (*n*), in the year of assessment (*o*);

Land tax.

(5) The amount of the unredeemed land tax (*p*) payable under the Land Tax Act, 1797 (*q*);

Drainage, fencing and embankment rates.

(6) The amount charged on lands, tenements or hereditaments by a public rate or assessment in respect of draining, fencing, or embanking the same (*r*);

Repairs of sea walls.

(7) The amount expended on an average of the twenty-one preceding years, by the landlord or owner, in the making or repairing of sea walls or other embankments necessary for the preservation or protection of lands against the encroachment or overflowing of the sea or any tidal river, although not charged by a public rate (*a*);

(*h*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 12.
(*i*) See pp. 643—654, *post*.
(*j*) See pp. 621 *et seq.*, *ante*.
(*k*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. V. (1). The subject-matter from which these deductions and those specified in the following heads, (2) and (3), are to be made is not specified, but presumably they relate to ecclesiastical revenues chargeable under Sched. A.
(*l*) *Ibid.*, s. 60, No. V. (2).
(*m*) *Ibid.*, s. 60, No. V. (3); s. 61, No. VI.; Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 34.
(*n*) 6 & 7 Will. 4, c. 71, s. 69.
(*o*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. V. (4).
(*p*) *Ibid.*, s. 60, No. V. (5).
(*q*) 38 Geo. 3, c. 5.
(*r*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. V. (6). The amount that may be deducted is limited by the rule.
(*a*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 37. As to construction of this section, see *Hesketh* v. *Bray* (1888), 21 Q. B. D. 444, C. A.

SECT. 5.
Allowances by way of Abatement or Exemption.

(8) The amounts expended in repairs of public buildings or offices belonging to any college or hall of the universities of the United Kingdom, and not occupied by any individual member thereof or by any person paying rent for the same, or in the repair of any gardens, walks, and grounds for recreation appurtenant thereto and repaired and maintained by the funds of such college or hall (*b*) ;

Repairs of university buildings.

(9) The amounts expended in repairs of public buildings, offices, or premises belonging to any hospital, public school or almshouse, and not occupied by any individual officer or master thereof, whose income estimated according to specified rules shall amount to £150 per annum or upwards, or by any person paying rent for the same (*c*) :

Repairs of buildings, of hospitals, public schools, and almshouses.

By whom the allowances are granted.

1268. The allowance under head (4) is granted upon the application of the person entitled by the General Commissioners, and they are thereupon to certify the amount allowable to the Special Commissioners, who are to make an order for repayment (*d*).

The allowances under heads (5) and (6) are to be deducted from the assessment in the first instance, while the deductions under heads (1), (2), and (3) may at the option of the party either be deducted from the assessment or, if not so deducted, be recovered by applying for a certificate as above mentioned (*e*).

A mandamus to the Special Commissioners will lie in case of improper refusal to order repayment (*f*).

The allowances under head (7) are to be allowed by the General Commissioners (*g*), and those under heads (8) and (9) by application before the Special Commissioners (*h*).

SUB-SECT. 2.—*Allowances by way of Exemption.*

Allowances by way of exemption.

1269. Certain classes of property are exempted from the tax. They are as follows :—

University buildings.

(1) The public buildings and offices belonging to any college or hall in any of the universities of the United Kingdom and not occupied by any individual member thereof or by any person paying rent for the same (*i*).

Buildings of hospitals, public schools and almshouses.

(2) The public buildings, offices or premises belonging to any hospital, public school, or almshouse, and not occupied by any individual officer or the master thereof whose income,

(*b*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 61, No. VI. As to total exemption in respect of the buildings and offices themselves, see *infra*.

(*c*) *Ibid.* As to total exemption in respect of the buildings, offices, and premises themselves, see *infra*.

(*d*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. V., and s. 61 ; Income Tax Act, 1860 (23 & 24 Vict. c. 14), s. 10.

(*e*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. V.

(*f*) *Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A. C. 531.

(*g*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 37.

(*h*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 61, No. VI.

(*i*) *Ibid.*, s. 60, No. VI. Under the provision conferring the above exemption, a deduction is also sanctioned for the repairs of these buildings and offices, and the gardens, walks, and grounds for recreation; see *supra*.

estimated, according to the rules of the Income Tax Acts, shall amount to £150 per annum or upwards, or by any person paying rent for the same (*k*).

Buildings of literary and scientific institutions.

(3) Any building the property of any literary or scientific institution used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded by lectures or otherwise, and which is not occupied by any officer of such institution or by any person paying rent for the same (*l*).

Rents and profits of lands etc. belonging to hospitals, public schools, or almshouses, or to trustees for charitable purposes.

(4) The rents and profits of lands, tenements and hereditaments belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes so far as the same are applied to charitable purposes (*m*).

British Museum and friendly societies.

(5) Trade unions, under certain conditions and in respect of certain property (*n*).

(6) The trustees of the British Museum and also certain friendly societies (*o*) are respectively entitled to the like allowances as are granted to colleges and to the other properties mentioned under the foregoing heads (*a*).

Exemptions, by whom granted.

Exemptions under heads (1), (2), (3) and (presumably) (5) are to be allowed by the General Commissioners of the district by certificate to the Special Commissioners (*b*).

Those under head (4) are to be allowed by the Special Commissioners upon application made to them, and without vacating, altering or impeaching the assessments made upon the properties (*c*).

Legal decisions.

1270. A society, the main object of which is advancement of the interests of a profession, does not come within the exemption by reason of its incidentally furthering the advancement of science (*d*). A free public library, vested in a municipal corporation and

(*k*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. VI. A deduction is also sanctioned for the repairs of these buildings, offices, and premises, and the gardens, walks, and grounds for recreation, repaired and maintained by the funds of the institution in question; see pp. 627, 628, *ante*.

(*l*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. VI.

(*m*) *Ibid.*, s. 61, No. VI. As to what institutions come within this exemption, see title CHARITIES, Vol. IV., pp. 105, 208; and as to the meaning of "charitable," see *Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A. C. 531; and *R.* v. *Income Tax Special Commissioners, Ex parte University College of North Wales* (1909), 100 L. T. 585, C. A.

(*n*) Namely, under the conditions and in respect of the property specified under Sched. C, p. 641, *post*.

(*o*) Namely, such friendly societies as come within the first exemption in Sched. C of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, as amended. As to which exemption, see p. 641, *post*. As to the British Museum, see title LITERARY AND SCIENTIFIC INSTITUTIONS, and as to friendly societies, see title FRIENDLY SOCIETIES, Vol. XV., pp. 119 *et seq.*

(*a*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 149; Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 12.

(*b*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 61, No. VI.

(*c*) *Ibid.*, and see s. 62, *ibid.*

(*d*) *Inland Revenue* v. *Royal College of Surgeons of Edinburgh* (1892), 19 R. (Ct. of Sess.) 751. The following decisions upon the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11, in reference to corporation duty may be consulted: *Inland Revenue Commissioners* v. *Forrest* (1890), 15 App. Cas. 334; *Re Royal College of Surgeons of England*, [1899] 1 Q. B. 871, C. A.

SECT. 5. Allowances by way of Abatement or Exemption.

maintained under the Public Libraries Act, 1892 (*e*), is within the exemption (*f*) provided the entire library is free and used for no other purpose (*g*).

1271. Exemption under head (4) is confined to cases where the lands etc. are let to third persons, and is not applicable to lands which are occupied by the trustees or servants of the charity (*h*). The tax is paid and deducted by the tenant of the lands in the ordinary way and is then returned to the charity by the Special Commissioners, to the extent to which it is shown that the rent received has been applied to charitable purposes (*i*).

Meaning of "charitable."

1272. It would seem that the expression "charitable" is used in the technical sense in which it is used in the 43 Eliz. c. 4, and in general legislation applicable to England, Scotland, and Ireland. It is not confined to purposes connected with the relief of poverty. Lands held in trust to support missionary establishments among the heathen are within the exemption (*j*).

Crown property and property used for Government purposes are also the subject of exemption (*k*).

SECT. 6.—*Place of Assessment.*

Properties to be assessed in parish where situate.

1273. The general rule is that properties are to be assessed and charged in the parish or place where situate (*l*), but there are exceptions to this rule in the cases of railways, canals, and other large undertakings (*m*), profits arising from manors or royalties extending into different parishes and profits from fines (*n*), lands in different parishes held on the same demise (*o*), and mines (*p*).

Exceptions.

In cases of doubt the Commissioners of Inland Revenue may determine in which district or parish the assessment shall take place (*q*).

(*e*) 55 & 56 Vict. c. 53.

(*f*) *Manchester Corporation* v. *McAdam*, [1896] A. C. 500.

(*g*) *Inland Revenue* v. *Dundee Magistrates* (1897), 24 R. (Ct. of Sess.) 930.

(*h*) See, however, *R.* v. *Income Tax Special Commissioners, Ex parte Essex Hall* (1911), 27 T. L. R. 190.

(*i*) *Surveyor of Taxes* v. *Free Church of Scotland (Trustees)* (1893), 20 R. (Ct. of Sess.) 759.

(*j*) *Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A. C. 531; see also *R.* v. *Income Tax Special Commissioners, Ex parte University College of North Wales* (1909), 100 L. T. 585, C. A., where the exemption was held to be applicable to the University College of North Wales; and see title CHARITIES, Vol. IV., pp. 105 *et seq.*, 208.

(*k*) See p. 632, *post*.

(*l*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. IV. (1). As to a parish situate in two counties, and a house situate in two parishes, see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 53; Revenue Act, 1884 (47 & 48 Vict. c. 62), ss. 6, 7.

(*m*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. IV. (1).

(*n*) *Ibid.*

(*o*) *Ibid.*, s. 60, No. IV. (2). This rule is not in force in the Metropolis; see Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 77.

(*p*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. IV. (5).

(*q*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 53 (2), 54.

SECT. 7.—*Persons upon whom the Duty Falls.*

SUB-SECT. 1.—*Persons Chargeable as between the Subject and the Crown.*

SECT. 7. Persons upon whom the Duty Falls.

1274. In the case of lands and hereditaments which are capable of actual occupation the general rule is that the person who is the occupier for the time being is the person who as between himself and the Crown is chargeable to the tax, and every person having the use of any lands or tenements is to be taken and considered as such occupier (*r*).

Properties assessed under Class No. 1 are chargeable to the occupier.

Houses and lands, however, which are for the time being unoccupied are to be assessed, subject to the right of application to the Commissioners to discharge the assessment for the period during which they are unoccupied (*s*).

Unoccupied houses.

1275. Houses let in several apartments or tenements and occupied by two or more persons are to be charged as one house upon the landlord, with remedy against the occupiers upon default by him (*t*).

Flats and apartments.

But houses divided into distinct properties and occupied by distinct owners or their respective tenants are to be charged separately on the respective occupiers (*u*).

To the above general rule, however, there are the following exceptions:—(1) Upon request in writing made to their clerk before the 31st July of any year by the landlord or immediate lessor of any lands etc., the Commissioners may charge and assess such person in the place of the occupier, and in that case the duty may be recovered from him, but without prejudice to the right of distraint upon the property. In such case, if the tenant be called upon to pay, he has the right to deduct the amount from the next or any subsequent payment on account of rent to his landlord. The landlord or immediate lessor may cancel the request by notice in writing to the clerk on or before the 31st July in any year (*x*). (2) In the case of a dwelling-house in the occupation of a tenant, which with the buildings or offices belonging thereto and the land occupied therewith are under the annual value of £10, and also in the case of lands and tenements let to a tenant for a less period than a year, the assessment is in every case to be made upon the landlord, with power of recovery against the occupier in case of default of payment by the landlord (*a*). (3) In the case of a house or tenement occupied by an accredited minister of a

Exceptions to the rule.

(*r*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 63, No. IX. (1), (2). As to the meaning of "occupier," see *Bent* v. *Roberts* (1877), 3 Ex. D. 66; *Coomber* v. *Berks Justices* (1883), 9 App. Cas. 61.

(*s*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 70. As to the meaning of "unoccupied," see *Smith* v. *Dauney*, [1904] 2 K. B. 186.

(*t*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 36.

(*u*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. IV. (13). As to the meaning of the words "distinct properties," see *A.-G.* v. *Mutual Tontine Westminster Chambers Association* (1876), 1 Ex. D. 469, C. A. (a decision upon the inhabited house duty).

(*x*) Finance Act, 1898 (61 & 62 Vict. c. 10), s. 10.

(*a*) Income Tax Act, 1842 (5 & 6 Vict. c 35), s. 60, No. IV. (3).

SECT. 7. **Persons upon whom the Duty Falls.**

foreign State, the assessment is to be made upon the landlord or person immediately entitled to the rent (*b*).

In the case of hereditaments not capable of actual occupation and chargeable under Class No. 2 (*c*), the person chargeable is generally the owner or person entitled or his lessee or agent (*d*), and in the case of properties chargeable under Class No. 3 (*e*) the person carrying on the concern or his agent or other officer having the direction or management thereof, or being in the receipt of the profits (*f*).

Persons chargeable in the case of properties assessed under Classes No. 2 and No. 3.

Occupation by the Crown.

1276. Hereditaments in the occupation of the Crown (other than the private estates of the Sovereign) are not chargeable, and this exemption applies to premises required for the administration of justice, such as county assize courts and police stations not owned by the Crown, but not to premises used in the administration of municipal affairs (*g*).

SUB-SECT. 2.—*Remedy Over of Occupier, Mortgagor, or other Person paying the Duty to the Crown.*

Where there are several interests, the duty is borne by them rateably.

1277. Although, for convenience of collection, the duty payable under Schedule A is charged upon one person, that person, in cases where the tenement is capable of occupation, being as a rule the occupier, yet in the result the entire duty is not necessarily borne by that person. The duty is, as stated above, a tax upon the profits derived from the "property," in lands, tenements and hereditaments, and, therefore, is ultimately borne rateably by the several persons interested therein, in proportion to their respective interests as owners. The provisions authorising such deduction may be summarised as follows:

Deduction by tenant.

1278. If the occupier be a tenant, he is entitled to deduct from the first payment thereafter to be made to his landlord on account of rent, such amount, not exceeding the duty paid by him, as is equivalent to the duty upon the rent so payable, and the landlord and his agent respectively are required under a penalty (*h*) to allow such deduction, which enures as a payment *pro tanto* of the rent due (*i*).

(*b*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. IV. (7).

(*c*) See p. 623, *ante*.

(*d*) See Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. II. As to tithes, and composition for tithes, markets, fairs, tolls and fisheries, see *ibid.*, ss. 71, 72.

(*e*) See p. 624, *ante*.

(*f*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. III.

(*g*) *Coomber* v. *Berks Justices* (1883), 9 App. Cas. 61; *Adam* v. *Inland Revenue Commissioners* (1889), 27 Sc. L. R. 64; and see *Brown* v. *Smith* (1901), 4 F. (Ct. of Sess.) 31. As to the liability in the case of private estates of the Crown, see Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), ss. 8, 9; and Crown Private Estates Act, 1873 (36 & 37 Vict. c. 61). As to the liability of houses etc. belonging to His Majesty in the occupation of an officer of His Majesty in right of his office, see Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. IV. (8).

(*h*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 103; and see p. 686, *post*.

(*i*) *Ibid.*, s. 60, No. IV. (9). By the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40, the right of deduction is given to "every person who shall be liable to the payment of any rent." As to the rate at which the deduction is to be made, see, further, Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), s. 15.

SECT. 7. Persons upon whom the Duty Falls.

A similar power is given to the occupier of lands which are charged on the amount of any composition, rent, or payment for tithes arising therefrom, to deduct the proportion of the tax from the composition rent or payment (*j*).

Payments other than rent.

1279. A similar power of deduction is given to the owner of lands, tenements, and hereditaments who has paid or borne the tax directly or by deduction, to deduct to a similar extent, and retain, the tax upon any annuity, fee farm rent, rent service, quit rent, feu duty, teind duty, stipends to licensed curates or other annual payments thereon reserved or charged (*k*).

Mortgagor etc. may deduct from interest payable.

This provision applies to the ordinary case of mortgagor and mortgagee, and generally to cases where the property assessable under this schedule is subject to a charge, and an analogous provision is made for the case of a mortgagee in possession (*l*).

General Commissioners to decide disputes relating to deduction.

A power is given to the General Commissioners to settle differences touching the sums to be deducted under the above provisions as between the parties interested (*m*).

Contracts not to allow deduction are void.

All contracts, covenants and agreements made or entered into or to be made or entered into for payment of any interest, rent or other annual payment aforesaid in full, without allowing any such deduction, are declared utterly void (*n*).

The right of reduction, when applicable.

1280. A tenant who omits to deduct the duty "from the first payment of rent thereafter to be made" loses his right of deduction (*o*).

The deduction may be made in cases where the payment of rent has been effected by a distress (*p*).

In the case of a publican holding a licence and liable to pay compensation charges under the Licensing Act, 1904 (*q*), the rent payable by him for his licensed premises, in respect of which he is entitled to deduct the duty, is the gross rent, and not the rent less the portion of the compensation charges which he is entitled to deduct from that rent (*r*).

Certain contracts dealing with the right of deduction are not avoided.

1281. A provision in a lease which provides for the payment of an additional rent equivalent to the amount of income tax on the

(*j*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, No. IV. (9).

(*k*) *Ibid.*, s. 60, No. IV. (10); Income Tax Act, 1853 (16 & 17 Vict. c. 34), ss. 40, 42. As to the penalty for refusing to allow deduction, see Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 103; and p. 686, *post*.

(*l*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 60, No. IV. (11), 158; Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40. Cases arising in reference to a mortgagor's right of deduction under this and other provisions contained in the Income Tax Acts are dealt with at pp. 661 *et seq.*, *post*.

(*m*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 160.

(*n*) *Ibid.*, ss. 73, 103.

(*o*) *Cumming* v. *Bedborough* (1846), 15 M. & W. 438. In certain cases the right to deduct is extended to subsequent payments of rent; see Customs and Inland Revenue Act, 1883 (46 & 47 Vict. c. 10), s. 10 (2); Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 36; and see title LANDLORD AND TENANT.

(*p*) *Graham* v. *Tate* (1813), 1 M. & S. 609; *Franklin* v. *Carter* (1845), 1 C. B. 750.

(*q*) 4 Edw. 7 c. 23; repealed and re-enacted by Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24).

(*r*) *Hancock & Co.* v. *Gillard*, [1907] 1 K. B. 47.

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property for the time being is not void (*s*). Nor is an agreement that if the tenant will pay the rent in full without deduction of tax the landlord will repay him the amount which he might have deducted under the statute; and this amount may be recovered by action (*t*).

SUB-SECT. 3.—*Unoccupied Lands: Successive Occupation.*

Unoccupied houses and lands.

1282. Special provisions are made for the case of unoccupied lands, tenements and hereditaments, and also for the case of a change of occupancy during the year of assessment or before the tax is paid or satisfied, as follows (*a*):—

In what cases the duty is enforceable.

The duties are, in the case of all such lands, tenements or hereditaments, to be assessed whether they are occupied or not (*b*).

In the case of lands, as distinguished from houses, where no distress can be found on the premises at the time the duties are payable, power is given to distrain upon them at any future time whoever may be the occupier (*c*).

In the case of houses, however, as distinguished from lands, the duties are not to be levied on any house which is unoccupied for the year of assessment or for a portion of such year (*d*), but the assessment thereupon for such year or portion of a year must upon appeal be discharged or diminished by the Commissioners on due proof of the facts. If no appeal is brought within the time specified for an appeal, the assessment remains valid with the same power of distress as in the case of lands (*e*).

Change of occupier.

In the case of a change of occupier the original assessment remains valid, and the duties may be levied on the occupier for the time being (*f*) except where the tax is both paid and borne by the then occupier (*i.e.*, where the person in occupation at the time of assessment was owner of the property as well as occupier (*g*)).

Remedies as between successive occupiers.

As between successive occupiers, however, but without prejudice to the above right of the Crown, each occupier and the personal representative of a deceased occupier is liable for such part of the

(*s*) *Beadel* v. *Pitt* (1865), 11 L. T. 592; *Colbron* v. *Travers* (1862), 12 C. B. (N. S.) 181.

(*t*) *Lamb* v. *Brewster* (1879), 4 Q. B. D. 220, 607, C. A. For a case where an agreement with reference to payment of the tax was held invalid by reason of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 73, see *A.-G.* v. *Shield* (1858), 3 H. & N. 834.

(*a*) These provisions are contained in the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 63, No. IX. (3), s. 70; and in the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 35. They are somewhat obscure, but it is conceived that their effect is as stated in the text.

(*b*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 63, No. IX. (3), 70.

(*c*) *Ibid.*, s. 70.

(*d*) *Ibid.*

(*e*) *Ibid.*

(*f*) *Ibid.*, s. 63, No. IX. (3), and see note (*g*), *infra*.

(*g*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 35; and see *Reading* v. *Chew* (1898), 78 L. T. 681. In that case an assessment was made upon a house which remained unoccupied during the year of assessment. No appeal from the assessment having been made under Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 70, a distress for the amount of the tax made, after the year of assessment, upon the goods of a subsequent lessee of the house, was held valid.

tax as is apportionable to the period of his occupation, such apportionment to be made by the Commissioners (*h*); and an occupier who is compelled to pay the tax or any part thereof which ought to have been paid by any former tenant or occupier, may deduct the amount from any subsequent payment of rent to his landlord (*i*).

SECT. 7. Persons upon whom the Duty Falls.

SECT 8.—*Procedure on Assessment.*

1283. After the time for making the returns has expired (*k*), and whether they are duly made or not, the assessors are required to proceed to make the assessments according to the rules above set forth, and to deliver them when made to the Commissioners, taking instructions and assistance from the surveyors (*l*) and Commissioners when necessary (*m*). The assessors have power in certain cases to view and survey the lands (*n*).

Assessors are required to make assessments.

The surveyors are entitled to inspect the returns and amend them, if necessary, by way of surcharge, subject always to appeal to the Commissioners (*o*).

Surveyors may inspect returns and surcharge.

After the surveyor has examined the assessor's assessment the General Commissioners take them into consideration, and in case the surveyor has not objected to them, and the Commissioners are satisfied that they have been made truly and without fraud, and so as to charge the properties and persons contained therein with the full duty which ought to be charged thereon, they are to sign and allow them. If the surveyor in the prescribed manner objects to any assessment or applies for any revision thereof, the Commissioners may rectify it (*p*).

General Commissioners to sign and allow assessments.

Certain errors of description are not to vitiate the assessments (*q*). Powers are conferred both upon the Commissioners and upon the assessors of calling for the production of leases and rate books, and of otherwise obtaining evidence of the rack rent of the houses, lands and hereditaments within their respective districts (*a*). The Commissioners are empowered to direct a valuation by an expert, and provision is made for the costs of such valuation (*b*). An appeal to the General Commissioners lies from the assessment so signed (*c*).

Incidental powers of Commissioners.

Appeals to General Commissioners.

(*h*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 63, No. IX. (3).
(*i*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 35.
(*k*) See p. 617, *ante*.
(*l*) The term "surveyors" is throughout this article used as including inspectors.
(*m*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 74, 75; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 49—52 inclusive.
(*n*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 78.
(*o*) *Ibid.*, ss. 121, 122, 161, 162; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 51.
(*p*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 79; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 56.
(*q*) *Ibid.*, s. 55.
(*a*) Income Tax Act, 1842 (5 & 6 Vict c. 35), ss. 65—68 inclusive.
(*b*) *Ibid.*, s. 81.
(*c*) See pp. 680, 681, *post*.

SECT. 8. Procedure on Assessment.

An owner or other person in receipt of the rents of any lands, although not the occupier, is entitled to appeal (*d*).

Allowance in case of loss by flood or tempest.

The Commissioners have power to abate the assessments in certain cases where loss has occurred to growing crops or stock on lands by flood or tempest, or where lands have by such flood or tempest been rendered incapable of cultivation for any year (*e*).

Proceedings subsequent to assessment.

Subsequent proceedings, including appeals to General Commissioners and to the High Court of Justice, are hereinafter dealt with (*f*).

Part IV.—Schedule B.

SECT. 1.—*Scope of Schedule.*

Schedule B deals with profit derived from occupation of lands.

1284. The duty leviable under Schedule B, like that leviable under Schedule A, is a duty upon profits derivable from land, but it differs from the latter in that it is chargeable upon the profits derived from the occupation of, and not upon those derived from the property in, land. Consequently the duty is not only charged in the first instance upon, but is also borne by, the occupier.

It is chargeable upon one-third of the annual value.

The annual value upon which the duty is payable also differs; the duty under Schedule B being (with certain exceptions hereinafter mentioned (*g*)) chargeable upon every twenty shillings of one-third of the annual value of the lands; or in other words, if the annual value is £150, the tax is upon a value of £50 (*h*).

Houses and buildings, except farm buildings, are not chargeable.

1285. The duty is leviable upon the properties chargeable under Class No. 1 of Schedule A (*i*), with the important exceptions, however, that it is not charged (1) upon such dwelling-houses and the domestic offices thereunto belonging as are not occupied by virtue of one and the same demise with a farm of lands, for the purpose of farming such lands, or with a farm of tithes for the purpose of farming the same; nor (2) upon warehouses or other buildings occupied for the purpose of carrying on a trade or profession (*k*).

Nurseries, gardens etc., how charged.

The duty, therefore, mainly falls upon occupiers of agricultural land and the buildings accessory thereto. Lands occupied as nurseries and gardens for the sale of the produce are to be estimated according to the rules contained in Schedule D (*l*), and in the case of such lands the duty is upon the full annual value (*m*).

(*d*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 28.
(*e*) *Ibid.*, ss. 83—86 inclusive.
(*f*) See pp. 680—683, *post.*
(*g*) See *infra.*
(*h*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 26.
(*i*) See p. 619, *ante.*
(*k*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 63, No. VII.
(*l*) *Ibid.*, s. 63. No. VIII. The provision relating to hop gardens is repealed by the Income Tax Act, 1835 (16 & 17 Vict. c. 34), s. 39.
(*m*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 63, No. VIII.

SECT. 2. Ascertainment of Assessable Value.

SECT. 2.—*Ascertainment of Assessable Value.*

1286. The hereinbefore mentioned provisions relating to the assessment of lands under Schedule A, Class No. 1, are applicable also to Schedule B, with the following exceptions:—

The provisions relating to Schedule A are applicable, with exceptions.

(1) No deduction from the rack rent or hypothetical rack rent of the lands is to be made either under the Finance Act, 1894 (*n*), or under the Finance (1909-10) Act, 1910, s. 69 (*o*).

(2) None of the allowances by way of deduction and exemption (*p*) which are made with regard to lands under Schedule A are applicable.

(3) The tax being upon the profits derived from the occupation of the land, neither a tenant nor an occupying owner has any right of deduction or recoupment against third persons.

(4) Certain provisions hereinbefore set forth (*q*) relating to the payment of the duty in the case of a change of occupancy during the year of assessment, or before the tax is paid, have no application (*r*).

SECT. 3.—*Adjustment of Assessments in certain Cases to accord with Profits Realised.*

SUB-SECT. 1.—*At the Instance of the Occupier.*

Adjustment.

1287. Various provisions have been made for the purpose of securing occupiers against any liability under this Schedule in excess of the actual profits derivable by them from the occupation of land. They may be summarised as follows:—

Farmer may elect to be assessed under Schedule D in lieu of Schedule B.

(1) Any person occupying land for the purpose of husbandry only, may by notice in writing, delivered personally, or sent by post in a registered letter, to the surveyor of taxes, within two months after the commencement of the year of

(*n*) 57 & 58 Vict. c. 30, s. 35. See pp. 621, 622, *ante*.

(*o*) 10 Edw. 7, c. 8. See pp. 622, 623, *ante*.

(*p*) See pp. 627—629, *ante*.

(*q*) See p. 634, *ante*. The provisions in question are contained in the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 70, and the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 35. The proviso to the latter section, however, applies to Sched. B.

(*r*) In order to illustrate the mode of arriving at the assessable value of lands under Scheds. A and B respectively, and the incidence of these duties, let a case be supposed of lands, the rack rent value of which is £200, and which are let to a tenant at £150 per annum, by a landlord who has mortgaged his reversion to secure a loan, paying £100 a year interest. The lands are subject to the following charges: land tax £1, public draining rate £4. For the purpose of Sched. A the assessable value would be £200 less (under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 38 (1)) one-eighth = £175, less the amount of land tax and draining rate £5, = £170. On this the duty at 1*s.* 2*d.* in the £ would be £9 18*s.* 4*d.* and this would be borne as follows:—By the tenant £1 3*s.* 4*d.* (representing the difference between £150 and £170), by the landlord £2 18*s.* 4*d.* (representing the duty on the rent less mortgage interest), and by the mortgagee £5 16*s.* 8*d.* (the balance). The landlord, as owner, might be entitled to a further allowance under the Finance (1909-10) Act, 1910, s. 69; see pp. 622, 623, *ante*. For the purpose of Sched. B the assessable value would be one-third of the full rack rent of £200, and the entire duty would be borne by the tenant.

SECT. 3.
Adjustment of Assessments etc.

assessment, elect to be assessed under Schedule D in lieu of Schedule B (*a*).

Remedy in case of loss in the occupation of lands.

(2) Any person sustaining a loss in the occupation of lands for the purpose of husbandry only may on notice in writing to the surveyor given within six months after the year of assessment, apply to the General Commissioners or to the Commissioners for Special Purposes for an adjustment of his liability by reference to the loss and the aggregate amount of his income for the year, estimated according to the rules and directions of the Income Tax Acts (*b*).

Remedy in case actual profits of the year fall short of the assessment.

(3) Any person occupying, as owner or otherwise, lands for the purpose of husbandry only, who shows at the end of any year to the satisfaction of the General Commissioners that his profits and gains arising from the occupation of such lands during the year fell short of one-third of the annual value thereof (*i.e.*, the value on which the assessment to Schedule B is made) is to be assessed on his actual profits, and the excess, on certain conditions, is to be certified and repaid to him (*c*).

SUB-SECT. 2.—*At the Instance of the Crown.*

Crown may charge a dealer in cattle upon his actual profits.

1288. On the other hand, where lands occupied by a dealer in cattle or by a dealer in or seller of milk are not sufficient for the keep and sustenance of the cattle brought on the said lands so that the rent or annual value thereof cannot afford a just estimate of the dealer's profits, the Commissioners may require a return of profits, and charge such further sum thereon as together with the charge in respect of the occupation of the lands, shall make up the full sum wherewith such trader ought to be charged in respect of the like amount of profits charged under Schedule D (*d*).

SECT. 4.—*Procedure on Assessment.*

Procedure on assessment.

1289. The procedure on assessment of duty is the same as in the case of Schedule A (*e*).

(*a*) Customs and Inland Revenue Act, 1887 (50 & 51 Vict. c. 15), s. 18.

(*b*) Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 23; Finance Act, 1907 (7 Edw. 7, c. 13), s. 27. The provision is more fully dealt with under Sched. D, note (*f*), p. 650, *post*.

(*c*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 27. The assessment must be made and the excess certified in accordance with the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 133, which for the purposes of the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 27, remains unrepealed (see Finance Act, 1907 (7 Edw. 7, c. 13), Sched. III.). Upon the whole, it would appear that the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 27, and consequently this provision is applicable only in cases where a claim is made for exemption, relief, or abatement; see pp. 670 *et seq.*, *post*.

(*d*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, third case, r. 3.

(*e*) See p. 635, *ante*.

Part V.—Schedule C.

SECT. 1.—*Scope of Schedule.*

SECT. 1
Scope of Schedule.

1290. Schedule C relates to profits arising from interest, annuities, dividends and shares of annuities payable out of any public, *i.e.*, Government, revenue, and is to be charged for every twenty shillings of the annual amount thereof.

The Schedule comprises dividends and interest upon Government securities, whether British, Colonial, or Foreign.

The Schedule comprises not only dividends etc. upon securities of the British Government payable in the United Kingdom, but also (when received here) dividends etc. upon colonial and Indian Government securities and those of any foreign Government. Upon dividends etc. not received in the United Kingdom, whether such as are chargeable under this Schedule, or dividends of private companies chargeable under Schedule D, no duty is payable, but it seems that in the case of a company resident in this country, such dividends are chargeable when they form part of the profits of the company (*f*).

Exception.

Dividends, however, under 50*s.* per half-year, and interest and dividends paid to a depositor in a savings bank whose income exceeds £160 per annum, are not assessed under this Schedule, but under Schedule D, Case 3 (*g*).

SECT. 2.—*Provisions for Retention of Tax by the Person Paying the Dividend etc.*

1291. The duty is to be assessed in the hands of the persons or corporations entrusted with the payment of the dividends etc., and by them deducted before making such payment (*h*). The person entitled to the dividends etc. is required to allow such deduction (*i*). The persons or corporations deducting the duty are to pay it over or account for it to the Crown (*j*). For the purpose of securing due performance of these duties by such persons and corporations, various provisions are contained in the Income Tax Acts. They may be summarised as follows:—

The duty is assessable in the hands of the payer of the interest or dividend who accounts to the Crown.

1292. As regards British Government securities, it has been seen (*k*) that the Bank of England and the National Debt Commissioners are constituted *ex officio* Commissioners for the purpose of assessing the duties on the dividends of such of these securities as are entrusted to them for payment, and the duty when so assessed is retained by them and accounted for by them to the Crown. Any foreign or colonial security, the dividend on which is paid by the Bank of England, stands on the same footing (*l*).

Dividends of British Government securities and other dividends payable by the Bank of England.

1293. In the case of annuities, or dividends, or shares of annuities, payable out of the revenue of any foreign State, or out of

Certain agents for payment are required to deliver accounts to the Commissioners of Inland Revenue.

(*f*) See as to this, note (*m*), p. 655, *post*. As to what constitutes a receipt of dividends in this country, see p. 658, *post*.

(*g*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 35; and see p. 657, *post*. As to Indian Stock, see India Stock Certificate Act, 1863 (26 & 27 Vict. c. 73), s. 10.

(*h*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 88, 93.

(*i*) *Ibid.*, s. 93.

(*j*) *Ibid.*, s. 96.

(*k*) See p. 615, *ante*.

(*l*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 24, 89, 93, 94.

SECT. 2. Provisions for Retention of Tax by the Person Paying the Dividend etc.

the public revenue of any colony or settlement belonging to the Crown, the following persons are required to deliver an account showing the names and residences of those entitled to the same (*m*):—

(1) Any person (other than the Bank of England and the National Debt Commissioners) entrusted with, or acting as agent or in any other character in (*n*), the payment thereof to any persons, corporations, or companies in the United Kingdom (*o*), or to any person whose title thereto is shown by the registration or entry of his name in any book or list ordinarily kept in the United Kingdom (*p*).

Bankers dealing in coupons for dividends.

(2) Any banker, or person acting as a banker, who shall sell or otherwise realise coupons or warrants for, or bills of exchange purporting to be drawn or made in payment of, any dividends (save such as are payable in the United Kingdom only), and pay over the proceeds to any person or carry the same to his account (*q*).

Persons obtaining payment abroad by means of such coupons.

(3) Any person who shall by means of coupons (in which word is included warrants for, or bills of exchange purporting to be drawn or made in, payment of any dividends) received from any other person, or otherwise on his behalf, obtain payment of any dividends elsewhere than in the United Kingdom (*r*).

Dealers in such coupons other than bankers.

(4) Any dealer in coupons who shall purchase coupons for any dividends (in which word is included warrants for, or bills of exchange purporting to be drawn or made in payment of any dividend, save such as are payable in the United Kingdom only) otherwise than from a banker, or person acting as a banker, or another dealer in coupons (*s*).

Nature of account to be delivered.

Such account is to be delivered to the Commissioners of Inland Revenue (*t*) within a month after a general notice in the *London Gazette*. It is to include a description of the annuities, dividends etc., and (if demanded) a statement of the amounts payable by each of the persons so required to deliver such account, and other particulars (*u*).

(*m*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 96; Income Tax (Foreign Dividends) Act, 1842 (5 & 6 Vict. c. 80), s. 2. The provisions mentioned below extend also to interest, dividends and annual payments, payable out of or in respect of the stocks, funds, shares, or securities of any foreign or colonial company, society, adventure or concern (Income Tax Act, 1853 (16 & 17 Vict. c. 34) s. 10; Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), s. 36, and to annuities, pensions, or other annual sums payable out of the funds of any institution in India (Revenue Act, 1868 (31 & 32 Vict. c. 28), s. 5).

(*n*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 96. The words of the section are "acting as agent therein or in any other character before described." It is not clear to what part of the Act the latter words refer.

(*o*) *Ibid.*; Income Tax (Foreign Dividends) Act, 1842 (5 & 6 Vict. c. 80), s. 2.

(*p*) Revenue Act, 1866 (29 & 30 Vict. c. 36), s. 9. For the purpose of this section the person having the ordinary custody of the book or making the list is to be deemed to be the person entrusted.

(*q*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 26 (a).

(*r*) *Ibid.*, s. 26 (b); Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24 (2).

(*s*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 26 (c); Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24 (2).

(*t*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 96; Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), ss. 3, 37 (2).

(*u*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 96.

The amount of duty payable on such annuities, dividends etc. is then assessed by the Special Commissioners (*a*), and the person delivering the account deducts the sums assessed from the annuities or dividends etc. payable, and pays such sums into the account of the Commissioners of Inland Revenue at the Bank of England (*b*).

SECT. 2. Provisions for Retention of Tax by the Person Paying the Dividend etc.

Assessments are made by Special Commissioners. Party delivering account pays the duty and deducts from the dividends.

SECT. 3.—*Allowances and Exemptions.*

1294. The tax is not payable in respect of the interest or dividends of any securities of a foreign State or a British possession which are payable in the United Kingdom, where it is proved to the satisfaction of the Commissioners of Inland Revenue that the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom (*c*). With this exception no allowance is given or repayment made in respect of the tax on such interest or securities (*c*).

Return of tax on foreign and colonial Government dividends to persons resident abroad.

1295. Relief under this provision may be given by the Commissioners of Inland Revenue either by way of allowance or repayment on a claim being made to them for the purpose within six months of the end of the year for which the tax is charged (*d*).

Relief, how given.

1296. The dividends upon investments made by various charitable and public bodies are exempt from duty under this Schedule. The bodies exempt, and the conditions of exemption, are as follows:—

(1) Friendly societies legally established, whose rules or any Act of Parliament limit the sum assured to any individual by way of gross sum to £300, or any annuity granted to an individual, to £52 (*e*). Friendly societies.

(2) Registered industrial and provident societies, unless they sell to persons not members of the society, and the number of shares of the society is limited either by its rules or practice (*f*). Industrial and provident societies.

(3) Registered trade unions, under the conditions mentioned above in reference to friendly societies, in respect of interest and dividends applicable, and applied solely for the purpose of provident benefits as defined by the Act (*g*). Trade unions.

(*a*) See p. 614, *ante*.

(*b*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 96; Income Tax (Foreign Dividends) Act, 1842 (5 & 6 Vict. c. 80), s. 2.

(*c*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 71 (2). The words of the sub-section are "save as provided by this or any other Act." The words "any other Act" probably refer to the exemptions mentioned in the next paragraph.

(*d*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 71 (2).

(*e*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 88, r. 1; Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 70. The expression used in r. 1 above referred to is "stock dividends or interest of" any friendly society etc., and in the following exempting rules "stock or dividends of." There seems no doubt, however, that the several exemptions are intended to and do protect the investments of these societies from liability to duty. The exemption extends also to duty payable on investments and interest under Sched. D. As to Sched. A, see p. 629, *ante*; see also title FRIENDLY SOCIETIES, Vol. XV., pp. 161 *et seq.*

(*f*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 24. This exemption extends also to duty payable under Sched. D. The exemption does not relieve individual members of the society from assessment.

(*g*) Trade Unions Provident Funds Act, 1893 (56 & 57 Vict. c. 2), ss. 1,

SECT. 3. Allowances and Exemptions.

Savings banks.

(4) Any penny savings bank or other bank for savings, whether certified under the Trustee Savings Banks Act, 1863 (*h*), or not, in respect of the income of the funds of the bank so far as it is applied in the payment or credit of interest to the depositor not exceeding £5 in the year for which exemption is claimed (*i*).

Charitable societies.

(5) Any corporation, fraternity or society of persons, or any trust established for, or the stock and dividends of which are applicable to, charitable purposes only, so far as the stock or dividends shall in such cases be applied to such purpose (*k*).

Trust for repair of ecclesiastical buildings.

(6) Any trust applicable solely to the repair of any cathedral, college, church or chapel or building used solely for the purpose of divine worship so far as the stock and dividends shall be so applied (*l*).

Stock in the name of the Treasury or National Debt Commissioners.

(7) Stock in the name of the Treasury or the Commissioners for the reduction of the National Debt (*m*).

Stock belonging to the King or accredited Ministers.

(8) Stock belonging to His Majesty or an accredited Minister of a foreign State (*n*).

Jurisdiction of Special Commissioners over exemptions.

The Special Commissioners have exclusive jurisdiction over claims for exemption under heads (1), (4), (5), (6) and (8) (*o*).

Part VI.—Schedule D.

SECT. 1.—*Scope of Schedule.*

To what profits the Schedule is applicable.

1297. From a reference to Schedule D (*a*), it is obvious that the general terms of that Schedule, if taken alone, would sweep into the charge, profits which are charged specifically under other Schedules. To avoid this, the generality of the provisions are cut down (*b*), the application of the Schedule being limited to such description of property or profit as is not included in other Schedules, and is not specifically exempted from the duties chargeable thereunder. It will be found further that the express language of the Schedule is

2, 3. This exemption applies to duty payable under Sched. A and under Sched. D. See also title TRADE AND TRADE UNIONS.

(*h*) 26 & 27 Vict. c. 87.

(*i*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 36 (1), (2), (3). The exemption applies to duty payable under Sched. D; see also Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 88 (2). The Savings Bank Act, 1828 (9 Geo. 4, c. 92), is repealed by the Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), ss. 1, 68, except so far as it relates to Post Office Savings Banks.

(*k*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 88, r. 3. As to what institutions come within this exemption, see title CHARITIES, Vol. IV., p. 210; and see note (*m*), p. 629, *ante*.

(*l*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 88, r. 3.

(*m*) *Ibid.*, r. 4.

(*n*) *Ibid.*, r. 5.

(*o*) *Ibid.*, rr. 1—5 inclusive; and see p. 614, *ante*.

(*a*) See p. 618, *ante*.

(*b*) By Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, with which this Schedule is to be read.

SECT. 1. Scope of Schedule.

in one instance controlled and limited by the language of other parts of the Income Tax Acts.

The annual profits or gains chargeable under the Schedule may, subject to these limitations, be divided into five general heads: (1) those accruing to any person residing in the United Kingdom from any property whatever, whether situate in the United Kingdom or elsewhere, or from any profession, trade, employment, or vocation, whether carried on in the United Kingdom or not; (2) those arising or accruing to any person not resident within the United Kingdom from any property situate there, or from any profession, trade, employment, or vocation exercised there; (3) those arising or accruing from interest of money, and annuities; (4) those arising from foreign or colonial securities or possessions; and (5) those accruing from any annual profits or gains not otherwise charged. The first, second, fourth, and fifth, and to some extent the third of these heads are dealt with under headings called in the Act "Cases," each Case containing rules showing how the duty falling within the particular Case is to be assessed, and these have now to be considered *seriatim*.

SECT. 2.—*Case* 1. (*Trades, Manufactures etc.*)

SUB-SECT. 1.—*What Concerns are Chargeable.*

Profits derived from trades and manufactures etc. (hereinafter referred to as trades).

1298. The first Case relates to the duties to be charged in respect of trades, manufactures, adventures or concerns in the nature of trade, except such as are charged in any other Schedule (*c*).

The Case applies under certain conditions to traders abroad as well as to those in the United Kingdom.

With this exception the Case applies to all trades, manufactures, adventures or concerns in the nature of trade which are either carried on within the United Kingdom, or which, with a further exception hereinafter to be noticed (*d*), are carried on elsewhere than within the United Kingdom, by a person resident within the United Kingdom; and it applies to trades carried on by companies or societies of persons, whether corporate or not corporate, as well as by individuals (*e*).

Meaning of "trade, adventure or concern in the nature of trade."

The words "trade, manufacture, adventure or concern in the nature of trade" (*f*) are used in a very wide sense. They include trading operations carried on by municipal corporations for which

(*c*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 1. Concerns in the nature of trade which come within Sched. A, Class No. 3 (see p. 624, *ante*), are therefore excluded. But it is to be borne in mind that these concerns are to be charged and assessed according to the rules prescribed by Sched. D so far as such rules are consistent with Sched. A, Class No. 3; see Revenue Act, 1866 (29 & 30 Vict. c. 36), s. 8 (p. 626, *ante*). It would seem that all the rules and provisions contained in Cases 1 and 2 are applicable to such concerns, with the exception of those rules which prescribe three years as the average of years upon which profits are to be estimated; see *Ryhope Coal Co.* v. *Foyer* (1881), 7 Q. B. D. 485.

(*d*) See p. 645, *post*.

(*e*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Sched. D.

(*f*) In the several Acts and rules, various expressions are used to describe the "trades, manufactures, adventures or concerns in the nature of trade" which are chargeable under Case 1, and the "professions, employments or vocations" which are chargeable under Case 2. In the text the single word "trade" is hereinafter used, where the context admits, to describe concerns chargeable under the first Case, and the word "professions" to describe those chargeable under the second Case, including salaried employments.

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money is received, notwithstanding that the profits derived therefrom are not distributed among individuals (*g*); also operations carried on by a burial board, under an Act of Parliament, for the benefit of the ratepayers of a parish (*h*), and, speaking generally, it would seem that in every case where profits (*i.e.*, an excess of receipts over expenditure) are earned, such profits are chargeable without reference to the purpose for which they are used, or whether they are earned for the benefit of a community or for the benefit of individuals (*i*).

SUB-SECT. 2.—*What Constitutes Residence in the United Kingdom.*

What constitutes residence within the Acts.

1299. With one exception, hereinafter to be noticed (*k*), it follows from the language of the Schedule that where an individual or corporation is resident in the United Kingdom, the entire profits of the trade carried on by him or it are chargeable, no matter where the trade is carried on. The question, however, of what constitutes residence in reference both to individuals and corporate bodies has given rise to much difficulty.

Temporary residence.

1300. It is provided in the case of a person who is in the United Kingdom for a temporary purpose only, and not with any view or intent of establishing his residence therein, and who has not actually resided therein for a period equal in the whole to six months in any one year, that he is not to be charged, as a person residing there, with the duties mentioned in Schedule D (*l*).

(*g*) See p. 625, *ante*, where the subject of the chargeability of municipal trading concerns is discussed.

(*h*) *Paddington Burial Board* v. *Inland Revenue Commissioners* (1884), 13 Q. B. D. 9.

(*i*) *A.-G.* v. *Black* (1871), L. R. 6 Exch. 308, Ex. Ch.; *Mersey Docks* v. *Lucas* (1883), 8 App. Cas. 891, *per* Lord SELBORNE, L.C., at p. 905; *St. Andrew's Hospital, Northampton* v. *Shearsmith* (1887), 19 Q. B. D. 624; *Needham* v. *Bowers* (1888), 21 Q. B. D. 436; *Grove* v. *Young Men's Christian Association* (1903), 88 L. T. 696; *Armitage* v. *Moore*, [1900] 2 Q. B. 363.

(*k*) See p. 645, *post*.

(*l*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 39. The entire section, which is somewhat obscurely worded, is as follows:—"Any subject of Her Majesty whose ordinary residence shall have been in Great Britain, and who shall have departed from Great Britain and gone into any parts beyond the seas for the purpose only of occasional residence, at the time of the execution of this Act, shall be deemed, notwithstanding such temporary absence, a person chargeable to the duties granted by this Act as a person actually residing in Great Britain, and shall be assessed and charged accordingly (in manner hereinafter directed) upon the whole amount of his profits or gains, whether the same shall arise from property in Great Britain or elsewhere, or from any allowance, annuity, or stipend (except as herein is excepted) or from any profession, employment, trade or vocation in Great Britain or elsewhere: Provided always, that no person who shall on or after the passing of this Act actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain at one time or several times for a period equal in the whole to six months in any one year shall be charged with the said duties mentioned in Sched. D, as a person residing in Great Britain in respect of the profits or gains received from or out of any possessions in any other of Her Majesty's dominions, or any foreign possessions, or from securities in any other of Her Majesty's dominions, or foreign securities; but nevertheless every such person shall, after such residence in Great Britain for such space of time as aforesaid, be chargeable to

In many cases it seems clear, however, that actual presence within the United Kingdom for six months is not necessary in order to establish residence, and a person may be resident there even if he has not been personally present during any part of the year of assessment (*m*).

A person may be resident, although not personally present.

The place of domicil has little, if any, bearing upon that of residence, and a person may have simultaneously more than one place of residence (*n*).

Sleeping partner in a business exclusively carried on abroad.

1301. Notwithstanding the general language of Schedule D, an individual partner in a business exclusively carried on abroad, in which he takes no active part, although himself resident in this country, is not liable to pay income tax upon his entire share of the profits of that business under Case 1, but only (under Case 5) (*o*) upon so much of such profits as is received by him in this country (*p*).

What constitutes residence in the case of a corporation.

1302. The residence of a corporation depends, not upon the place of registration, but upon where the central management and control in fact abides, that being the place where the real business is carried on (*q*). This test applies not only to companies

the said duties for the year commencing on the sixth day of April preceding: Provided also, that any person who shall depart from Great Britain after claiming such exemption, and shall again return to Great Britain on or before the fifth day of April next after such claim made, shall be chargeable to the said duties, as a person residing in Great Britain for the whole of the year in which such claim shall have been made."

(*m*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 39; and see *Young* v. *Inland Revenue Commissioners* (1875), 2 R. (Ct. of Sess.) 925; *Rogers* v. *Inland Revenue* (1879), 6 R. (Ct. of Sess.) 1109; *Lloyd* v. *Inland Revenue* (1884), 1 R. (Ct. of Sess.) 687; *Inland Revenue* v. *Cadwalader* (1904), 42 Sc. L. R. 117; *Turnbull* v. *Inland Revenue Solicitor* (1904), 42 Sc. L. R. 15; *A.-G.* v. *Coote* (*Bart.*) (1817), 4 Price, 183 (a case under the repealed Income Tax Act, 1806 (46 Geo. 3, c. 65); *A.-G.* v. *M'Lean* (1863), 1 H. & C. 750. As to a case of residence upon a yacht, see *Brown* v. *Burt* (1911), 27 T. L. R. 363.

(*n*) See cases cited in note (*m*), *supra*.

(*o*) See p. 659, *post*.

(*p*) *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493. The ground of the decision was that although such a person's case comes within the language of the Schedule itself, yet it is excluded by reason of the fact that there is no machinery in the Act by which the duty is in such a case to be assessed, whereas there are appropriate words in the fifth Case to meet it; and see *Sulley* v. *A.-G.* (1860), 5 H. & N. 711, Ex. Ch. In the case of *San Paulo (Brazilian) Rail. Co.* v. *Carter*, [1896] A. C. 31, it was pointed out that the decision in *Colquhoun* v. *Brooks*, *supra*, only applied where the business is exclusively carried on abroad, and it was held that it was not applicable to the case of a company resident in this country whose trading operations, though carried on abroad, were controlled by directors who held their meetings here. The decision in *Colquhoun* v. *Brooks*, *supra*, is, it is conceived, in practice applicable only to an unincorporated partnership where the partner resident in this country in fact takes no active part in the business of the foreign partnership.

(*q*) See *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A. C. 455, *per* Lord LOREBURN, L.C., at p. 458. The question of what constitutes residence in the case of a corporation has been the subject of considerable litigation. Usually, however, the matter in dispute seems to have been chiefly as to the proper inferences to be drawn from the facts. The cases on the subject are: *Cesena Sulphur Co.* v. *Nicholson* (1876), 1 Ex. D. 428; *Calcutta Jute Mills Co.* v. *Nicholson* (1876), 1 Ex. D. 437; *Imperial Continental Gas Association* v. *Nicholson* (1877), 37 L. T. 717; *London Bank of Mexico and South America* v. *Apthorpe*, [1891] 2 Q. B. 378, C. A.; *Bartholomay Brewing Co.* (*of Rochester*) v. *Wyatt*, *Nobel Dynamite Trust Co.* v. *Wyatt*, [1893] 2 Q. B. 499; *Denver Hotel Co.* v. *Andrews* (1895), 43 W. R.

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registered in the United Kingdom, but also to foreign corporations (*r*).

Foreign company controlled by English company—assessability of the former.

Difficult questions arise in cases where a company resident in the United Kingdom owns, either itself or by trustees, the entirety, or the great bulk of the shares in a company resident abroad. Where a foreign company is acquired by an English company, it seems that the mere fact that the English company in its capacity of shareholder, through its directors, exercises a controlling power over the operations of the foreign company does not alone entitle the Crown to claim duty upon the entire profits of the foreign company. In such case, the real question is whether the foreign company is in fact the agent of the English company to carry on the business, in which case it is in point of law carried on by the latter (*a*).

SUB-SECT. 3.—*What Constitutes a Carrying on of Business in the United Kingdom—Duty, how Enforced against a Foreigner.*

Non-resident person trading in this country assessable either personally or by his agent having the receipt of profits.

1303. A person or corporation though non-resident in the United Kingdom is, notwithstanding, chargeable under Case 1 in respect of a trade or profession exercised or carried on in the United Kingdom to the extent of the profits earned by the trade or profession carried on here (*b*).

The duty may be enforced either against the principal personally if he can be affected by process (*c*) or by assessment upon any trustee or any factor, agent or receiver, having the receipt of any assessable profits or gains belonging to such person, in the like

339, C. A.; *Grove* v. *Elliots and Parkinson* (1896), 3 Tax Cas. 481; *Frank Jones Brewing Co.* v. *Apthorpe* (1898), 15 T. L. R. 113; *Goerz & Co.* v. *Bell*, [1904] 2 K. B. 136; *New Zealand Shipping Co.* v. *Stephens* (1906), 96 L. T. 50; *American Thread Co.* v. *Joyce* (1911), 27 T. L. R. 272. It will be observed that in all these cases the residence of the company was held to depend upon the place where the directors' meetings were held. The decision in *A.-G.* v. *Alexander* (1874), L. R. 10 Exch. 20, appears to have turned on the exceptional constitution of the Ottoman Bank.

(*r*) *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A. C. 455. This proposition, which had long been recognised in the case of companies of the United Kingdom, *i.e.*, companies which are registered here, was by the judgment of the House of Lords held to be applicable to foreign corporations. The company in question was formed and registered in the Transvaal, where the general meetings of the shareholders were held. Directors' meetings were held both in the Transvaal and in England; but the Commissioners found upon the evidence that "the head, seat and directing power of the affairs of the company were at the office in London, from whence the chief operations of the company, both in the United Kingdom and elsewhere, were in fact controlled, managed and directed." In these circumstances the House of Lords, affirming the decision of the courts below, held that the company was resident within the United Kingdom and chargeable upon its entire profits under Case 1.

(*a*) *Bartholomay Brewing Co.* (*of Rochester*) v. *Wyatt*, *Nobel Dynamite Trust Co.* v. *Wyatt*, [1893] 2 Q. B. 499; *St. Louis Breweries, Ltd.* v. *Apthorpe* (1898), 79 L. T. 551; *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (1899), 80 L. T. 395; *R.* v. *General Commissioners of Taxes for Clerkenwell*, [1901] 2 K. B. 879, C. A.; *Kodak, Ltd.* v. *Clark*, [1903] 1 K. B. 505, C. A.; *Gramophone and Typewriter, Ltd.* v. *Stanley*, [1908] 2 K. B. 89, C. A.

(*b*) See the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sched. D, paragraph 2.

(*c*) *Tischler & Co.* v. *Apthorpe* (1885), 52 L. T. 814.

manner and to the like amount as would be charged if such person were resident in the United Kingdom and in the actual receipt thereof, and every such trustee, factor, agent or receiver is answerable for the doing of all such acts, matters and things as are required to be done in order to the assessing of such person (*d*). It seems that the words "having the receipt of any profits" etc. apply to a trustee, factor or agent as well as to a receiver (*e*).

What constitutes an exercising of a trade in the United Kingdom.

The question of what constitutes a carrying on, or, in the language of Schedule D, an exercising, of a trade in the United Kingdom is, upon the authorities, one of considerable nicety. It would appear that in many cases the criterion of whether or not the trade is carried on in this country is whether the trade contracts, which result in profits being earned, are entered into here. Accordingly, in a case where a wine merchant, carrying on business in France, appointed an English firm as his sole agent in England for the sale of wine, and the agent took the orders in England, but without accepting them forwarded them to his principal in France, who exercised a discretion as to accepting them, and if accepted, the principal forwarded the consignment to the customer direct, it was held that no trade was exercised within the United Kingdom (*f*). On the other hand, in many cases where the general facts were similar to the above, except that the agent in this country had authority to accept orders, and in other cases where he supplied the customer, on application, from a general stock kept by him here, it has been held that a trade was exercised within the United Kingdom (*g*). Whenever a foreigner, either by himself or through an agent, habitually in this country does and contracts to do a thing capable of producing profits, and for the purpose of producing profits, he carries on a trade here (*h*).

SUB-SECT. 4.—*Profits, how Computed.*

Profits computed on a three years' average.

1304. Profits chargeable under Case 1 are to be computed upon the profits (*i*) of the trade upon an average of three years ending

(*d*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 41; and see pp. 676, 677, *post*.

(*e*) *Grainger & Son* v. *Gough*, [1896] A. C. 325.

(*f*) *Grainger & Son* v. *Gough*, *supra*. This case was followed in the Privy Council in a case arising under a New Zealand Income Tax Act (*Lovell and Christmas, Ltd.* v. *Commissioners of Taxes*, [1908] A. C. 46); and see *Sulley* v. *A.-G.* (1860), 5 H. & N. 711, Ex. Ch.

(*g*) *Tischler & Co.* v. *Apthorpe* (1885), 52 L. T. 814; *Pommery* v. *Apthorpe* (1886), 56 L. J. (Q. B.) 155; *Werle & Co.* v. *Colquhoun* (1888), 20 Q. B. D. 753, C. A.; *Watson* v. *Sandie and Hull*, [1898] 1 Q. B. 326; and see *Erichsen* v. *Last* (1881), 8 Q. B. D. 414, C. A.

(*h*) *Grainger & Son* v. *Gough*, *supra*, *per* Lord WATSON, at p. 420, approving the *dictum* of COTTON, L.J., in *Erichsen* v. *Last*, *supra*, at p. 420. It is conceived, however, that the decision in *Grainger & Son* v. *Gough*, *supra*, did not affirm the proposition that in no case is a business carried on in this country unless trade contracts are made here.

(*i*) The question of what constitutes assessable profit as distinguished from realised capital was discussed in *Stevens* v. *Hudson's Bay Co.* (1909), 101 L. T. 96, C. A. In that case the company was incorporated under charter, and obtained from the Government large tracts of land in Canada, parts of which lands it from time to time sold, and distributed the proceeds among its shareholders. The Court of Appeal, reversing CHANNELL, J., held that the

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either on such day of the year immediately preceding the year of assessment on which the accounts of the trade shall have been usually made up, or on the 5th April preceding the year of assessment (*j*), and are to be assessed without any other deduction than is allowed (*k*) in the Income Tax Acts.

Exceptions in certain cases.

1305. Where, however, the trade has been commenced within the said three years, the computation is to be made on the average of profits for one year (*l*); and where the trade has been commenced within the year of assessment the computation is to be made upon the profits actually made (*m*).

In each of the two cases last mentioned, the person charged is, upon proof given to the satisfaction of the Commissioners at the end of the year of assessment that his actual profits fall short of those computed on the basis above mentioned, entitled to be charged on the actual profits and to a return of any excess paid (*n*).

In case a trade is discontinued in any year, the person chargeable is entitled to be charged only upon the actual profits arising in that year, and if he proves that the total amount of the tax, paid during the three previous years, exceeds the amount which would have been paid if he had been assessed in each of these years on the actual amount of his profits, he is entitled to repayment of the excess (*o*).

In computing the duty on a trade, the profits arising from lands, tenements or hereditaments occupied for the purpose of such concern are to be excluded (*p*).

SUB-SECT. 5.—*Assessment of Profits of a Partnership and a Company—Succession to a Business.*

Partnerships, how assessed.

1306. In the case of a trade or profession carried on by two or more partners, the partner having precedence, *i.e.*, the partner mentioned singly or with precedence in the partnership agreement,

proceeds so distributed were not profits, but a part of the realised capital of the company, and that the fact that they were distributed among the shareholders (which, under its charter, the company had power to do, irrespective of whether they constituted profits) did not render them chargeable under Schedule D.

(*j*) There is an exception to this rule in the case of a partner in a firm who claims exemption or abatement; see p. 675, *post*.

(*k*) No deductions are in terms allowed by the Income Tax Act, 1842 (5 & 6 Vict. c. 35), but these words probably refer to the exceptions contained in the rules which disallow certain deductions, Case 1, r. 3, Cases 1 and 2, r. 1. On the meaning and effect of these words, see *Russell* v. *Town and County Bank* (1888), 13 App. Cas. 418, *per* Lord HERSCHELL, at pp. 424, 425.

(*l*) As to this provision, see *Merchiston Steamship Co.* v. *Turner*, [1910] 2 K. B. 923.

(*m*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 1, r. 1. The expression "the balance of profits and gains" is sometimes used in the Act of 1842, but the expression seems to mean the same thing as "profits and gains"; see *Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 315, *per* Lord BLACKBURN, at p. 334; and *Gresham Life Assurance Society* v. *Styles*, [1892] A. C. 309).

(*n*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 24 (2).

(*o*) *Ibid.*, s. 24 (3).

(*p*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Cases 1 and 2, r. 2. This applies also to the case of a profession under Case 2. The excluded profits are chargeable under Sched. A. See as to this, Finance Act, 1898 (61 & 62 Vict. c. 10), s. 9.

or if there is no such agreement, the partner whose name is mentioned either with precedence or singly in the usual style of the firm, is to make the return required by the Act in respect of the entire profits of the firm, if he be an acting partner and resident in the United Kingdom (*q*).

If the partner having precedence is not so acting and resident, then the partner who is next in precedence and who is so acting and resident is to make it, and if there be no such partner, then the agent, manager or factor in the United Kingdom (*r*).

The return is to specify the names and residences of the several partners, and is declared to be sufficient authority to charge them jointly (*s*).

The Commissioners may, if they think fit, require a similar return and the like information or evidence from any other partner, but except in such case (*t*), or except where any partner makes a claim for exemption or abatement (*u*), no separate statement by the respective partners is allowed.

British company, how assessed.

1307. An English company residing in the United Kingdom pays the duty upon its profits before declaring a dividend, and is then entitled to make, out of such dividends, a proportionate deduction in respect thereof (*v*).

Assessment in the case of (1) a change of partners; (2) a succession to a business.

1308. In the case of (1) a change in partnership by death or dissolution as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment or within the period for which it ought to be made, and (2) a succession by any person (including a corporation) to any trade or profession within such period, the duty is to be computed according to the profits during the respective periods before mentioned, notwithstanding such change or succession (*i.e.*, as if no change or succession had taken place) (*a*). But if the partners or the person who succeeds prove to the satisfaction of the Commissioners that the profits of the business have fallen short or will fall short of that amount from some specific cause to be alleged by them, since the change or succession took place or by reason thereof, the assessment is to be made on the gains of the current year (*b*). A company formed by the incorporation of a private partnership is a successor to the partnership within the rule (*c*). So is a bank which purchases the business of another bank, and carries on a

What constitutes a succession to a business.

(*q*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Cases 1 and 2, r. 3.
(*r*) *Ibid.*
(*s*) *Ibid.*
(*t*) *Ibid.*
(*u*) As to which, see p. 675, *post.*
(*v*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 54; and see *Ashton Gas Co.* v. *A.-G.*, [1906] A. C. 10.
(*a*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Cases 1 and 2, r. 4. This rule applies to professions under Case 2, as well as to trades under Case 1.
(*b*) *Ibid.* An extraordinary depression in the coal trade has been held to be a specific cause within this rule (*Ryhope Coal Co.* v. *Foyer* (1881), 7 Q. B. D. 485); and see *Miller* v. *Farie* (1878), 6 R. (Ct. of Sess.) 270.
(*c*) *Ryhope Coal Co.* v. *Foyer, supra.*

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branch there in its own name as part of its general business, the profits of the branch being merged in the general profits (*d*). So also is a local authority in respect of a tramway undertaking purchased by them under compulsory powers and extended by them (*e*).

SUB-SECT. 6.—*Claim for Repayment in Case of Loss.*

Adjustment of duty to meet the case of a loss in trade.

1309. A person who sustains a loss in trade may, upon giving notice to the surveyor of taxes of the district within six months after the year of assessment, apply to the General Commissioners or to the Commissioners for Special Purposes for an adjustment of his liability by reference to the loss and to the aggregate amount of his income for that year estimated according to the several rules and directions of the Income Tax Acts (*f*).

The Commissioners are, on proof to their satisfaction, to give a certificate authorising repayment of so much of the sum paid for income tax as would represent the tax upon income equal to the loss (*g*).

A person to whom repayment has been made under the provision is not entitled to claim a deduction on the assessment for a subsequent year by reference to the amount of loss in respect of which such repayment has been made (*h*).

Meaning of loss.

The word "loss" does not here signify a diminution of profit, but a loss as the general result of the trading (*i*).

SUB-SECT. 7.—*Deductions from Gross Profits.*

What constitutes the profits of a trade.

1310. The profits of a trade or business would for commercial purposes seem to be the difference between the receipts and the expenses necessary to earn them. In estimating profits, however, for the purpose of income tax the rules specifically prohibit a variety of deductions, some of which would probably form proper subjects

(*d*) *Bell* v. *National Provincial Bank of England*, [1904] 1 K. B. 149, C.A.; see also *Farrell* v. *Sunderland Steamship Co.* (1903), 88 L. T. 741; *Watson Brothers* v. *Inland Revenue* (1902), 39 Sc. L. R. 604; and on the question of what constitutes a "succession," see further *Ferguson* (*Alexander*) *& Co., Ltd.* v. *Aikin* (1898), 4 Tax Cas. 36.

(*e*) *Stockham* v. *Wallasey Urban District Council* (1906), 95 L. T. 834.

(*f*) Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 23 (1); Finance Act, 1907 (7 Edw. 7, c. 13), s. 27. These provisions relate also to "professions" coming under Case 2, and to the case of profits derived from the occupation of lands for the purposes of husbandry (see p. 638, *ante*). See also Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 134. This latter provision, so far as it relates to a loss of profits "from any other specific cause," is obscure, and does not appear to have been often acted upon, since claims which might possibly come within these words have hitherto been more often dealt with under the now repealed s. 133 (*ibid.*). As has been seen, the profits assessable under Case 1 or Case 2 are not in any way computed upon those of the year of assessment, so that it may be questioned whether the words of the section are applicable to that case. Moreover, a diminution of profits in a particular year, however arising, necessarily produces (if the business continues) a corresponding diminution of income tax spread over the three succeeding years; it is not easy, therefore, to see how it would be "just" to make in addition any reduction in the assessment of the year during which the loss occurs.

(*g*) Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 23 (2).

(*h*) *Ibid.*, s. 23 (4).

(*i*) *R.* v. *Income Tax Commissioners for London* (*City*) (1904), 91 L. T. 94.

of deduction in a commercial balance sheet. These may be summarised as follows:—

What deductions from gross profits are prohibited by statute.

No deduction is to be made (1) for sums expended for repairs of the trade premises or for the supply, repairs, or alterations of trade implements or utensils beyond the sum usually expended for such purposes during the three years of average, nor (2) for loss not connected with or arising out of the trade, nor (3) on account of capital withdrawn therefrom, nor (4) for any sum employed or intended to be employed as capital in the trade, or in the improvement of trade premises, nor (5) on account of any interest which might have been made on such sums if laid out at interest, nor (6) for any debts except bad debts proved to be such to the satisfaction of the commissioners (*k*), nor (7) for any average loss beyond the actual amount of loss after adjustment, nor (8) for any sum recoverable under an insurance or contract of indemnity, nor (9) for any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade or profession, nor (10) for any disbursements or expenses of maintenance of the parties or their families or establishments, nor (11) for the rent or value of any dwelling-house or domestic offices except such part as may be used for the trade or profession, not exceeding two-thirds of the rent *bonâ fide* paid for such house (*l*), nor (12) for any sum expended in any other domestic or private purposes distinct from the purposes of the trade or profession. It is also provided that in estimating profits no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of the profits, nor on account of any royalty or other sum paid in respect of the user of a patent; but in these cases the person paying is entitled to deduct, upon making the payment, the proper tax thereon, and to retain it for his own use (*m*).

Person carrying on two distinct trades may set off results.

1311. A person carrying on two or more distinct trades chargeable under the rules of Schedule D (*n*) may deduct or set against the profits acquired in one or more of such trades the excess of the loss sustained in another in the same manner as may be done in the case of a single concern, and may make separate statements thereof, and a person renting a dwelling-house, part of which is used for the purpose of the trade, may deduct or set off from the profits of such trade such sum not exceeding two-thirds of the rent *bonâ fide* paid by him for such dwelling-house with the appurtenances, as the Commissioners may allow (*o*).

(*k*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 1, r. 3. As to bad debts, see also Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 50.

(*l*) Compare Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Cases 1 and 2, r. 1, with *ibid.*, s. 101.

(*m*) *Ibid.*, s. 100, Case 1, rr. 3, 4; Cases 1 and 2, r. 1; *ibid.*, ss. 101, 102, 159; Finance Act, 1907 (7 Edw. 7, c. 13), s. 25 (1).

(*n*) As to the meaning of the words "distinct trades chargeable under the rules of Sched. D," see *Brown* v. *Watt* (1886), 13 R. (Ct. of Sess.) 590; *Grove* v. *Young Men's Christian Association* (1903), 88 L. T. 696; *Religious Tract Society* v. *Inland Revenue* (1896), 23 R. (Ct. of Sess.) 390; *Re Birmingham Corporation* (1875), 1 Tax Cas. 26; and see notes (*r*), (*s*), p. 653, *post*.

(*o*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 101.

SECT. 2. Case 1. (Trades, Manufactures etc.)

1312. Upon the question of what deductions from receipts are permissible in arriving at the profits upon which tax is payable, there are a great many legal decisions. The points decided, among which are included those decided in reference to concerns chargeable under Schedule A, Class 3 (3), may be summarised as follows:—

Legal decisions.

In the case of brewers, no deduction is authorised in respect of premiums paid on the purchase of leases of licensed premises intended to be used as "tied houses" (*p*), nor for the wasting value of such leases (*q*), nor for repairs of "tied houses" (*r*), nor for law costs or other expenses incurred in connection with making, unsuccessfully, applications to magistrates for new or additional licences, nor for expenses incidental to such applications (*a*), nor for a sum paid in the brewers' capacity of owners of an inn to a guest by way of compensation for injuries caused by the fall of a chimney therein (*b*).

(1) Cases in which deductions are not allowed.

Brewery business. Borrowed capital. Insurance against strikes etc.

No deduction is authorised in respect of debenture interest paid by an English company to debenture holders residing abroad (*c*); nor in respect of bonuses payable, by the person to be charged, to the lender of money on repayment thereof (*d*); nor in respect of an annual subscription by a colliery company to a coal association in consideration of being indemnified against certain consequences of strikes (*e*); nor in the case of a company which makes its profit by borrowing on debentures and re-lending at a higher rate, for commission paid or the other expenses of issuing the debentures (*f*).

Capital charges.

No deduction is authorised in respect of money paid, by a company purchasing an existing business, to the manager of the business purchased, under an agreement with the selling company that they would either employ such manager or pay him an agreed sum for compensation (*g*); nor, in the case of the purchase of a business, in respect of a sum paid as the price of the estimated profits of unexecuted contracts taken over (*h*).

Loss on plant.

No deduction is authorised for loss on trade machinery through removal of business premises, or through closing them, or working them on a smaller scale (*i*), nor for loss on a ship destroyed by sea perils, in respect of which the owner (a shipping company) was his own insurer (*k*).

(*p*) *Watney* v. *Musgrave* (1880), 5 Ex. D. 241.
(*q*) *Gillatt and Watts* v. *Colquhoun* (1884), 33 W. R. 258.
(*r*) *Brickwood & Co.* v. *Reynolds*, [1898] 1 Q. B. 95, C. A., where the grounds of decision were that such houses were not occupied for the purposes of such (*i.e.*, the brewers') trade; and that the money was not expended "wholly and exclusively" for the purpose of their trade.
(*a*) *Southwell* v. *Savill Brothers, Ltd.* [1901] 2 K. B. 349.
(*b*) *Strong & Co., Ltd.* v. *Woodifield*, [1906] A. C. 448.
(*c*) *Alexandria Water Co.* v. *Musgrave* (1883), 11 Q. B. D. 174, C. A.
(*d*) *Arizona Copper Co.* v. *Surveyor of Taxes* (1891), 19 R. (Ct. of Sess.) 150.
(*e*) *Rhymney Iron Co.* v. *Fowler*, [1896] 2 Q. B. 79.
(*f*) *Texas Land and Mortgage Co.* v. *Hotham* (1894), 10 T. L. R. 337.
(*g*) *Royal Insurance Co.* v. *Watson*, [1897] A. C. 1.
(*h*) *City of London Contract Corporation* v. *Styles* (1887), 4 T. L. R. 51; and see *London Bank of Mexico and South America* v. *Apthorpe*, [1891] 2 Q. B. 378, C. A.
(*i*) *Granite Supply Association* v. *Inland Revenue Solicitor* (1905), 43 Sc. L. R. 65; *Smith* v. *Westinghouse Brake Co.* (1888), 2 Tax Cas. 357.
(*k*) *Inland Revenue* v. *Western Steamship Co.* (1907), 44 Sc. L. R. 715.

In the case of an English company manufacturing nitrates abroad from deposits situate on lands owned by them there, no deduction is authorised in respect of the annual exhaustion of such deposits (*l*), nor, in the case of a mine, for capital lost by partial exhaustion (*m*), nor, in any shape, for losses in past years (*n*); nor, in the case of a mine worked on the cost-book system, for a call to raise money to sink a new shaft (*o*). Exhaustion of capital etc.

In assessing a trade carried on by a municipal corporation, it seems that no allowance can be made in respect of any part of the general expenditure of the corporation (*p*), nor for losses on other concerns carried on by it (*q*), and where as part of a philanthropic association a trade is carried on from which profits are made, no deduction from these profits can be allowed in respect of the expenses of the non-trading part of the concern (*r*). Municipal corporations. Philanthropic association.

Loss on a farm assessed under Schedule B, and worked in connection with a seed merchant's business, cannot be set off against the profits of that business (*s*). Loss on business assessed under Schedule B.

(2) Deductions which are allowed.

In the case of a brewery company owning tied houses as part of its trade and carrying on also the business of lending money to such houses, losses or bad debts upon loans to customers may be deducted (*t*). In a case in which it was found as a fact by the Commissioners that brewers were the owners of certain tied houses solely for the purposes and as part of their business, and as a necessary incident to the profitable working thereof, it was held that the portion of the compensation charges imposed on them as landlords by statute was a deductible item (*u*). Bad debts. Compensation charges.

In the case of a financial company an annual payment made to another company as the price of obtaining a controlling interest in the latter company's business may be deducted (*a*). Price paid for a controlling interest in another concern.

In the case of a bank the annual value of that part of the bank which is used as a residence for the manager may be deducted (*b*). Banks.

(*l*) *Alianza Co., Ltd.* v. *Bell*, [1906] A. C. 18.
(*m*) *Miller* v. *Farie* (1878), 6 R. (Ct. of Sess.) 270.
(*n*) *Broughton Coal Co.* v. *Kirkpatrick* (1884), 14 Q. B. D. 491.
(*o*) *Morant* v. *Wheal Grenville Mining Co.* (1894), 71 L. T. 758.
(*p*) *A.-G.* v. *Scott* (1873), 28 L. T. 302.
(*q*) *Re Birmingham Corporation* (1875), 1 Tax Cas. 26.
(*r*) *Grove* v. *Young Men's Christian Association* (1903), 88 L. T. 696; *Religious Tract Society* v. *Inland Revenue* (1896), 23 R. (Ct. of Sess.) 390. See also *Dillon* v. *Haverfordwest Corporation*, [1891] 1 Q. B. 575.
(*s*) *Brown* v. *Watt* (1886), 13 R. (Ct. of Sess.) 590.
(*t*) *Reid's Brewery Co.* v. *Male*, [1891] 2 Q. B. 1.
(*u*) *I.e.*, by the Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3, repealed and re-enacted by the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 20; see *Smith* v. *Lion Brewery Co., Ltd.*, [1909] 2 K. B. 912, C. A.; affirmed in the House of Lords (1911), 27 T. L. R. 261, H. L., their lordships being equally divided.
(*a*) *Moore* v. *Stewarts and Lloyds, Ltd.* (1906), 43 Sc. L. R. 811; and see *Guest, Keen, and Nettlefolds, Ltd.* v. *Fowler*, [1910] 1 K. B. 713, where payments made by a trader to a trade association under arrangement for "pooling" prices were allowed as deductions.
(*b*) *Russell* v. *Town and County Bank* (1888), 13 App. Cas. 418

SECT. 2. Case 1. (Trades, Manufactures etc.)

Depreciation of plant and machinery.

1313. The Commissioners are required, in assessing the profits of any trade chargeable under Schedule D or of any concern chargeable by reference to the rules of that Schedule, to allow such sum as they may think just and reasonable as representing the diminished value during the year of any machinery or plant used for the purpose of the concern and belonging to the person or company by whom the concern is carried on (*c*).

Hired plant and machinery.

For the purpose of this provision, where machinery or plant is let to such person or company, upon the terms that he or it is bound to maintain it and deliver it over at the end of the term of the lease, it is to be deemed to belong to such person or company, and where on such letting the burden of maintenance and restoring falls upon the lessor, the latter may claim the allowance (*d*).

No claim is to be allowed unless made within twelve months after the expiration of the year of assessment (*e*).

Claims for depreciation, when made.

Claims in respect of such depreciation must now be included in the annual return of profits and gains which is required to be made (*f*).

Successive claims must not exceed total value of plant or machinery.

No such deduction is to be allowed in any year if the deduction when added to previous deductions allowed on that account in any previous years to the person by whom the concern is carried on, will make the aggregate amount of the deductions exceed the actual cost to that person of the machinery and plant, including any capital expenditure thereon by way of renewal, improvement or reinstatement (*g*).

When claims may be carried forward.

Where full effect cannot in any year be given to the deduction, owing to there being no profits, or no sufficient profits, chargeable in that year, the allowance, or the balance of the allowance, may be carried on to the next year, or if necessary to the succeeding years (*h*).

In computing the duty on a trade the profits arising from lands, tenements, or hereditaments occupied for the purpose of such trade concern are to be excluded (*i*).

(*c*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 12. Before this Act, no deduction was allowable in respect of depreciation of machinery or plant (see *Forder* v. *Handyside* (1876), 1 Ex. D. 233 ; *Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 315).

(*d*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 12.

(*e*) *Ibid.* The provisions of this section have given rise to a number of judicial decisions; but these have turned rather upon questions of fact or the practice of accountants than upon the construction of the language of the section. The cases on the section are *Burnley Steamship Co.* v. *Inland Revenue* (1894), 21 R. (Ct. of Sess.) 965 ; *Leith, Hull and Hamburg Steam Packet Co.* v. *Bain* (1897), 3 Tax Cas. 560 ; *Cunard Steam Ship Co.* v. *Coulson*, [1899] 1 Q. B. 865 ; *Peninsular and Oriental Steam Navigation Co.* v. *Lee* (1898), 79 L. T. 118 ; *Peninsular and Oriental Steam Navigation Co.* v. *Leslie* (1900), 82 L. T. 137, C. A. ; *British India Steam Navigation Co.* v. *Leslie* (1900), 4 Tax Cas. 257 ; *John Hall, Junior & Co.* v. *Rickman*, [1906] 1 K. B. 311 ; *London County Council* v. *Edwards* (1909), 100 L. T. 444.

(*f*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 26 (1).

(*g*) *Ibid.*, s. 26 (2).

(*h*) *Ibid.*, s. 26 (3).

(*i*) See p. 648, *ante*.

SUB-SECT. 8.—*Special Points arising in connection with the Assessment of Insurance Companies.*

SECT. 2. Case 1. (Trades, Manufactures etc.)

1314. An insurance company which grants annuities is entitled to deduct from its gross receipts the sum actually paid by it during the years of average in respect of its annuity contracts (*k*).

Annuities paid out of gross receipts.

Dividends and interest upon the invested funds of an insurance company are chargeable as such, without reference to whether or not they exceed the taxable profits of the company, or to whether the tax be deducted by the payer or not. In practice the tax so paid or borne is deducted from the tax which would otherwise be payable upon the total profits of the company from all sources, and the balance only is claimed (*l*).

Crown may charge dividends received as such, or may charge them as part of the profits of the concern.

It seems, however, that the Crown may, at its option, treat dividends received upon the necessary investments of an insurance company resident in the United Kingdom, as part of the general profits of the company, and claim tax upon this basis under Case 1: in which case such dividends will be chargeable whether received in this country or not (*m*).

Company carrying on life and fire business.

Where a company carries on a life as well as a fire insurance business, the profits from the two branches must, for the purpose of ascertaining the profit chargeable, be treated as one undivided income (*n*).

Profits from realised investments.

If the company in the course of its business derives profit by realising investments at a larger price than was paid for them, the profits are chargeable (*o*).

Deduction in respect of unexpired risk.

In the case of fire or accident insurance business no reduction is allowed in respect of the unexpired risks of the current year (*p*). But in the case of a life insurance business the calculation of the profits is made upon an actuarial calculation in which the burden to the company of unexpired risks is taken into account (*q*).

(*k*) *Gresham Life Assurance Society* v. *Styles*, [1892] A. C. 309, *per* Lord WATSON, at p. 320. This sum does not come within Case 1, r. 4 (Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100), inasmuch as the annuities in question are not payable out of profits and gains brought into charge." The rule in question appears to apply mainly, if not entirely, to annual payments which either are directly charged upon the profits, or are of such a character that they form a proper charge on them (*Gresham Life Assurance Society* v. *Styles*, *supra*, *per* Lord WATSON, at p. 320).

(*l*) *Clerical, Medical and General Life Assurance Society* v. *Carter* (1889), 22 Q. B. D. 444.

(*m*) *Revell* v. *Edinburgh Life Insurance Co.* (1906), 5 Tax Cas. 221; *Norwich Union Fire Insurance Co.* v. *Magee* (1896), 73 L. T. 733. It is submitted that upon this ground the latter case is distinguishable from *Gresham Life Assurance Society* v. *Bishop*, [1902] A. C. 287; and see now *Liverpool, London and Globe Insurance Co.* v. *Bennett* (1911), *Times*, 31st March.

(*n*) *Last* v. *London Assurance Corporation* (1884), 12 Q. B. D. 389; reversed on another point (1885), 10 App. Cas. 438; *Scottish Union and National Insurance Co.* v. *Inland Revenue* (1889), 16 R. (Ct. of Sess.) 461.

(*o*) *Scottish Union and National Insurance Co.* v. *Inland Revenue*, *supra*; *Imperial Fire Insurance Co.* v. *Wilson* (1876), 35 L. T. 271; *General Accident Fire and Life Assurance Corporation, Ltd.* v. *McGowan*, [1908] A. C. 207.

(*p*) *Imperial Fire Insurance Co.* v. *Wilson*, *supra*; *General Accident Fire and Life Assurance Corporation, Ltd.* v. *McGowan*, *supra*. A different view appears to have been taken by BRAY, J., in *Clark* v. *Sun Insurance Office* (1910), 102 L. T. 336.

(*q*) *Scottish Union and National Insurance Co.* v. *Inland Revenue*, *supra*.

SECT. 2. Case 1. (Trades, Manufactures etc.)

A company issuing "participating" policies which entitle the holders to receive a share of the "gross profits" of the company is chargeable upon that part of the "gross profits" which is distributed to the holders(*r*).

"Participating" policies.

Mutual insurance.

But where, in the case of a mutual insurance company, an annual contribution is levied from the policy holders to cover the year's estimated expenses, any excess over actual expenses being afterwards in part returned to the respective policy holders and in part placed to the credit of the company, no part of such excess is chargeable as profits (*s*).

SECT. 3.—*Case* 2. (*Professions, Salaried Employments etc.*)

Professions and salaried employments which are not charged under Schedule E.

1315. Case 2 relates to the duties to be charged upon such professions, salaried employments or vocations (as distinguished from the trades, manufactures, adventures or concerns comprised in Case 1), as are not charged under any other Schedule of the Act (*a*). As employments in public offices, including those in corporations and companies, are chargeable under Schedule E (*b*), these are excluded from the Case. Save as aforesaid, the Case extends to all employments by retainer or in any character whatever, whether annual or for a longer or shorter period, and to all emoluments derived from such employment of whatever value.

As regards principals, the Case applies only to such as are engaged in a profession or vocation, as distinguished from a trade; but it includes all employés who are not chargeable under Schedule E, whether employed in trades, professions or vocations (*c*).

"Vocation," meaning of.

The expression "vocation" is used in a wide sense and includes a professional bookmaker (*d*).

Emoluments of ministers of religion.

The emoluments of ministers of dissenting bodies are chargeable under this Case, but, for convenience, the decisions in reference thereto, together with those arising in reference to ministers of an established Church, which are chargeable under Schedule E, are dealt with under that Schedule (*e*).

Profits, how computed.

1316. The duty is to be computed on the full amount of the profits, gains and emoluments of such professions, employments and vocations upon a three years' average in the same way as in the case of trades etc. coming within Case 1 (*f*).

Statutory rules for Case 1 are applicable.

All the statutory rules and provisions applicable to Case 1, summarised above (*g*), appear to apply to the assessment of

(*r*) *Last* v. *London Assurance Corporation* (1885), 10 App. Cas. 438; see also *Equitable Life Assurance Society of the United States* v. *Bishop*, [1900] 1 Q. B. 177, C. A.

(*s*) *New York Life Insurance Co.* v. *Styles* (1889), 14 App. Cas. 381.

(*a*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 2.

(*b*) See pp. 666 *et seq.*, *post.*

(*c*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 2, rr. 1 and 2; Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 48.

(*d*) *Partridge* v. *Mallandaine* (1886), 18 Q. B. D. 276.

(*e*) See notes (*f*), (*g*), p. 668, *post.*

(*f*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 2, rr. 1 and 2; Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 48.

(*g*) See Case 1, pp. 643 *et seq.*, *ante.*

principals under Case 2, except probably the provision relating to allowance in respect of the deterioration of machinery and plant (*h*).

An employer is required to make a return of the names and places of residence of persons employed by him, and to specify the amount of payments made by him to such persons (*i*).

Employers to give certain notices.

SECT. 4.—*Case* 3. (*Casual Profits.*)

What profits are chargeable under.

1317. Case 3 relates to the duty to be charged in respect of profits of an uncertain annual value except those charged under Schedule A (*j*). Under this Case are charged (1) profits upon all securities bearing interest payable out of the public revenue (except those directed to be charged under the rules of Schedule C); (2) profits upon all discounts and up on all interest of money not being annual interest (*k*); (3) home and foreign and colonial Government annuities, dividends and shares, except India stock, in cases where the half-yearly payment thereon shall not amount to 50*s*. (*l*); (4) interest or dividends paid or credited to a depositor in any savings bank whose income exceeds £160 per annum (*m*); (5) annuities, yearly interest of money, and other annual payments when not payable out of profits brought into charge (*n*).

Duty, how computed.

1318. The duty is to be charged upon profits arising within the preceding year ending as in the first Case (*o*).

SECT. 5.—*Case* 4. (*Dividends etc. on Securities of Foreign and Colonial Companies.*)

Dividends on foreign and colonial securities other than Government securities.

1319. Case 4 relates to the duty to be charged in respect of interest arising from securities in any of His Majesty's dominions out of the United Kingdom, and foreign securities except such as are directed to be charged under Schedule C (*p*).

Dividends on debentures and other securities of foreign companies when received in the United Kingdom are chargeable under this Case, but dividends upon shares in such companies would seem to be chargeable as foreign possessions under Case 5 (*q*).

Enactments referred to under Schedule C as to deduction at the source apply.

Various enactments in reference to foreign and colonial Government securities assessable under Schedule C are applicable to dividends assessable under this and the succeeding Case (*r*). Consequently,

(*h*) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 12.

(*i*) This requirement does not extend to employés who are not employed in any other employment, and whose remuneration does not exceed £160; see p. 669, *post*.

(*j*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 3.

(*k*) *Ibid.*, Case 3, r. 2; and see *ibid.*, s. 102.

(*l*) *Ibid.*, s. 95; India Stock Certificates Act, 1863 (26 & 27 Vict. c. 73), s. 10.

(*m*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 36 (3).

(*n*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 102. The section says that such annuities etc. are to be charged according to the provisions of Case 3.

(*o*) *Ibid.*, Case 3, r. 1; and see pp. 647, 648, *ante*.

(*p*) See pp. 639 *et seq.*, *ante*.

(*q*) *Bartholomay Brewing Co.* (*of Rochester*) v. *Wyatt*, *Nobel Dynamite Trust Co.* v. *Wyatt*, [1893] 2 Q. B. 499, 512.

(*r*) See pp. 639, 640, note (*m*), *ante*, and Income Tax Act, 1853 (16 & 17 Vict.

SECT. 5. Case 4. (Dividends etc. on Securities etc.)

if, as is very commonly the case, the dividends are remitted by the foreign company to an agent or other person in this country for distribution, they are assessable in his hands, and he is required to deduct and pay over the duty to the Crown as therein provided, as are also the bankers and other persons negotiating or dealing in coupons or other securities for such dividends under the circumstances mentioned in those enactments.

Profits, how computed.

This duty is to be charged on the amount of the sums (so far as the same can be computed) which have been or will be received in the United Kingdom in the current year without deduction or abatement (*s*).

What constitutes a remittance to this country—constructive remittance.

1320. It is not clear what process, short of actual remittance of the interest in specie to this country, would constitute a receipt in the United Kingdom within the Case.

Where an English company carries on operations at home and abroad, the mere fact that interest received abroad and invested there is taken into account in the company's English balance sheet as part of the profits does not amount to a receipt here (*a*).

Where remittances to this country are made out of a mixed fund consisting partly of interest and partly of capital, it is a question of fact which of the two the sum remitted consists of, and the mere characterising it as capital will not make it so (*b*).

Crown's right of election.

1321. Where the duty is claimable both under the first and under the fourth or fifth Cases the Crown may elect under which Case it will make the claim (*c*).

c. 34), s. 10. For the operation of this section in the case of a foreign company having a branch in this country, managed by a committee of directors, through whom payment of dividends is made to English shareholders, see *Gilbertson* v. *Fergusson* (1881), 7 Q. B. D. 562, C. A.

(*s*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 4.

(*a*) *Gresham Life Assurance Society* v. *Bishop*, [1902] A. C. 287; *Inland Revenue* v. *Scottish Provident Institution* (1895), 23 R. (Ct. of Sess.) 322; *Standard Life Assurance Co.* v. *Allan* (1901), 3 F. (Ct. of Sess.) 805; *Scottish Widows' Fund* v. *Inland Revenue*, [1909] S. C. 1372. The question of "constructive remittances" had been previously dealt with in *Bartholomay Brewing Co.* (*of Rochester*) v. *Wyatt*, *Nobel Dynamite Trust Co.* v. *Wyatt*, [1893] 2 Q. B. 499; *Denver Hotel Co.* v. *Andrews* (1895), 43 W. R. 339, C. A.; *Norwich Union Fire Insurance Co.* v. *Magee* (1896), 73 L. T. 733; and *Scottish Mortgage and Land Investment Co. of New Mexico* v. *Inland Revenue Commissioners* (1886), 14 R. (Ct. of Sess.) 98. In the last-mentioned case the interest received abroad was treated as remitted to this country by writing it off in the books of the company, against a corresponding amount payable at the place where it was received, thereby avoiding cross remittances, and the court on these facts held that there was a receipt in this country. In *Gresham Life Assurance Society* v. *Bishop*, *supra*, at p. 295, there appears to have been a difference of opinion among some of the law lords who took part in that decision as to whether or not the decision in *Scottish Mortgage and Land Investment Co. of New Mexico* v. *Inland Revenue Commissioners*, *supra*, was correct, but it was certainly not overruled.

(*b*) *Scottish Provident Institution* v. *Allan*, [1903] A. C. 129.

(*c*) *Surveyor of Taxes* v. *Northern Investment Co. of New Zealand* (1887), 14 R. (Ct. of Sess.) 734.

SECT. 6.—*Case* 5. (*Foreign and Colonial Possessions.*)

SECT. 6. Case 5. (Foreign and Colonial Possessions.)

1322. Case 5 relates to the duty to be charged in respect of possessions in any of His Majesty's dominions out of the United Kingdom and foreign possessions (*d*).

The word "possessions" is used in a wide sense, and covers income from all that is possessed in His Majesty's dominions out of the United Kingdom or in foreign countries (*e*).

Meaning of "foreign possessions."

It includes profits of a foreign business received in the United Kingdom by a sleeping partner resident here (*f*), and it probably covers most, if not all, cases of colonial or foreign profits, interest, or dividends received in this country and not coming either within Schedule C or within Case 1, 2, or 4 of Schedule D.

1323. The duty is to be computed on the full amount of the average receipts of the three previous years as directed in Case 1 (*g*).

Duty, how computed.

Where the recipients in this country are trustees for others, no deduction in respect of expenses of management of the trust estate in this country can be made (*h*).

Agents' and trustees' expenses.

SECT. 7.—*Case* 6. (*Annual Profits not otherwise Charged.*)

1324. Case 6 relates to the duty to be charged in respect of any annual profits or gains not falling under any of the foregoing cases and not charged by virtue of any other Schedule (*i*).

Annual profits not otherwise charged.

The assessment is to be made either on the amount of the full value of the profits and gains received annually or according to an average of such period greater or less than a year, as the case may require, and as the Commissioners shall direct (*j*).

Profits, how computed.

SECT. 8.—*Interest, Annuities, and Annual Payments.*

1325. The "Cases" contain no special rules in reference to the assessment of interest, annuities, and other annual profits which do not fall within either Case 3, 4, or 5. Although these subject-matters are assessable under the Schedule, in practice the duty thereon is more often satisfied by deduction in the hands of the person paying the same, in which case no assessment is made.

Certain kinds of interest and other annual payments are not specially dealt with in the "Cases."

It should be pointed out, however, that many annual payments chargeable with duty, such as dividends, debenture interest, and certain descriptions of interest, are assessed or charged under parts of the Acts already referred to. Thus, dividends etc. on home, foreign, and colonial Government securities are charged under Schedule C (*k*); dividends on shares and interest on debentures of colonial and foreign companies are charged under Schedule D,

Enumeration of such as are so dealt with.

(*d*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 5.
(*e*) *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493, *per* Lord HERSCHELL, at p. 508.
(*f*) *Ibid.*; and see p. 645, *ante*.
(*g*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 5.
(*h*) *Inland Revenue* v. *Macdonald's Trustees* (1894), 22 R. (Ct. of Sess.) 88.
(*i*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 6; and see *A.-G.* v. *Black* (1871), L. R. 6 Exch. 308, Ex. Ch.
(*j*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 6.
(*k*) See pp. 639 *et seq.*, *ante*.

SECT. 8. **Interest, Annuities, and Annual Payments.**

Cases 4 and 5 (*l*); while the profits of companies resident in the United Kingdom are taxed in the hands of the company under Schedule D before any dividend upon the share is distributed (*m*). The interest payable upon a mortgage of real property is taxed as part of the assessment of the property under Schedule A, and the tax then deducted from the mortgage interest by the person paying it (*n*).

Provisions as to interest and other annual payments not specially dealt with in the "Cases."

In reference to interest, whether annual or not, annuities, and annual payments generally, the Income Tax Acts contain successive provisions having for their object to secure as far as possible the deduction of the duty by the persons making the payment before it reaches the hands of the recipient. In some of these provisions, "annual" interest, in common with annuities and other annual payments, is dealt with in a different manner from interest which is not "annual" (called "short" interest).

The enactments are in some respects obscure, and to be intelligible should be considered chronologically. It is believed that the following is a summary of the effect of such of the provisions as are now operative, as interpreted by legal decisions (*o*).

(*l*) See pp. 657—659, *ante*.

(*m*) See p. 649, *ante*. As to debentures in such companies, see p. 662, *post*.

(*n*) See p. 633, *ante*.

(*o*) The main sections in question are as follows:—

Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 102: "Upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half yearly or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of 7*d*. [now 1*s*. 2*d*.], without deduction, according to and under and subject to the provisions by which the duty in the third case of Sched. D, may be charged; provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorised to deduct out of such annual payment at the rate of sevenpence for every twenty shillings of the amount thereof, and the person to whom such payment liable to deduction is to be made shall allow such deduction, at the full rate of duty hereby directed to be charged, upon the receipt of the residue of such money, and under the penalty hereinafter contained, and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; but in every case where any annual payment as aforesaid shall, by reason of the same being charged on any property or security in the British plantations, or in any other of Her Majesty's dominions, or on any foreign property or foreign security, or otherwise, be received or receivable without any such deduction as aforesaid, and in every case where any such payment shall be made from profits or gains not charged by this Act, or where any interest of money shall not be reserved or charged or payable for the period of one year, then and in every such case there shall be charged upon such interest, annuity or other annual payment as aforesaid the duty before mentioned, according to and under and subject to the several and respective provisions by which the duty in the third case of Sched. D, may be charged. Provided always, that where any creditor on any rates or assessments not chargeable by this Act as profits shall be entitled to such interest it shall be lawful to charge the proper

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(i.) Income Tax Act, 1842, s. 102;

1326. The Income Tax Act, 1842 (*p*), charges the duty upon all interest, annual or otherwise (*q*), as well as upon annuities and other annual payments, all of which are to be charged subject to the provisions of the third Case of Schedule D. It is provided, however, that where an annuity, annual interest, or other annual payment is payable out of profits brought into charge no assessment is to be made upon the person entitled thereto, but that the duty is to be charged upon the person liable to make the payment, who then recoups himself by deducting the tax from the amount paid. It would seem that this provision, however, is applicable only to such interest etc. as is either directly charged upon profits or is of such

officer having the management of the accounts with the duty payable on such interest and every such officer shall be answerable for doing all acts, matters and things necessary to a due assessment of the said duties and payment thereof, as if such rates or assessments were profits chargeable under this Act, and such officer shall be in like manner indemnified for all such acts, as if the said rates and assessments were chargeable."

S. 103 imposes a penalty on persons refusing to allow deductions and provides further "that all contracts, covenants and agreements made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid shall be utterly void."

[S. 104 appears to be superseded by the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40.]

Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40:—"Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half yearly or at any shorter or more distant periods, shall be entitled and is hereby authorised, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable for every twenty shillings of such payment: and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction, upon receipt of the residue of such money under pain of forfeiting the sum of fifty pounds for any refusal so to do: Provided always, that no tenant or occupier of any property chargeable under Sched. A of this Act shall be entitled to deduct or retain out of the rent thereof any greater sum than the amount of the duty which shall have been assessed and charged upon or in respect of such property, and actually paid by such tenant or occupier."

Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24 (3):—"Upon payment of any interest of money or annuities charged with Income Tax under Sched. D, and not payable, or not wholly payable out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be, and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly; and the provision contained in s. 8 of the Act of the thirteenth and fourteenth years of Her Majesty's reign, chapter ninety-seven" (repealed by the Stamp Duties Management Act, 1891 (55 & 56 Vict. c. 38) Schedule), "now in force in relation to money in the hands of any person for legacy duty, shall apply to money deducted by any person in respect of income tax."

(*p*) 5 & 6 Vict. c. 35, s. 102.

(*q*) See passage commencing "or where any interest," note (*o*), p. 660, *ante*.

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a character that it forms a proper charge upon them (*r*). It applies to interest on debentures payable by a British company, to annuities charged on partnership profits, and to other similar payments, and, as has been seen (*s*), the person liable to make the payment is precluded from deducting the amount so payable in his return of profits. Where the interest etc. is secured on rates or other assessments not chargeable with income tax, power is given to charge with the duty the officer having the management of the accounts of the corporation, who is to be answerable for the doing of all acts necessary for making an assessment.

(ii.) Income Tax Act, 1853, s. 40;

The Income Tax Act, 1853 (*t*), entitles, but does not compel, a person liable to the payment of rent or of any annual interest of money (*a*), annuity, or other annual payment, to deduct and retain the duty payable thereon, which deduction operates as payment *pro tanto* of such interest, and the recipient is bound under penalty to allow the deduction. The Act applies to all payments whether paid out of profits brought into charge or not. It does not apply to "short" interest. It is not clear whether before the coming into operation of the Act of 1888, next referred to, the person so deducting was entitled to retain the duty deducted as against the Crown (*b*).

(iii.) Customs and Inland Revenue Act, 1888, s. 24 (3).

The Customs and Inland Revenue Act, 1888 (*c*), makes it compulsory on the person paying any interest of money or annuities charged under Schedule D, and not payable, or not wholly payable, out of profits brought into charge to income tax under any Schedule (*d*), to deduct the tax thereon, and render an account to the Commissioners of the amount so deducted, or of the amount deducted out of so much of the interest or annuity as is not paid out of profits brought into charge, which amount is recoverable as a debt due to the Crown. The provision now applies also to royalties or other sums paid in respect of the user of a patent (*e*), and it applies to "short" as well as "annual" interest (*f*). If, however,

(*r*) *Gresham Life Assurance Society* v. *Styles*, [1892] A. C. 309, *per* Lord WATSON, at p. 320.

(*s*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Case 1, r. 4, s. 159.

(*t*) 16 & 17 Vict. c. 34, s. 40.

(*a*) As to deduction for rent and interest upon a loan secured upon hereditaments chargeable under Sched. A, see pp. 632 *et seq.*, *ante*. Rent, unlike interest and annuities, is not assessable to income tax, and the lessee's right of deduction on payment of rent is by way of recoupment of his liability under Sched. A. See also Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), s. 15.

(*b*) See *Aberdeen Commissioners of Supply* v. *Russell* (1890), 17 R. (Ct. of Sess.) 942; *London County Council* v. *A.-G.*, [1901] A. C. 26, *per* Lord MACNAGHTEN, at p. 40. As to liability since the passing of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), see, in addition to the other caess cited, *H. M. Advocate* v. *Forth Bridge Rail. Co.* (1890), 28 Sc. L. R. 576; *De Peyer* v. *R.* 1909), 100 L. T. 256, C. A.

(*c*) 51 & 52 Vict. c. 8, s. 24 (3).

(*d*) See *London County Council* v. *A.-G.*, *supra*.

(*e*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 25 (2). See, on this provision, *Langton Monotype Corporation* v. *Anderson* (1911) (not yet reported).

(*f*) *Anglo-Continental Guano Works* v. *Bell* (1894), 70 L. T. 670; *Lord Advocate* v. *Edinburgh Corporation* (1903), 6 F. (Ct. of Sess.) 1; (1905) 7 F. (Ct. of Sess.) 972; compare, however, the case of *Scottish North American Trust, Ltd.* v. *Inland Revenue*, [1910] S. C. 966.

the person paying omits to deduct the duty, the Crown may assess the recipient in respect thereof (*g*). It is not certain whether a person who omits to make the deduction upon the payment of mortgage or other interest can deduct the duty afterwards (*h*).

When deduction must be allowed.

1327. When deduction is made under any of the above provisions the recipient is bound to allow it (*i*).

Loans charged partly on assessable and partly on non-assessable property—right of payer to retain tax.

1328. Difficult questions have arisen in cases where a loan bearing interest is secured upon a fund or other property part of which has borne tax and part not. A case in point is where a loan by a municipal council is secured upon the rates, upon property of the council chargeable under Schedule A, and upon other property chargeable under Schedule D. In such case the council, having paid the interest out of a fund derived from these three sources, is entitled to retain for its own benefit against the Crown so much of the tax deducted on payment as is equal to the tax paid or borne by it upon the moneys forming part of the fund out of which the interest is paid, including as well the tax borne by it as landlords under Schedule A as that under Schedule D (*j*). But it cannot retain as against the Crown any sum as representing the tax upon that part of the security chargeable under Schedule A which is in its own occupation, because no part of the interest is in fact paid out of income arising from such property (*k*). Where an insurance company paid annuities granted by them, and not charged upon any particular property of the company, out of their general funds, which consisted partly of dividends upon investments which had borne tax, and partly of premiums upon life policies which had not, the company were, in the circumstances, held entitled to retain the tax deducted on payment of the annuities to an amount equal to the tax upon their taxed income, and not merely to an amount calculated upon the proportion which that income bears to the general funds (*l*).

Guaranteed interest.

1329. Interest guaranteed by a Government to a company during the construction of a public work is chargeable under the above provision, including any portion which under the contract is paid

(*g*) *Leeds Benefit Building Society* v. *Mallandaine*, [1897] 2 Q. B. 402, C. A.; *Glamorgan Quarter Sessions* v. *Wilson*, [1910] 1 K. B. 725.

(*h*) *Galashiels Provident Building Society* v. *Newlands* (1893), 20 R. (Ct. of Sess.) 821; *Agnew* v. *Ferguson* (1903), 5 F. (Ct. of Sess.) 879. As to the effect of non-deduction when paying rent, see p. 633, *ante*.

(*i*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 103; Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24 (3).

(*j*) *London County Council* v. *A.-G.*, [1901] A. C. 26. In this case and the case of *Leeds Benefit Building Society* v. *Mallandaine*, *supra*, the effect of the enactments relating to the deduction of tax upon annual interest etc. is very fully discussed; see now further on this point, *Edinburgh Life Assurance Co.* v. *Lord Advocate*, [1910] A. C. 143.

(*k*) *A.-G.* v. *London County Council*, [1907] A. C. 131; *Leeds Corporation* v. *Sugden* (1911), 104 L. T. 166.

(*l*) *Edinburgh Life Assurance Co.* v. *Lord Advocate*, *supra*.

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direct to trustees to form a debenture redemption fund (*m*). But a payment guaranteed, in similar circumstances, under the name of interest, to make up to a certain sum the yearly balance of receipts over expenditure, is not so chargeable (*n*).

What constitutes "annual" and "short" interest respectively.

In order to constitute interest "annual" it is not necessary that it should by contract be payable during a specified term of years. Interest payable under a mortgage in the ordinary form is annual interest, and so, it seems, is interest for non-payment of purchase-money running on at a yearly rate until payment (*o*). On the other hand, interest on a "short loan" or on a bill of exchange which on its face does not provide for payment of interest, is not (*p*).

What constitutes an annuity within the Acts.

1330. In order to bring an annuity or annual payment (*q*) within the foregoing provisions, it is not sufficient either that such payment is called an annuity in the contract under which the payment is made, or that it is continued over a term of years or in perpetuity.

Instances.

In the following instances sums annually payable have been held to be chargeable: an annuity to a wife, payable upon a divorce or under a deed of separation (*r*), an annual payment equal to a percentage of gross receipts payable for forty years upon the sale of a secret process (*s*), a fixed sum covenanted to be paid upon the sale of a lease during the continuance of the term (*t*). On the other hand, in the case of a sale of property for a lump sum paid down together with a further sum payable by half-yearly instalments extending over thirty years, the instalments were held not chargeable (*a*), and in two cases annual sums (called in the contract, annuities) payable by the Secretary of State for India, as the purchase price with interest of a railway, were held chargeable to the extent to which the sum payable consisted of interest on the unpaid purchase-moneys, but not chargeable on the part which represented payment of principal (*b*).

Exemptions from duty in favour of charities.

1331. Trustees for charitable purposes only, whether corporations, societies of persons, or individuals, are entitled to exemption in respect of any yearly interest or other annual payment chargeable

(*m*) *Blake* v. *Imperial Brazilian and Nova Cruz Rail. Co.* (1884), 1 T. L. R. 68, C. A.; *City of London Contract Corporation* v. *Styles* (1887), 4 T. L. R. 51, C. A.; *Nizam State Rail. Co.* v. *Wyatt* (1890), 24 Q. B. D. 548.

(*n*) *Pretoria-Pietersburg Rail. Co.* v. *Elgood* (1908), 98 L. T. 741, C. A.; and see *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, C. A.

(*o*) *Bebb* v. *Bunny* (1854), 1 K. & J. 216; *Re Craven's Mortgage, Davies* v. *Craven*, [1907] 2 Ch. 448; *Mosse* v. *Salt* (1863), 32 Beav. 269.

(*p*) *Goslings and Sharpe* v. *Blake* (1889), 23 Q. B. D. 324, C. A. *Dinning* v. *Henderson* (1850), 3 De G. & Sm. 702, seems to turn upon the practice of the administration Officers of the Court of Chancery.

(*q*) The words in the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 102, are "all annuities, yearly interest of money or other annual payments."

(*r*) *Warren* v. *Warren* (1895), 43 W. R. 490; *Re Barry's Trusts, Barry* v. *Smart*, [1906] 2 Ch. 358, C. A.

(*s*) *Delage* v. *Nugget Polish Co.* (1905), 92 L. T. 682.

(*t*) *Chadwick* v. *Pearl Life Insurance Co.*, [1905] 2 K. B. 507.

(*a*) *Foley* (*Lady Emily*) v. *Fletcher* (1858), 3 H. & N. 769.

(*b*) *Secretary of State in Council of India* v. *Scoble*, [1903] A. C. 299; *East Indian Railway* v. *Secretary of State in Council of India*, [1905] 2 K. B. 413, C. A.; and compare with the latter case *Chadwick* v. *Pearl Life Insurance Co.*, *supra*; *Delage* v. *Nugget Polish Co.*, *supra*.

under Schedule D (*c*) so far as it is applied for charitable purposes; and friendly societies, industrial and provident societies, trades unions, and savings banks are, in respect of any profits chargeable under Schedule D, entitled to the same exemptions and under the same conditions as similar bodies enjoy in reference to Schedule C (*d*).

friendly societies, and trades unions.

SECT. 9.—*The Place of Assessment.*

Traders, professional men, and employés.

1332. As a general rule a person engaged in a trade or profession is to be assessed by the Commissioners of the parish or place where the trade or profession is carried on. Where a trade is carried on by the manufacture and sale of goods the assessment is to be at the place of manufacture. A non-trader is to be assessed at the place where his dwelling-house is situate; or if he has two residences, then at the place at which he is ordinarily resident at the time the general notices are given (*e*), or at the place where he shall first come to reside after that time. Special provision is made for the case of persons to whom the above provisions do not apply (*f*).

Non-traders.

Returns must show place of assessment.

Persons are required to supply in the statement delivered by them such particulars as are necessary to show the place or places of charge, and, if they have two residences or places of trade, may be required to deliver a declaration at each (*g*).

Persons chargeable to duties on foreign and colonial securities and possessions.

The duties chargeable under Cases 4 (*h*) and 5 (*i*) on profits derived from foreign and colonial securities and possessions are to be assessed by the Commissioners acting for such of the several ports of London, Bristol, Liverpool, and Glasgow as is nearest the place where the property is first imported, or, in certain cases, in such place as is nearest to the recipient's place of residence. There is a special provision to meet the case where the property is imported at more places than one (*j*).

London and India Docks.

The concerns now amalgamated as the London and India Docks are to be assessed by the Commissioners for the City (*k*).

SECT. 10.—*Procedure on Assessment.*

Machinery for assessment differs from that under Schedule A in following particulars.

1333. The machinery for assessing the duty under Schedule D differs from that in reference to Schedule A (*l*) mainly in the following particulars:—

Party may elect to be

(1) The party to be charged may, in respect of profits chargeable

(*c*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 105. The exemption does not apply to trade profits (*Psalms and Hymns (Trustees)* v. *Whitwell* (1890), 7 T. L. R. 164; *St. Andrew's Hospital, Northampton* v. *Shearsmith* (1887), 19 Q. B. D. 24). As to the meaning of charitable purposes, see note (*m*), p. 629, *ante*, and title CHARITIES, Vol. IV., p. 210.

(*d*) As to these exemptions, see p. 641, *ante*.

(*e*) See p. 617, *ante*.

(*f*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 106.

(*g*) *Ibid.*, s. 110.

(*h*) See pp. 657, 658, *ante*.

(*i*) See p. 659, *ante*.

(*j*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 108. As to the mode of assessment when dividends or shares are remitted to an agent for distribution in this country, see pp. 639 *et seq.*, *ante*.

(*k*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 109. The undertaking is now vested in the Port of London Authority under the Port of London Act, 1908 (8 Edw. 7, c. 68).

(*l*) See p. 635, *ante*. As to proceedings subsequent to assessment, including appeals, see pp. 679 *et seq.*, *post*.

SECT. 10. Procedure on Assessment.

under Schedule D, upon giving notice to that effect in his return within the time limited for making that return (*m*), elect to be assessed by the Special Commissioners (*n*).

assessed by Special Commissioners; otherwise by Additional Commissioners.

(2) If he does not so elect, the assessment is to be made by the Additional Commissioners (*o*), who have power to refer any particular return to the General Commissioners (*p*), and must on the requisition of the surveyor or inspector state a case for their opinion (*q*).

Assessors do not act.

(3) The assessor does not take part in the assessment except where the party to be charged has not made a return, in which case he is to furnish to the Commissioners an estimate of the profits assessable (*r*).

Appeal to Special Commissioners.

(4) The party charged may at his option appeal to the Special Commissioners instead of to the General Commissioners (*s*).

Functions of Additional Commissioners, inspectors, and surveyors.

The Additional Commissioners are to make their assessment upon the returns made, if satisfied that they are made *bonâ fide*, or if no return or no sufficient return is made, then according to the best of their judgment (*a*). Inspectors and surveyors may examine and raise objections to the returns (*b*) and assessments (*c*) respectively, and may make surcharges on the returns (*d*). The Additional Commissioners are to make out and sign certificates of the assessments when made by them and deliver them under cover, sealed up, to the General Commissioners, together with the returns and other documents. The General Commissioners then proceed to make the assessment (*e*).

Part VII.—Schedule E.

SECT. 1.—*Scope of Schedule.*

Schedule relates to salaries and

1334. Under Schedule E, income tax is payable (*f*) in respect of public offices or employments of profit, and on annuities, pensions

(*m*) As to which, see p. 617, *ante*.
(*n*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 131.
(*o*) *Ibid.*, s. 111.
(*p*) *Ibid.*, ss. 113, 114.
(*q*) *Ibid.*, s. 112.
(*r*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 50.
(*s*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 130.
(*a*) *Ibid.*, ss. 111, 113.
(*b*) *Ibid.*, s. 116; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 51.
(*c*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 113, 115, 116, 161.
(*d*) *Ibid.*, s. 116.
(*e*) *Ibid.*, s. 117. The General Commissioners have power to require from the party charged answers to questions, in writing and *vivâ voce*, to summon and examine witnesses on oath, and other incidental powers (Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 123—126), and to increase the assessments (*ibid.*, ss. 122, 127). As to the powers of Special Commissioners, see p. 614, *ante*. As to subsequent proceedings, including appeals to the General Commissioners and the High Court, see pp. 679 *et seq.*, *post*.
(*f*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sched. E.

or stipends payable by the Crown or out of the public revenue, except such annuities as are charged under Schedule C (*g*).

With the above exception the charge includes all salaries, fees, wages, perquisites or profits, accruing by reason of public offices, employments or pensions (*h*). Perquisites are defined to be such profits of offices and employments as arise from fees or other emoluments payable either by the Crown or the subject in the course of executing such office or employment (*i*). The provisions applicable to this Schedule may be summarised as follows:—

pensions derived from the Crown and public offices.

1335. The salary, pension or stipend is chargeable upon the amount actually received in the year of assessment (*k*). The perquisites are chargeable either on the profits of the year preceding the year of assessment, or on an average of the three preceding years (*l*).

Duty chargeable on amount received in year of assessment—perquisites.

1336. The expression "public office and employment of profit" in the Schedule is used in a very wide sense, and includes any office in the Civil Service and the Duchies of Lancaster and Cornwall, appointments of commissioned officers in the army, navy, or territorial force, offices held under any ecclesiastical body aggregate or sole, or under any public corporation or under any company or society (whether corporate or not) or public foundation, county and municipal office, and every other public office or employment of a public nature (*m*).

Meaning of public office and employment of profit.

1337. The Schedule does not extend to workmen or artificers, and consequently engine drivers, porters and labourers in the employ of a railway company are chargeable under Schedule D and not under this Schedule (*a*). An officer, such as a bursar of a college, who is paid a salary out of the college funds is within the Schedule, but a corporator, such as a fellow of a college, is not (*b*).

Workmen and artificers.

Corporators.

1338. Where a person is chargeable under this Schedule in respect of a public office, everything in the shape of profit accruing therefrom is chargeable (if at all) thereunder, and not under Schedule D (*c*).

Profits derived from the employment, when chargeable.

An emolument or perquisite which is neither money nor capable of being converted into money is not income, and is consequently not chargeable as an emolument of office, and for this reason the right of the holder of an office, as part of the terms of employment to occupy premises rent free, but not to let them, is not chargeable (*d*), although if the right to let such premises existed, the money value of such right would be chargeable (*e*).

Premises occupied rent free.

(*g*) See pp. 639 *et seq.*, *ante*.
(*h*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 146, r. 1.
(*i*) *Ibid.*, s. 146, r. 4.
(*k*) *Ibid.*, s. 146, r. 1.
(*l*) *Ibid.*, s. 146, r. 4.
(*m*) *Ibid.*, s. 146, r. 3. Employés of companies, therefore, are charged under this Schedule, while employés of private firms are charged under Schedule D; see p. 656, *ante*.
(*a*) *A.-G.* v. *Lancashire and Yorkshire Rail. Co.* (1864), 2 H. & C. 792.
(*b*) *Langston* v. *Glasson*, [1891] 1 Q. B. 567.
(*c*) *Tennant* v. *Smith*, [1892] A. C. 150.
(*d*) *Tennant* v. *Smith*, *supra*; *Inland Revenue* v. *Sutherland* (1894), 21 R. (Ct. of Sess.) 375.
(*e*) *Inland Revenue* v. *Fry* (1895), 22 R. (Ct. of Sess.) 422.

SECT. 1.
Scope of Schedule.

Voluntary gifts derivable from office or employment.

Voluntary gifts and contributions received from an employer or from third persons are chargeable as emoluments, provided they accrue to the holder of the office or employment by virtue of the holding of it, and not as gifts to him as an individual irrespective of his office. Thus, voluntary contributions to a beneficed clergyman from a sustentation fund which is designed to raise the incomes of livings to a certain sum, and voluntary Easter offerings made by parishioners and others, are chargeable (*f*), but presents made to a poor clergyman as an individual are not chargeable (*g*).

Provident funds.

An employé is chargeable in respect of a sum annually placed to his credit as part of his salary under a Provident Fund scheme, the payment of which is deferred (*h*).

SECT. 2.—*Method of Assessment.*

Duty assessed under two heads:

1339. For the purpose of assessment and collection the duties chargeable under this Schedule may be divided into two classes.

(1) Salaries and pensions under the Crown;

The first class consists of salaries etc. and pensions payable at a public office, or by any officer of His Majesty's household, by receivers, or paymasters, or by any agent in that behalf (*i*). In offices where *ex officio* Commissioners for the assessment of duty exist, the assessment of duty in respect of the salaries etc. and pensions of such office is made by the Commissioners for that office (*k*), and in other cases by the General Commissioners for the district. In either event the duty is deducted from the salary etc. or pension before payment and accounted for to the Crown (*l*).

(2) salaries and pensions of corporations and companies.

The second class applies to salaries etc. and pensions chargeable under the Schedule and not coming within the above rule. Where these are payable at the office where the employment takes place or is deemed to take place, or by any receiver of the same or by any agent employed in that behalf, the duties are in like manner to be deducted before payment over to the person entitled, and then accounted for to the Crown (*m*). If not so deducted

(*f*) *Herbert* v. *McQuade*, [1902] 2 K. B. 631, C. A.; *Poynting* v. *Faulkner* (1905), 93 L. T. 367, C. A.; *Blakiston* v. *Cooper* [1909], A. C. 104; *Inland Revenue* v. *Strang* (1878), 15 Sc. L. R. 704; see also *Duncan's Trustees* v. *Inland Revenue*, [1909] S. C. 1212.

(*g*) *Turner* v. *Cuxon* (1888), 22 Q. B. D. 150; *Turton* v. *Cooper* (1905), 92 L. T. 863.

(*h*) *Smyth* v. *Stretton* (1904), 90 L. T. 756, and see *Hudson* v. *Gribble*, *Bell* v. *Gribble*, [1903] 1 K. B. 517, C. A.

(*i*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 146, rr. 5 and 10, s. 147. This class certainly includes offices or employments under the Crown, and probably those under certain other public bodies.

(*k*) See p. 615, *ante*.

(*l*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 146, rr. 5 and 10, s. 147.

(*m*) *Ibid.*, s. 146, r. 6. The words of the rule are "payable at such office" and are obscure, but it is believed that the construction adopted in the text is the received interpretation. In view of the wording of r. 5, it is submitted that the words "by any receiver of the same or by any agent employed etc." are to be construed independently of and are not restricted by the words "at such office"; see *Re School for Indigent Blind at Liverpool*, [1898] 2 Ch. 669. As to the machinery for the assessment of duty under this Schedule, see also Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 147, 150—159 inclusive. As to deduction of tax in the case of salaries arising from offices or employment of

before payment, they may be assessed in the hands of the recipient (*n*).

SECT. 2. Method of Assessment.

1340. Every person assessable for his office or employment is to be deemed to have exercised the same at the head office of the department under which such office or employment shall be held, and is to be rated therefor although the duties be performed, or the profits arising therefrom be payable, elsewhere, within or without the United Kingdom (*o*).

Place where party assessable.

1341. A person who has paid duty under this Schedule upon a salary which is charged with payment to another person, or a person who has to pay thereout salary to a deputy or clerk, is required and allowed to deduct from such payment the proper proportion of duty, and the recipient is to allow such deduction (*p*).

Deduction of salary paid to deputy.

1342. Every employer, whether his employés are chargeable under this Schedule or under Schedule D, when required to do so by notice from an assessor, must under penalty within the time limited therein prepare and deliver a return of the names and places of residence of all persons employed by him and the payments made to them in respect of that employment, including, in the case of a body of persons corporate or not corporate, directors and managers, but this provision does not apply to such employés as are not employed in any other employment, and whose remuneration for the year in question does not exceed the limit of total exemption, £160 (*q*).

Returns required from employers.

1343. Where the employer is a body of persons corporate or not corporate, the secretary, or person performing the duties of secretary, is for this purpose to be deemed the employer (*r*).

Where employer is a corporation.

SECT. 3.—*Deductions from Gross Salary etc.*

1344. Deductions from the gross salary etc. are sanctioned in respect of duties or other sums payable or chargeable on salaries or emoluments by virtue of any Act of Parliament (*s*), and in respect of any official deductions and payments made on passing the accounts belonging to such office or upon the receipt of such pension (*t*).

Deductions in respect of charges on salaries and official deductions.

Expenses of travelling in the performance of the duties of a public office or employment, or of keeping a horse to enable

Expenses incidental to the performance of an office.

profit under a railway company, see the Income Tax Act, 1860 (23 & 24 Vict. c. 14), s. 6.

(*n*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 155.

(*o*) *Ibid.*, s. 147.

(*p*) *Ibid.*, s. 146, rr. 7, 8.

(*q*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 21 (1).

(*r*) *Ibid.*, s. 21 (2).

(*s*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 146, r. 1. There are at present no such duties or sums; see, as to this, *Hudson* v. *Gribble, Bell* v. *Gribble*, [1903] 1 K. B. 517, C. A., where the Court of Appeal, overruling *Beaumont* v. *Bowers*, [1900] 2 Q. B. 204, held that amounts compulsorily deducted from salary under a provident fund scheme sanctioned by Act of Parliament were not within the words quoted in the text. As to deductions in respect of past years' losses, see *Bray* v. *Brothers* (1897), 13 T. L. R 325.

(*t*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 146, r. 9.

SECT. 3. Deductions from Gross Salary etc.

the holder to perform such duties, or moneys otherwise laid out wholly, exclusively and necessarily in the performance of such duties, are deductible (*a*), as are expenses incurred by a clergyman or minister of any religious denomination, wholly, exclusively and necessarily in the performance of his duty (*b*); and where the clergyman or minister pays rent for a dwelling-house, and uses part mainly and substantially for the purpose of his duty as such, the Commissioners may allow as a deduction such part of the rent, not exceeding one-eighth, as they think fit (*c*). Expenses of travelling from a person's residence to his place of business are not deductible (*d*), nor are the wages of a servant, whose services are necessary to enable a schoolmaster and his wife to give their services as teachers in a national school (*e*).

Part VIII.—General Allowances, Exemptions and Abatements.

SECT. 1.—*Allowance of Premiums paid on Life Insurance Policies and Deferred Annuities.*

What premiums and annuities are entitled to the allowance.

1345. A person who has insured, or who has contracted for a deferred annuity upon, his own or his wife's life,

(1) With any insurance company which either—

(i.) existed on the 1st November, 1844 (*f*); or

(ii.) is registered under the Joint Stock Companies Act, 1844, now repealed by the Companies Act, 1862, s. 205 (*g*); or

(iii.) is legally established in any British possession (*h*); or

(iv.) is lawfully carrying on business in Great Britain or Ireland (*i*); or

(2) With any friendly society legally established under any Act relating to friendly societies (*k*); or

(*a*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 51.

(*b*) *Ibid.*, s. 52.

(*c*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 28.

(*d*) *Cook* v. *Knott* (1887), 4 T. L. R. 164; *Revell* v. *Elworthy Brothers & Co., Ltd.* (*Directors*) (1890), 3 Tax Cas. 12.

(*e*) *Bowers* v. *Harding*, [1891] 1 Q. B. 560. As to the prohibition of certain other deductions, see p. 677, *post*. As to proceedings subsequent to assessment including appeals to the General Commissioners and to the High Court, see pp. 679 *et seq.*, *post*.

(*f*) Income Tax (Insurance) Act, 1853 (16 & 17 Vict. c. 91), s. 1. This provision does not apply to a foreign insurance company (*Colquhoun* v. *Heddon*, (1890), 25 Q. B. D. 129, C. A.; *Murphy* v. *Colquhoun* (1891), 7 T. L. R. 613.

(*g*) Income Tax (Insurance) Act, 1853 (16 & 17 Vict. c. 91), s. 1.

(*h*) Finance Act, 1904 (4 Edw. 7, c. 7), s. 9.

(*i*) Revenue Act, 1906 (6 Edw. 7, c. 20), s. 11.

(*k*) Income Tax Insurance Act, 1855 (18 & 19 Vict. c. 35), s. 1; Revenue Act, 1903 (3 Edw. 7, c. 46), s. 10 (see last-mentioned Act as to production of a certificate from the society's officer).

(3) Who has contracted with the National Debt Commissioners for such deferred annuity as above mentioned (*l*); or

(4) Who under any Act of Parliament is liable to the payment of an annual sum, or to have an annual sum deducted from his salary in order to secure a deferred annuity to his widow, or provision for his children after his death (*m*),

is entitled to deduct the amount of the annual premiums paid by him, in respect of the year of assessment, for such insurance or contract, or the annual sum paid or deducted from his salary, not exceeding in all one-sixth of his total taxable income, from any sum in respect of which he is liable to be assessed under Schedules D or E, or if he has paid the sum to which he is assessed under any Schedule, or has been charged thereto by deduction or otherwise, he is entitled to be repaid such proportion of the duties so paid, as the amount of the annual premium bears to the whole profits on which he is chargeable, on production of the receipt for the premium to the Special Commissioners, and on proof of the facts to their satisfaction (*n*).

How the allowance is to be claimed.

Where under a life insurance policy the company advances the annual premium to the assured as a loan on the security of the policy, and gives a receipt for the premium as paid, the assured is not entitled to deduct such premium, it not being "paid by him" within the statute (*o*).

Premium advanced by company as a loan.

1346. The claim must be made within three years next after the end of the year of assessment to which the claim relates (*p*).

Claim must be made within three years.

SECT. 2.—*Exemptions and Abatements where Income is below a Certain Sum. Abatements to Parents of Living Children.*

1347. A person whose total annual net (*q*) income from all sources does not exceed £160 is exempt from duty (*r*).

Incomes under £160 exempt.

1348. Where such total income exceeds £160 but does not exceed £700, allowances by way of abatement are made by deducting a specified sum from the total income and charging the duty upon the balance only. These allowances are made either by reduction of the assessment, or by repayment, as the case may require. They are as follows (*s*):—

Scale of abatements.

Income not exceeding £	Sum deductible £
400	160
500	150
600	120
700	70

(*l*) Income Tax Act, 1859 (22 & 23 Vict. c. 18), s. 6.
(*m*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 54.
(*n*) *Ibid.*
(*o*) *Hunter* v. *R.*, [1904] A. C. 161.
(*p*) Income Tax Act, 1860 (23 & 24 Vict. c. 14), s. 10.
(*q*) See pp. 672—673, *post.*
(*r*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 163; Finance Act, 1894 (57 & 58 Vict. c. 30), s. 34.
(*s*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 34; Finance Act, 1898 (61 & 62

SECT. 2. Exemptions and Abatements etc.

Income chargeable under Schedules A and B, how ascertained.

1349. The annual value of hereditaments belonging to or in the occupation of a person claiming exemption or abatement is, for that purpose, to be estimated according to the rules contained in Schedules A and B respectively, and in the case of a claimant who is proprietor as well as occupier, the Schedule A value is to be added to the Schedule B value and the aggregate amount is to be deemed to be the income from those sources (*t*).

How and when the claim is to be made.

1350. A person claiming exemption or abatement is required to give notice of his claim to the assessors of the district where he resides within the time limited for making his return (now twenty-one days) or within such further time as the Commissioners shall for special cause assigned allow (*u*). The notice must set forth in the prescribed form all particulars of his income, and the sums of annual interest or other annual payment reserved or charged thereon whereby his income is or may be diminished, and also every sum which he may have charged or be entitled to charge against any other person for or on account of duty, or which he may have deducted or retained or be entitled to deduct or retain from out of any payment (*v*).

The claim is open to inspection by the inspectors or surveyors, and is then dealt with by the General Commissioners, who certify to the Commissioners of Inland Revenue the amount (if any) allowed by them. The amount allowed is then either deducted from the assessment, or, if the duty be already paid, the excess is returned to the claimant (*w*).

Income is reckoned exclusive of charges and mortgage interest, and of sums deductible under Section 1 of this Part.

1351. A person's income is reckoned exclusive of any sum which he is entitled to charge against any other person or to deduct or retain from or out of any payment to which he may become liable (*x*). The amount of a person's income is to be reckoned inclusive of any sum deductible under Section 1 of this Part in respect of premiums upon life insurance and annuities etc. (*y*).

Emoluments which are neither paid in money nor capable of being converted into money do not constitute income (*a*).

Company or corporation cannot claim relief under this Section.

1352. A limited company is not entitled to relief under these provisions (*b*), nor is an unincorporated body of persons not

Vict. c. 10), s. 8 ; Finance Act, 1907 (7 Edw. 7, c. 13), s. 19 (8). The Act of 1898 to a certain extent overlaps that of 1894, and while the earlier Act applies to "persons," the later Act applies to "individuals." At the time the later Act was passed it was doubted whether or not a corporation might claim relief as a "person"; as to this, see *infra*.

(*t*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 167. This seems to be the effect of the section. A claim for the reduction of the amount assessed under Sched. B is in certain circumstances given by the Finance Act, 1896 (59 & 60 Vict. c. 28) s. 27; see p. 638, *ante*.

(*u*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 164.

(*v*) *Ibid.*

(*w*) *Ibid.*, s. 165.

(*x*) *Ibid.*, ss. 163, 164.

(*y*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 54; see pp. 670, 671, *ante*.

(*a*) See *Tennant* v. *Smith*, [1829] A. C. 150 ; *Inland Revenue* v. *Sutherland* (1894), 21 R. (Ct. of Sess.) 753 ; and p. 667, *ante*.

(*b*) *Mylam* v. *Market Harborough Advertiser Co.*, [1905] 1 K. B. 708.

established for trading purposes (*c*). And it would appear that under no circumstances is a corporate body or society a "person" entitled to relief thereunder (*d*). A special exemption is given in favour of an unregistered friendly society whose income does not exceed £160 (*e*).

Abatement in respect of being the parent of living children.

1353. An individual who has been assessed or charged to income tax, or has paid income tax either by deduction or otherwise, who claims and proves (*f*) that his total income from all sources, although exceeding £160, does not exceed £500, and that he had, at the commencement of the year for which income tax is charged, a child or children (which expression includes stepchild or stepchildren, but not illegitimate child or children unless the parents have after the birth of such child or children married each other) living and under the age of sixteen years, is entitled, either by reduction of the assessment or repayment of the excess, or both, to relief from income tax to the amount of the income tax upon £10 in respect of each such child (*g*).

SECT. 3.—*Differentiation of Earned Income.*

Relief in respect of earned income when total income does not exceed £2,000.

1354. An individual who claims, and proves, that his total income from all sources estimated according to the rules and directions in the Income Tax Acts does not exceed £2,000, and that any part of that income is earned income, is entitled to such relief from income tax as will reduce the amount payable on the earned income to the amount which would be payable if the duty were charged on that income at the rate of 9*d*. (*h*).

This relief is to be in addition to and not in derogation of any exemption or other relief or abatement under the Income Tax Acts, except that where an individual is entitled to relief from income tax under the foregoing Sections 1 and 2 of this Part, or either of them, relief is to be given only in respect of such earned income (if any) as remains after deducting therefrom the amount on which he is relieved of income tax under either of such Sections (*i*). Where relief is given under Sections 1 or 2 of this Part by way of repayment of the tax after relief has been given under this head, the amount repaid is to be adjusted so that the total amount of the relief given under this Section and under Sections 1 and 2 of this Part, does not exceed the amount which would have been given if the whole relief had been claimed simultaneously (*k*).

(*c*) *Curtis* v. *Old Monkland Conservative Association*, [1906] A. C. 86.
(*d*) *Ibid.*
(*e*) Finance Act, 1904 (4 Edw. 7, c. 7), s. 8.
(*f*) The Finance Act, 1907 (7 Edw. 7, c. 13), s. 19 (2), (3); the Finance Act, 1898 (61 & 62 Vict. c. 10), s. 8; and the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 54, as well as the other provisions of the Income Tax Acts which relate to claims for exemption, relief, or abatement, or the proof to be given with respect to those claims, apply to such claims, and to the proof to be given with respect thereto; see the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 68 (3).
(*g*) *Ibid.*, s. 68.
(*h*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 19 (1).
(*i*) *Ibid.*, s. 19 (2).
(*k*) *Ibid.*, s. 19 (3); see pp. 670—672, *ante*, and the text, *supra*.

SECT. 3. Differentiation of Earned Income.

An individual is not entitled to relief in respect of any income the tax on which he is entitled to charge against any other person, or to deduct, retain, or satisfy out of any payment which he is liable to make to any other person (*l*).

When relief must be claimed.

An individual who claims relief must, in cases where he is required to make a return for the purpose of the assessment of income tax, claim that relief at the time the return is made, and must, in any case, make the claim before the 30th September in the year for which the tax is charged (*m*).

The provisions applicable to Section 2 of this Part apply to claims for relief under this Section (*n*).

Definition of earned income.

1355. For the purposes of relief the expression "earned income" means—

(1) Any income arising in respect of any remuneration from any office or employment of profit held by the individual, or in respect of any pension, superannuation, or other allowance, deferred pay, or compensation for loss of office given in respect of the past services of the individual, or of the husband or parent of the individual, in any office or employment of profit, whether the individual or husband or parent of the individual shall have contributed to such pension, superannuation allowance, or deferred pay or not (*o*); and

(2) Any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual (*p*); and

(3) Any income which is charged under Schedules B or D in the Income Tax Act, 1853, or under the rules prescribed by Schedule D in the Income Tax Act, 1842, and is immediately derived by the individual from the carrying on or exercise by him of his profession, trade or vocation either as an individual, or, in the case of a partnership, as a partner personally acting therein (*q*).

Where a wife's profits are deemed to be profits of the husband (*r*), any reference to the individual includes either the husband or the wife (*s*).

Modified differentiation of earned income where total income does not exceed £3,000.

A modified differentiation of earned income is provided in the case of an individual who claims and proves in the manner prescribed by this section (*t*) that his total income exceeds £2,000, and does not exceed £3,000. In such case he is chargeable in respect of his

(*l*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 19 (5).
(*m*) *Ibid.*, s. 19 (4). The Commissioners of Inland Revenue have no power under the Act to extend the time for making the claim or to grant relief if not made within the time.
(*n*) *Ibid.*, s. 19 (6).
(*o*) *Ibid.*, s. 19 (7) (a).
(*p*) *Ibid.*, s. 19 (7) (b).
(*q*) *Ibid.*, s. 19 (7) (c).
(*r*) See p. 675, *post*.
(*s*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 19 (7).
(*t*) See note (*n*), *supra*, and p. 672, *ante*.

earned income at the rate of 1*s*. The provisions of this Section are applicable to such claim (*a*).

SECT. 3. Differentiation of Earned Income.

SECT. 4. *Provisions Applicable Generally to Claims for Relief under this Part.*

The provisions in the above sections not applicable to persons not resident in the United Kingdom.

1356. With certain exceptions, no exemption, abatement, or relief under the Income Tax Acts which depends wholly or partially on the total income of an individual from all sources is given to any person, unless the person claiming the exemption, abatement, or relief is resident in the United Kingdom. The exceptions are as follows:—

Exceptions.

A person who either—

(a) is or has been employed in the service of the Crown,
(b) is employed in the service of any missionary society abroad,
(c) is employed in the service of any of the native states under the protectorate of the British Crown,
(d) is resident in the Isle of Man or Channel Islands, or
(e) being resident abroad, satisfies the Commissioners of Inland Revenue that he is so resident for the sake of health,

is entitled to any relief, exemption, or abatement to which he would be entitled if he were resident in the United Kingdom, and if his total income from all sources were calculated as including any income in respect of which income tax may not be chargeable as well as income in respect of which income tax is chargeable.

Claim by a partner.

1357. For the purpose of a claim for exemption, relief or abatement by a partner in any profession, trade or vocation, his income from the partnership may be treated separately, and, if so treated, is to be deemed to be his share in the partnership profits for the year of assessment, and assessed according to the rules and directions of the Income Tax Acts (*b*).

Income of husband and wife.

1358. The profits of a married woman living with her husband are to be deemed the profits of the husband and charged in his name (*c*). There is, however, a special exception in the case of a claim for exemption, relief, or abatement where the total joint income of the husband and wife does not exceed £500, and the Commissioners are satisfied that some part of that income is derived from profits of a business carried on by means of the wife's personal labour and that the rest of the total income, or any part thereof, arises or accrues from profits of a business carried on or exercised by means of the husband's own personal labour and unconnected with such business. In such case they are to deal with the claim as if it were a claim in respect of the said profits of the wife, and a separate claim on the part of the husband in respect of the rest of the total income, but they are to deal with any income of the husband arising or accruing from the business of the wife, or from any

(*a*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8) s. 67.
(*b*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 20. As to claim for abatement etc. by joint tenants and co-parceners, see Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 168.
(*c*) *Ibid.*, s. 45 ; and see p. 677, *post*.

SECT. 4. Provisions Applicable Generally to Claims etc.

source connected therewith, as if it were part of the income of the wife. The expression "business" means a profession, trade, employment, or vocation, office or employment of profit, and the "profits of the business" means such as are chargeable under Schedules D or E (*d*).

Part IX.—Miscellaneous Provisions Applicable to the Duties Generally.

General provisions.

1359. The provisions which are summarised below are applicable to the Schedules generally.

Commencement of financial year.

1360. Assessments are made for the financial year commencing on the 6th April and ending on the 5th April following, inclusive (*e*).

Time of making assessments.

1361. Assessments are made some time before the 1st January of the year of assessment and, except such duties as are payable by way of deduction and duties assessed upon railways, are payable on or before the last-mentioned date (*f*).

Duties, when payable.

Duties payable by way of deduction are payable as and when the payments from which they are deducted are payable (*g*). Duties assessed on railways are payable by four equal quarterly payments commencing on or before the 20th June of the financial year (*h*).

Returns etc. by corporate or *quasi*-corporate bodies.

1362. Bodies politic, corporate, or collegiate, companies, fraternities, fellowships, or societies of persons, whether corporate or not corporate, are chargeable with the duties. The secretary or other specified officer of any corporation, company, fraternity, or society of persons, whether corporate or not, is answerable for doing all acts required by the Income Tax Acts to be done for the assessment of such bodies and the payment of the duties (*i*).

Returns etc. by trustees, guardians, receivers, factors, and agents of non-residents.

1363. Trustees, guardians, and other named persons representing infants, married women, and other incapacitated persons, as also receivers appointed by the courts, having the direction, management or control of the property of such persons respectively, and

(*d*) Finance Act, 1897 (60 & 61 Vict. c. 24), s. 5 (1), repealing Finance Act 1894 (57 & 58 Vict. c. 30), s. 34 (2).

(*e*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 48; Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 176.

(*f*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 82 (1).

(*g*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 158; and see *Shrewsbury (Countess)* v. *Shrewsbury (Earl)* (1906), 23 T. L. R. 100.

(*h*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 95.

(*i*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 40; Finance Act, 1907 (7 Edw. 7, c. 13), s. 22 (2). Quarter sessions, as the Compensation Authority under the Licensing Act, 1904 (4 Edw. 7, c. 23) (repealed and re-enacted by the Licensing Consolidation Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24)), are assessable to income tax in respect of the interest upon so much of the compensation fund as is invested upon deposit (*Glamorgan Quarter Sessions* v. *Wilson*, [1910] 1 K. B. 725; see also *Bray* v. *Lancashire Justices* (1889), 22 Q. B. D. 484, C. A.; *Coomber* v. *Berks Justices* (1883), 9 App. Cas. 61).

factors and agents of persons not resident in the United Kingdom, whether subjects of His Majesty or not, having the receipts of the profits of such persons, are chargeable to duty in the place of such persons, and are required to do the acts and things mentioned in the last paragraph. Upon paying the duties they are entitled to recoupt hemselves out of the moneys of their principals, or *cestui que trust* (*k*).

Their liability and right of recoupment.

1364. The personal representatives are liable for any duties to which the deceased person was chargeable (*l*), and the personal representatives of a person who has died without making a due return of his profits are assessable in respect thereof, and such assessment may be made within the year of assessment or within three years after the expiration thereof (*m*).

Liability of personal representatives of deceased persons.

1365. The profits of a married woman living with her husband are to be deemed the profits of her husband and charged in his name. When she is living separate from her husband, whether her husband is temporarily absent from her or from the United Kingdom or otherwise, and she receives any allowance or remittance from property out of the United Kingdom, she is to be charged as a *feme sole*, if entitled thereto in her own right, and as the agent of the husband, if she receive the same from or through him or from his property or on his credit (*n*).

Profits of a married woman.

1366. No deduction from any of the duties is to be made other than such as are expressly enumerated in the Income Tax Acts, nor on account of annual interest, annuity or other annual payment to be paid to any person out of profits chargeable with the duty, nor on account of diminution of capital or loss sustained in any trade or profession (*o*).

What deductions from duties are prohibited.

1367. Duty is chargeable upon fractional parts of a pound, but not a duty of a lower denomination than a penny (*p*).

Fractions of a pound.

1368. Where no shorter period is specified in the Acts, any claim for repayment of duty must be made within three years next after the end of the year of assessment to which the claim relates (*q*).

Claim for repayment must be made within three years.

1369. Where a person has been assessed more than once to the duties for the same cause and for the same year, the General

Double assessments.

(*k*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 41—44; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 92. As to liability of agents of non-resident traders, see pp. 646, 647, *ante*.

(*l*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 92; Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 63, No. IX., rr. 1 and 3, ss. 100, 173.

(*m*) Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 24; Finance Act, 1907 (7 Edw. 7 c. 13), s. 23 (2).

(*n*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 45. See, on this section, *Bowers* v. *Harding*, [1891] 1 Q. B. 560. There are other provisions in reference to husband and wife in the case of claims for exemption and abatement; see p. 675, *ante*.

(*o*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 159. Similar provisions are contained in the sections and rules dealing with Sched. D; see pp. 650, 651, 661, *ante*. These provisions are, of course, subject to express provisions in the Income Tax Acts entitling a person to claim a return of duty in certain cases of loss; see pp. 637, 650, *ante*.

(*p*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 3.

(*q*) Income Tax Act, 1860 (23 & 24 Vict. c. 14), s. 10; and see *R.* v. *Income Tax Special Purposes Commissioners* (1888), 21 Q. B. D. 313, C. A.

PART IX. Miscellaneous Provisions etc.

Commissioners and the Board of Inland Revenue respectively have power and are required, on application, to grant relief (*r*). Where a remedy exists under this provision, a petition of right to recover back the moneys overpaid is not maintainable (*s*).

Enforcement of fines and penalties.

1370. Proceedings for the recovery of a fine or penalty incurred under the Income Tax Acts may be commenced within three years after the fine or penalty is incurred (*t*).

Provisions relating to particular Schedules.

1371. Provisions of the Income Tax Act, 1842 (*a*), in reference to one Schedule may be applied to any other Schedule, if applicable and not repugnant (*b*).

Validation of proceedings taken prior to the passing of the annual Finance Act.

1372. In order to secure the collection in due time of any income tax which may be granted for any year commencing on the 6th April, all the provisions contained in any Income Tax Act which were in force on the preceding day shall have full force and effect in respect of duties of income tax which may be so granted in the same manner as if the said duties had been actually granted by Act of Parliament and the said provisions had been applied thereto by the Act (*c*).

Interpretation.

1373. In the Income Tax Act, 1842 (*d*), the singular is to include the plural and the expression "person" is to include several persons and corporations, unless there is something in the subject or context repugnant (*e*).

Service of notices etc.

1374. Provision is made with regard to the service of notices and other proceedings (*f*), and forms for various proceedings are prescribed, subject to alteration by the Board of Inland Revenue (*g*).

(*r*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 171; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 60.

(*s*) *Holborn Viaduct Land Co.* v. *R.* (1887), 2 Tax Cas. 228.

(*t*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 23 (1). As to the time within which an assessment may be amended or an additional assessment made, see pp. 679, 680, *post.*

(*a*) 5 & 6 Vict. c. 35.

(*b*) *Ibid.*, s. 188.

(*c*) Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8), s. 30. This provision seems to be intended to provide for the interval between the date when the yearly budget resolutions are passed and the date when the Bill which enforces them is passed into law. See, as to payment of interest, dividends etc. during the same period, Customs and Inland Revenue Regulation Act, 1883 (46 & 47 Vict. c. 10), s. 10. There are special provisions in reference to the income tax for the year 1909-10; see Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 95.

(*d*) 5 & 6 Vict. c. 35.

(*e*) *Ibid.*, s. 192. There are certain other general provisions in the Act of minor importance; see *ibid.*, ss. 179—182, 184, 187, 189, 190.

(*f*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 16.

(*g*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 189, 190; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 15; Sched. II.

Part X.—Procedure Subsequent to the Assessment.

SECT. 1. Intro-ductory.

SECT. 1.—*Introductory.*

1375. The Taxes Management Act, 1880, contains, amongst other things, something in the nature of a code of rules in reference to the matters treated of under this heading. These provisions are summarised below, and they are applicable, unless expressed otherwise in the context, to inhabited house duty as well as income tax, both of which duties are, unless otherwise stated, referred to in the Act under the term "the duties" (*h*).

1376. The proceedings up to the time when the Commissioners sign and allow the assessments (*i*) have been dealt with under the respective Schedules (*j*).

SECT. 2.—*Additional and Supplementary Assessments.*

Surcharges

1377. In the case of duties, other than those assessable under Schedule D, powers are given to the surveyor, if he discovers that any properties or profits chargeable to the duties have been omitted from such assessments, or that any person chargeable has not made a full and proper or any return, or has not been charged to the duties, or has been undercharged, or has obtained and been allowed any allowance, deduction, abatement or exemption not authorised by the Acts, to certify the particulars thereof to the General Commissioners, who are to rectify the error by signing and allowing an additional first assessment in accordance therewith, subject to the same appeal and other proceedings as in the case of a first assessment (*k*).

In the case of duties assessable under Schedule D the Additional

(*h*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 5. This Act in its title and preamble purports to be merely an Act to consolidate Acts then in force for the management of the duties of land tax, inhabited house duties, and income tax. In fact, its scope is much wider. It contains various new provisions, and while it re-enacts in much abbreviated language the substance of certain of the provisions to be found in the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and applies those provisions to inhabited house duty also, it does not repeal the original provisions so re-enacted. It also leaves untouched other provisions of an analogous kind. The extent (if any), therefore, to which the original provisions have independent operation beyond the new enactment is left in some few cases in doubt, but speaking generally it is believed that with few exceptions the matters treated of under this heading contain the material law on the subject. References to any similar or additional provisions contained in the Income Tax Acts are given in the notes. The provisions in question as a whole are not applicable to the land tax.

(*i*) These assessments are, in the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), called "first assessments."

(*j*) See pp. 619 *et seq.*, 636 *et seq.*, 639 *et seq.*, 642 *et seq.*, 666 *et seq.*, *ante*.

(*k*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 52. Powers of correcting errors and omissions by way of surcharge are given by the Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 116, 161, 162, and the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 53.

SECT. 2. Additional and Supplementary Assessments.

Commissioners may, under similar circumstances, make an additional first assessment subject to the like appeal (*l*).

An additional assessment may be made at any time within the year of assessment or within three years after the expiration thereof (*m*).

Additional assessments and additional first assessments.

1378. A further power is given of charging a person liable to the duties, who has not been assessed in respect thereof in any first or additional first assessment, by making a fresh assessment upon him under certain conditions. This proceeding must be taken within the time above stated, and the fresh assessment is subject to the same right of appeal (*n*).

Certain errors in form not to invalidate.

1379. Assessments are not to be impeached nor affected by certain specified errors of a technical description (*o*).

SECT. 3.—*Appeal to the Commissioners.*

Proceedings in reference to appeals to General Commissioners—who may appeal.

1380. In all cases in which assessments, additional assessments, or surcharges are made by the General Commissioners, or, under Schedule D, by the Additional Commissioners, an appeal by the party charged thereby lies to the General Commissioners (*p*), who, as soon as the assessments of the duties within a parish are signed and allowed, are to fix days for hearing appeals, and to give notice thereof to the parties to be charged and to the surveyor, as well as a public notice (*q*). In the case of an assessment under Schedule A, an owner or other person in receipt of the rents of any lands may, if aggrieved, also appeal, although he be not an occupier (*r*).

Notice of objection.

1381. The party appealing is required, within twenty-one days after receiving notice of the assessment, to give ten days' notice of objection in writing to the surveyor within the time limited for hearing appeals (*s*).

Amendments of assessments.

1382. Except in cases specially authorised (*t*), no amendment of the assessments is to be made by the Commissioners before the time of hearing the appeals, and then only in cases appealed against (*a*).

(*l*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 52 (2).

(*m*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 23 (2); Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 52; Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 24.

(*n*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 63—66, where the conditions under which this power is to be exercised are set forth. These provisions will probably be of minor importance now that the time for making additional first assessments is extended by the Finance Act, 1907 (7 Edw. 7, c. 13), s. 23 (2), to three years; see note (*m*), *supra*.

(*o*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 55.

(*p*) *Ibid.*, ss. 57 (3), 67.

(*q*) *Ibid.*, s. 57 (1); Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 80, 118, 119.

(*r*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 28.

(*s*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 57 (3); Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 119. An exception is made in certain cases of incapacity to give this notice (*ibid.*, s. 119).

(*t*) See Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 52 (1) (a), (b), 56 (2).

(*a*) *Ibid.*, s. 57 (4).

SECT. 3. Appeal to the Commissioners.

Procedure on appeal.

1383. Persons who have removed from the district in which the assessment was made before appealing may, at the discretion of the Commissioners of Inland Revenue, appeal to the Commissioners of the district to which they have removed (*b*). The burden of proving that the assessment is excessive lies upon the party appealing, and unless it so appears to the Commissioners by examination of the appellant, or by other lawful evidence to be produced by him, the assessment is to stand (*c*). At every appeal the surveyor may attend and give reasons and adduce lawful evidence in support of the assessment or surcharge, and be present during all the time of hearing the appeals and of the Commissioners determining the same (*d*). The Commissioners have power on appeal to increase the assessment (*e*).

Decision on appeal.

1384. The opinion of the majority of the Commissioners present determines the appeal, and the decision is final except upon appeal to the High Court as hereinafter mentioned (*f*).

Barristers and solicitors may appear for the appellant or the Crown upon appeals (*g*).

Appeals to Special Commissioners.

This latter provision does not apply to appeals or proceedings before the Special Commissioners (*h*), but with this exception the Special Commissioners have in proceedings before them all the powers of the General Commissioners.

SECT. 4.—*Appeal to the High Court of Justice.*

Proceedings in reference to appeal to High Court.

1385. Immediately on the determination of an appeal by the General or Special Commissioners, the appellant or the surveyor may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction, and having so done may within twenty-one days require the Commissioners by notice in writing to their clerk to state a case for the opinion of the High Court (*i*).

(*b*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 55.

(*c*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 57 (6).

(*d*) *Ibid.*, s. 57 (7).

(*e*) *Ibid.*, s. 57 (8). In the case of appeals under Scheds. A and B, the Commissioners have power to direct, and the appellant has power to require, that a valuation be made by an expert, and the Commissioners have power over the costs of such valuation (Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 81; Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 47). They have power to reduce the assessment by reference to a lease produced or other evidence (Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 82). In the case of appeals under Sched. D, the Commissioners have power to require appellants to verify their statement upon oath, and to answer questions in writing upon oath or otherwise; they have power to summon and examine witnesses on oath (Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 122—126 inclusive). They are required in certain circumstances where they increase the assessment to charge the party on a sum not exceeding treble the amount by which the duties are increased (see p. 687, *post*).

(*f*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 57 (10).

(*g*) Finance Act, 1898 (61 & 62 Vict. c. 10), s. 16, repealing Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 57 (9).

(*h*) Except in a case where the General Commissioners refuse audience to a barrister, or solicitor, in which case the Special Commissioners may entertain the proceeding, and must hear the barrister or solicitor (Revenue Act, 1903 (3 Edw. 7, c. 46), s. 13.

(*i*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59 (1). Before he

SECT. 4. Appeal to the High Court of Justice.

On receiving the case he must within seven days transmit it to the High Court, having previously, or at the same time, given notice in writing to the opposite party of the fact of the case having been stated, together with a copy of the case (*j*). The High Court is then to hear any question of law arising on the case, and reverse, affirm or amend the determination accordingly, or remit the matter to the Commissioners with the opinion of the High Court (*k*). The High Court has full power over costs (*l*), and may send the case back for amendment (*m*).

An appeal lies from their decision to the Court of Appeal, and from thence to the House of Lords (*n*).

Notwithstanding the fact that a case is pending, the duty assessed must be paid, subject to a return of the duty with interest, if so ordered by the court, and if the assessment be diminished or discharged (*o*).

In what cases it lies.

1386. The power to state a case seems to be limited to cases where the proceeding before the Commissioners is in the nature of an appeal, and it seems the Commissioners have no power to state a case upon applications to them for relief (*p*). In such cases the only remedy of either the Crown or the party charged would seem to be by *certiorari*, *mandamus*, or prohibition, and then only if the Commissioners have exceeded or declined jurisdiction or have not considered the right question (*q*).

Appeal lies upon a point of law only.

1387. The court has refused to consider questions which were not raised in the court below, but probably will exercise a discretion as to doing this or not (*r*). It has no jurisdiction to deal with questions of fact, as to which the finding of the Commissioners is conclusive, but the question of what is the proper inference to be drawn from facts admitted or found by the Commissioners is sometimes considered to be one of law, as is, of course, the question whether there is any evidence to support the finding of the Commissioners.

Costs.

1388. The costs of preparing the special case are part of the costs of the appeal (*s*).

is entitled to have the case stated, the party requiring it must pay the clerk to the Commissioners a fee of 20*s*. (Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59 (2) (a)).

(*j*) *Ibid.*, s. 59 (1).

(*k*) *Ibid.*, s. 59 (2) (b).

(*l*) *Ibid.*

(*m*) *Ibid.*, s. 59 (2) (c).

(*n*) *Ibid.*, s. 59 (3).

(*o*) *Ibid.*, s. 59 (4).

(*p*) *Bruce* v. *Burton* (1901), 85 L. T. 227, quoting *Grimes* v. *Lethem* (1898), 3 Tax Cas. 622, a decision upon the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 133 (now repealed, except where referred to in any other enactment); see note (*c*), p. 610, *ante*. See also *Russell* v. *North of Scotland Bank* (1891), 8 R. (Ct. of Sess.) 543.

(*q*) *R.* v. *General Commissioners of Taxes for Clerkenwell*, [1901] 2 K. B. 879, C. A.; *R.* v. *Commissioners of Income Tax London City* (1904), 91 L. T. 94; and see *R.* v. *General Income Tax Commissioners for Offlow* (1911), 27 T. L. R. 353.

(*r*) *City of London Contract Corporation* v. *Styles* (1887), 4 T. L. R. 51, C. A.; *Bray* v. *Lancashire Justices* (1889), 22 Q. B. D. 484, C. A.

(*s*) *Manchester Corporation* v. *Sugden, Gresham Life Assurance Society* v. *Bishop*, [1903] 2 K. B. 171, C. A.

SECT. 4. Appeal to the High Court of Justice.

Appeal from High Court decision.

1389. The decision on a case stated is an order and not a judgment, and an appeal therefrom must be brought within fourteen days (*t*).

Power of the court to remit case to Commissioners.

1390. The court may if it thinks fit send the case back to the Commissioners for a further statement (*a*), and it is not unusual, where the parties consider that a supplemental statement of facts is desirable, to agree upon such a statement before the case comes before the court.

SECT. 5.—*Remedies of Crown for Non-payment of Duty.*

Remedy for non-payment by information.

1391. Duties which are in arrear may be sued for and recovered, with full costs of suit and all charges attending the same, from the person charged therewith, in the High Court, as a debt due to the Crown, or by any other means whereby any debt of record or otherwise due to the Crown can be sued for and recovered. Assessed duties are also recoverable by distress (*b*).

What constitutes evidence of liability.

As in other cases of debts due to the Crown (*c*), the proceeding is by way of information in the High Court at the suit of the Attorney-General, and in such suit the production of a schedule of arrears or defaulters made or purporting to be made in pursuance of the Taxes Management Act, 1880 (*d*), and purporting to contain the name of a defaulter, is sufficient evidence of the sum mentioned in the schedule having been duly charged and assessed upon such defaulter and of the same being in arrear (*e*).

Distress.

1392. The collector is required to make a demand of the sums specified in the duplicates furnished him by the General Commissioners, upon the persons charged, or at the places of their last abode, or on the premises charged with the assessment or duties (*f*) and, on refusal to pay, may distrain upon the lands charged with the sum due, or may distrain on the person so charged by his goods and chattels, without further authority than the warrant delivered to him on his appointment (*g*), and may upon special

(*t*) *Onslow* v. *Inland Revenue Commissioners* (1890), 25 Q. B. D. 465, C. A. (a case decided upon the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 19).

(*a*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59 (2) (c).

(*b*) *Ibid.*, s. 111 (1); and see title DISTRESS, Vol. XI., pp. 218, *et seq.*

(*c*) See title CROWN PRACTICE, Vol. X., pp. 4, *et seq.*

(*d*) As to these schedules, see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 105, 108. In the heading to s. 108, *ibid.*, the latter schedule is styled a Schedule of Deficiencies.

(*e*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 111 (2), (3).

(*f*) *Ibid.*, s. 85 (1).

(*g*) *Ibid.*, s. 86 (1). The words of the section empower him "to distrain upon the messuages, lands, tenements and premises, charged with such sum of money, or to distrain the person so charged by his goods and chattels, and all such other goods and chattels as the collector is hereby authorised to distrain." The words quoted are taken nearly *verbatim* from the stat. 43 (1803) Geo. 3, c. 99, s. 33 (now repealed), and there do not appear to be any special provisions in the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), to which the concluding words are applicable. It was held that under the provisions of the stat. 43 (1803) Geo. 3, c. 99, the Crown had a right to distrain the goods of third persons found upon the premises for arrears of house and window tax (see *Juson* v. *Dixon* (1813), 1 M. & S. 601), which

SECT. 5. Remedies of Crown for Non-payment of Duty.

authority from the General Commissioners and under specified conditions break open any house or premises (*h*).

The distress is to be kept five days, and, upon non-payment within that time, is to be appraised and sold (*i*). In default of sufficient distress being found, the Commissioners may by warrant commit the defaulter to prison until payment (*j*).

A refusal to pay the tax may be inferred from a neglect to do so within a reasonable time after due demand (*k*). A personal demand would not seem to be necessary (*l*).

A collector's warrant entitles him to distrain without authority after the expiration of his year of office, in respect of taxes assessed during his year of office, at any rate up to the time when his accounts are closed (*m*).

Responsibility of parish for payment of duties therein.

1393. Except in cases where the collector is appointed by the Commissioners of Inland Revenue, or gives security to the Crown, the parish or place in which an assessment under Schedules A, B, or D is made is responsible for the duties there charged and for their being duly demanded, and, when received, duly paid over. Any deficiencies are levied upon the other persons assessed therein by way of additional assessment (*n*).

Priority of the Crown's claim for duty.

1394. Apart from statutory provisions to the contrary, income tax, being a Crown debt, takes precedence of other debts due from the debtor (*o*). But in cases in which a receiving order has been made against a debtor, or a winding-up order against a company, this priority is limited. In these cases, so far as relates to taxes, it is only such as have been assessed on the bankrupt or the company, up to the 5th April next before the date of the receiving order or the commencement of the winding-up, and not exceeding in the whole one year's assessment, which are, together with certain assessed taxes, rates and land tax, to be paid in priority to ordinary debts (*a*), but these are payable in priority to the claims of

taxes were, as in the case of income tax under Sched. A, charged upon the occupier of the house. See also *Payne* v. *Esdaile* (1888), 13 App. Cas. 613. Where the tax is solely a personal tax, only the goods of the person charged may be distrained upon (*Shaftesbury (Earl)* v. *Russell* (1823), 1 B. & C. 666). As to liability of successive occupiers of premises assessed under Sched. A, see p. 634, *ante*.

(*h*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 86 (2)—(6), 87.

(*i*) *Ibid.*, s. 86 (5). The provisions of the Parish Officers Act, 1793 (33 Geo. 3, c. 55), apply to such levies and distresses (Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 86 (6)). And where the sum sought to be levied by such distress does not exceed £20, the provisions of the Distress (Costs) Act, 1817 (57 Geo. 3, c. 93),apply (see Distress (Costs) Act, 1827 (7 & 8 Geo. 4, c. 17), and see *Lumsden* v. *Burnett*, [1898] 2 Q. B. 177, C. A.).

(*j*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 89.

(*k*) *Lumsden* v. *Burnett, supra; Gibbs* v. *Stead* (1828), 8 B. & C. 528.

(*l*) *R.* v. *Ford* (1835), 4 Nev. & M. (K. B.) 451.

(*m*) *Elliott* v. *Yates*, [1900] 2 Q. B. 370, C. A. As to the time when the accounts are closed, see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 103.

(*n*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 174; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 79.

(*o*) *Re Henley & Co.* (1878), 9 Ch. D. 469, C. A.; and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 215; COMPANIES, Vol. V., p. 516.

(*a*) Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1. These provisions, so far as related to bankruptcy, were contained in the

debenture holders and debenture stock holders under any floating charge (*b*). A distress by the Crown takes precedence of a prior distress by the subject not completed by sale (*c*).

SECT. 5. Remedies of Crown for Non-payment of Duty.

Part XI.—Penal Provisions.

SECT. 1.—*Offences against the Income Tax Acts.*

Penalties.

1395. Various penalties are imposed for offences committed against provisions of the Income Tax Acts (*d*). Of these a summary is sufficient.

Obliterating etc. "church door" notice.

1396. Any person who wilfully tears, defaces, or obliterates a "church door" notice incurs a penalty not exceeding £20 (*e*).

Refusing, neglecting, or delaying to make return or making an untrue return.

1397. Any person who refuses, neglects, or wilfully delays to deliver any return prescribed by the Income Tax Act, 1842 (*f*), ss. 49—54 inclusive, or by the Finance Act, 1907 (*g*), ss. 21, 22, is subjected, if proceedings are taken before the Commissioners, to a penalty of £20 together with treble the duty chargeable, or, if proceedings are taken in the High Court, to a penalty of £50 (*h*). The liability attaches to every person upon whom notice is served in the prescribed manner (*i*), requiring him to make a return of any profits in respect of which he is chargeable under Schedules D or E, whether he is or is not chargeable with duty thereunder, but in case he proves that he is not chargeable to duties, the penalty is not to exceed £5 (*k*). No penalty is incurred unless the party has been served with a notice requiring him to make a return (*l*). The penalties are incurred by the delivery of a return which is untrue or incorrect in fact, although not fraudulently so, or at any rate one which is not estimated to the best of the person's judgment and

Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40 (1) (a). But the whole of this sub-section was repealed by the first-mentioned Act. Apart from these provisions Crown debts have no priority in bankruptcy (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 40 (4), 150). As these last-mentioned sections do not apply to winding up, the priority of Crown debts continues, except so far as it is taken away as stated in the text (*Re Oriental Bank Corporation, Ex parte the Crown* (1884), 28 Ch. D. 643). See also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 217.

(*b*) Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), s. 2. As to removal of goods from premises at a time when the duties are due, see Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 88 (1).

(*c*) *A.-G.* v. *Leonard* (1888), 38 Ch. D. 622.

(*d*) For penalties in connection with super-tax, see pp. 690, 691, *post.*

(*e*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 47. As to "church door" notices, see p. 617, *ante.*

(*f*) 5 & 6 Vict. c. 35.

(*g*) 7 Edw. 7, c. 13.

(*h*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 55, and sections referred to in the text.

(*i*) See pp. 617 *et seq.*, *ante.*

(*k*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 22 (1). In reference to returns under the other Schedules, the penalty only attaches if the party is in fact chargeable; see Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 52, 55.

(*l*) *Ibid.*, s. 56, and see *ibid.*, s. 151.

SECT. 1. Offences against the Income Tax Acts.

belief (*m*). The party may, it seems, relieve himself from the liability to penalty by amending his return (*a*).

Delivering false account or refusing to produce lease.

1398. Any person wilfully delivering a false account under the Income Tax Act, 1842 (*b*), s. 67, or refusing or omitting to produce a lease or agreement, with intent to conceal the annual value of premises, is liable to a penalty of £20 with treble the duty chargeable (*c*).

Refusing inspection etc. of rate books.

1399. Any person who has the custody of rate books and who refuses or neglects to permit the inspection or copying thereof by Commissioners and officers of the Inland Revenue is liable to a penalty not exceeding £20 and not less than £5 (*d*).

Fraud on claim for relief for loss by flood or tempest.

1400. Any person who is guilty of fraud in certain specified ways in reference to making a claim for abatement of rent by reason of loss by flood or tempest is liable to a penalty of £50 and treble the duty charged. Any person who aids and abets a person making such fraudulent claim is liable to a penalty of £100 (*e*).

Fraud on claim for exemption under Schedule C.

1401. Any person who fraudulently and with intent to defraud claims on his own behalf, or another's, exemption from duties charged under Schedule C is liable to a penalty of £100, and a person making such fraudulent claim may be assessed in treble the amount of the duty to be charged (*f*).

Refusal to allow deduction of tax on payment of interest or rent.

1402. Any person who refuses to allow an authorised deduction out of payment of annual interest is liable to a penalty of treble the value of the principal money or debt, and any person who refuses to allow an authorised deduction out of rent or other annual payment or annuity is liable to a penalty of £50 (*g*).

Refusal to deliver or verify a Schedule.

1403. Any person refusing or neglecting to deliver a schedule or to appear before Commissioners or to verify upon oath any statement or schedule, is liable to a penalty not exceeding £20 and treble duty chargeable (*h*).

Obstructing an officer.

1404. Any person wilfully obstructing officers in the execution of their duties is liable to a penalty of £50 (*i*).

Fraud in reference to claim for exemption and abatement.

1405. Any person who is guilty of fraud or fraudulent concealment in certain specified ways in reference to a claim for exemption or

(*m*) *Lord Advocate* v. *Sawers* (1897), 35 Sc. L. R. 190; *A.-G.* v. *Till*, [1910] A. C. 50.

(*a*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 55, 129; in *A.-G.* v. *Till*, *supra*, *per* Lord LOREBURN, L.C., at p. 53.

(*b*) 5 & 6 Vict. c. 35.

(*c*) *Ibid.*, s. 68. This jurisdiction is not applicable to the metropolitan area.

(*d*) *Ibid.*, s. 76.

(*e*) *Ibid.*, s. 86.

(*f*) *Ibid.*, s. 99.

(*g*) *Ibid.*, s. 103. The rent or annual payment referred to is that mentioned in *ibid.*, s. 60, No. IV., Sched. A., and the annuity or annual payment that referred to in *ibid.*, s. 102, or in Sched. C. or E.

(*h*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 67, 128. As to amending an erroneous Schedule, see *ibid.*, s. 129.

(*i*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 23; see also Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 11.

abatement is liable to a penalty of £20 and treble the duty chargeable in respect of all sources of income (*j*).

1406. Any person knowingly and wilfully aiding, abetting or assisting any person in such fraud is liable to a penalty of £50 (*k*). Abetting such fraud.

1407. Any person coming to reside in a parish who refuses to make the declaration required in such a case, or who makes an untrue declaration, is liable to a penalty not exceeding £20 (*l*). Untrue declarations.

1408. Any person who removes from his place of assessment without making a return or before an assessment is made on him, with intent to evade an assessment, or who, having been assessed to the duties, removes out of the parish or place of assessment without having paid the duties then due, or without leaving sufficient distress to satisfy them, is, if the same remain unpaid for twenty days after they become due, liable to a penalty of £20 (*m*). Removing from residence.

1409. Any person guilty of various specified acts with intent to evade the payment of duty is liable to a penalty of treble the duty which ought to have been charged (*n*). Evading payment of duty.

1410. Any person who knowingly and wilfully induces, assists and abets a person to make false returns concerning various matters is liable to a penalty of £50 (*o*). Abetting the making of false returns.

1411. Any person who is guilty of fraud in making application for relief in respect of losses under the Customs and Inland Revenue Act, 1890, s. 23 (*p*), is liable to a penalty of £50. Frauds in reference to claims of relief by reason of loss.

1412. Various penalties are provided for offences on the part of surveyors, collectors and other officers, on the part of persons pretending to be officers, and on the part of persons conniving at or assisting in a breach of duty by officers (*q*). Penalties for offences of income tax Officers.

1413. Where the surveyor has made a surcharge upon the amount or profits returned by a party charged, and upon appeal such surcharge is in whole or in part allowed by the Commissioners, the assessment is to be made on the amount of the surcharge allowed in treble the rate of duty, with power to the Commissioners, in certain specified cases of mitigation or excuse, to remit the additional duty either in whole or in part. The treble duty when assessed is recoverable in the same way as an ordinary assessment (*r*). The Powers of Commissioners to assess in treble duty.

(*j*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 166; Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 28; see also Finance Act, 1907 (7 Edw. 7, c. 13), s. 19 (6).
(*k*) *Ibid.*
(*l*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 177.
(*m*) *Ibid.*
(*n*) *Ibid.*, s. 178.
(*o*) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 56.
(*p*) 53 & 54 Vict. c. 8, s. 23 (3).
(*q*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 150, 154, 157; Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 102, 121; Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), ss. 10—12, 15.
(*r*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 68. The Income Tax Act, 1842 (5 & 6 Vict. c. 35), contains provisions authorising the assessment of a party by the Commissioners in treble duty upon appeal in cases other

party chargeable may, in certain cases, avoid assessment in treble duty by amending his return (*s*).

SECT. 2. Penalties, how Recoverable.

Forgery of certificates and fraudulent declarations.

1414. The forgery of certificates or receipts is a felony (*t*), and the making of a fraudulent declaration is in certain cases a misdemeanour (*u*).

SECT. 2.—*Penalties, how Recoverable.*

Penalties, in what court recoverable.

1415. Where the penalty exceeds £20 it is to be recovered in the High Court of Justice, except where it consists of an increased rate of duty imposed as a penalty (*e.g.*, treble duty), in which case such increased duty is, as is also a penalty which does not exceed £20, recoverable before the General Commissioners, and may be added to the assessment and be collected or levied in the same way as any duties included in the assessment (*a*).

Proceedings for the recovery of penalties can only be brought by order of the Commissioners of Inland Revenue (*b*).

How sued for.

Proceedings in the High Court of Justice are by way of information in the name of the Attorney-General (*c*).

To whom payable.

All penalties are to be paid to the Commissioners of Inland Revenue and applied to the use of the Crown (*d*).

Power to mitigate.

The Commissioners of Inland Revenue and the Treasury have power to mitigate penalties and to stay proceedings (*e*).

Statute of Limitations.

The period within which proceedings may be commenced is three years (*f*).

Part XII.—The Super-tax.

The incidence of super-tax.

1416. An additional income tax called a super-tax is levied upon the income of every individual (*g*), the total of which from all sources exceeds £5,000, at the rate of 6*d.* for every pound of the amount which exceeds £3,000 (*h*).

than the above, and these provisions appear to be still in force; see *ibid.*, ss. 127, 161, 162.

(*s*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), ss. 64—66 inclusive.

(*t*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 181.

(*u*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 66 (1); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 496.

(*a*) This seems to be the effect of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 185, the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 21, and the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 22, and is in accordance with the practice.

(*b*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 21 (1).

(*c*) Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 21.

(*d*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 33.

(*e*) *Ibid.*, s. 35; and see *Lord Advocate* v. *M'Laren* (1905), 42 Sc. L. R. 762.

(*f*) See p. 678, *ante*.

(*g*) The word "individual" (which is also used in the Finance Act, 1898 (61 & 62 Vict. c. 10), s. 8, and in the Finance Act, 1907 (7 Edw. 7, c. 13) ss. 19, 20) presumably does not include corporate bodies or incorporate societies of persons.

(*h*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 66 (1). The tax is an annual tax, and was first imposed by the last-mentioned Act for the year

Definition of total income.

For the purpose of this tax the total income of the individual (*i*) from all sources is to be taken to be his total income from all sources for the previous financial year (*j*) estimated in the same manner as it is estimated for the purposes of exemption or abatement (*k*), subject to the following qualifications (*l*):—

Qualifications.

(a) There shall be deducted in respect of any land on which income tax is charged upon the annual value estimated otherwise than in relation to profits (in addition to any other deduction) any sum by which the assessment is reduced for the purposes of collection under the Finance Act, 1894, s. 35 (*m*), or on which duty has been repaid under the provisions relating to the repayment of duty in respect of the cost of maintenance, repairs, insurance, and management (*n*);

(b) There shall be deducted the amount of any premiums in respect of which relief from income tax may be allowed (*o*);

(c) There shall be deducted in the case of a person in the service of the Crown abroad any such sum as the Treasury may allow for expenses which in their opinion are necessarily incidental to the discharge of the functions of his office and for which an allowance has not already been made;

(d) Any income which is chargeable with income tax by way of deduction shall be deemed to be income of the year in which it is receivable, and any deductions allowable on account of any annual sums paid out of the property or profits of the individual shall be allowed as deductions in respect of the year in which they are payable, notwithstanding that the income or the annual sums, as the case may be, accrued in whole or in part before that year (*p*).

Super-tax is assessed by Special Commissioners.

Their powers and duties.

1417. The super-tax is assessed and charged by the Special Commissioners (*q*), who may amend any assessment made by them (*r*) and make an assessment or an additional assessment during any time within the year of assessment or within three years after the expiration thereof (*q*). They have for the purpose of assessment the powers of an inspector or surveyor of taxes, and for the purpose of the representation of the Crown on any appeal before the Special Commissioners, any person nominated in that behalf

beginning on the 6th April, 1909. It was continued for the following year by the Finance Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 35), s. 3 (2). It is provided that all assessments or charges made or other things done before the passing of the Act with a view to the collection of any duty imposed by the Act shall have the same force and effect as if it had been in operation at the time when the assessment or charge was made or other thing done.

(*i*) See note (*g*), p. 688, *ante*.
(*j*) For the meaning of "financial year," see p. 676, *ante*.
(*k*) See p. 672, *ante*.
(*l*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 66 (2).
(*m*) 57 & 58 Vict. c. 30; see note (*l*), *supra*, and p. 621, *ante*.
(*n*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 69; see p. 622, *ante*.
(*o*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 66 (2) (b); see p. 670, *ante*.
(*p*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 66 (2) (c).
(*q*) *Ibid.*, s. 72 (1).
(*r*) *Ibid.*, s. 72 (7).

PART XII. The Super-tax.

by the Commissioners of Inland Revenue shall have the same powers at and upon the determination of the appeal as a surveyor of taxes has at and upon the determination of any appeal under the Income Tax Acts (*s*). They may make regulations for the purpose of carrying these provisions into effect (*t*).

The provisions of the Income Tax Acts apply to super-tax.

All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and to appeals against those assessments, and to the collection and recovery of duty, and to cases to be stated for the opinion of the High Court. shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of duty under this Section of this Part (*u*).

Obligation to make returns of total income.

1418. Every person upon whom notice is served in manner prescribed by the regulations by the Special Commissioners requiring him to make a return of his total income from all sources or, in the case of a notice served upon any person who is chargeable with or liable to be assessed to income tax under the Income Tax Act, 1842, s. 41, or the Customs and Inland Revenue Act, 1890, s. 24, as representing an incapacitated, non-resident, or deceased person, of the total income from all sources of the incapacitated, non-resident, or deceased person, shall, whether he is or is not chargeable with the super-tax, make such a return in the form and within the time required by the notice (*a*).

It is the duty of every person chargeable with the super-tax to give notice that he is chargeable to the Special Commissioners before the 30th September in the year for which the super-tax is chargeable (*b*).

(*s*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 72 (6); and see p. 681, *ante*.

(*t*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 72 (8). The regulations made are as follows:—The Special Commissioners shall serve a notice on every person required by them to make a return of his total income from all sources. Such notice shall be in the form hereto attached or in such amended form as the Commissioners of Inland Revenue shall approve.

On the making of an assessment by the Special Commissioners they shall cause notice to be served as hereinafter mentioned on the person assessed of the amount of the assessment and of the duty charged thereon.

All liability to the super-tax shall be assessable at the office of the Special Commissioners, London, and appeals shall be heard in London, Edinburgh, and Dublin, and at such other towns as the Commissioners of Inland Revenue may direct.

A person aggrieved by an assessment made upon him shall at any time within twenty-eight days from the date of the service of the notice of such assessment, or within such further time as the Special Commissioners shall allow, be entitled to give notice to the Special Commissioners of his intention to appeal to them against the assessment, and every such notice shall specify the grounds of appeal.

The super-tax payable shall be remitted by the person assessed to the Accountant-General of Inland Revenue, at his office, Somerset House, London, on or before 1st January in each year.

Any notice required to be served on any person under these regulations may be either delivered to such person, or left at his usual or last known place of abode, or sent by post by (prepaid) registered letter addressed to such person at his usual or last known place of abode, and such service shall be deemed sufficient service for the purpose of these regulations.

(*u*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 72 (6).

(*a*) *Ibid.*, s. 72 (2).

(*b*) *Ibid.*, s. 72 (3).

Penalty for not making return.

If any person without reasonable excuse fails to make any return or to give any notice required as above mentioned, he is liable to a penalty not exceeding £50, and after judgment has been given for that penalty to a further penalty of the like amount for every day during which the failure continues, such penalty to be recoverable in the High Court, or in Scotland in the Court of Session (*c*).

Power to assess in default of return.

If any person fails to make a return, or if the Special Commissioners are not satisfied with any return made, they may make an assessment of the super-tax according to the best of their judgment (*d*).

(*c*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 72 (3), (4).
(*d*) *Ibid.*, s. 72 (5).

INCORPOREAL CHATTELS.

See CHOSES IN ACTION; DESCENT AND DISTRIBUTION; PERSONAL PROPERTY.

INCORPOREAL HEREDITAMENTS.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

INCORRIGIBLE ROGUES.

See POOR LAW.

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INCUMBRANCE.

See BILLS OF SALE; MORTGAGE; REAL PROPERTY AND CHATTELS REAL.

INDECENT ASSAULT.

See CRIMINAL LAW AND PROCEDURE.

INDECENT EXPOSURE.

See CRIMINAL LAW AND PROCEDURE.

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See DEEDS AND OTHER INSTRUMENTS.

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BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.

309551 [Earl of and others (eds.)
Author Halsbury, Hardinge Stanley Giffard, 1st Law.D
Title The laws of England. Vol.16. H196.3

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